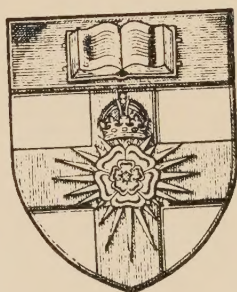


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THE REPORTERS

The cases printed in this volume were originally reported by members of the Bar whose names are given in the Reports from which the cases have been selected.

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DEVAYNES AND OTHERS *v.* NOBLE AND OTHERS BARING AND OTHERS *v.* NOBLE AND OTHERS CLAYTON'S CASE

[ROLLS COURT (Sir William Grant, M.R.), July 15-30, 1816]

[Reported 1 Mer. 572; 35 E.R. 781]

Contract—Payment—Money paid on account—Appropriation to oldest debt—Presumption—Rebuttal by agreement—Bank—Current account—Earlier drawings deducted from earlier payments-in.

In the case of a current account between debtor and creditor there is, in the absence of agreement to the contrary, a presumption that the first item on the credit side of the account is intended to be applied in the payment of the first item on the debit side of the account. On a current banking account, therefore, the earlier drawings, in the absence of specific appropriation, are attributed to and deducted from the earlier payments-in.

Notes. Applied: *Bodenham v. Purchas* (1818), 2 B. & Ald. 39; *Brooke v. Enderby* (1820), 2 Brod. & Bing. 70. Distinguished: *Simson v. Inham* (1823), 2 B. & C. 65. Considered: *Re Tills, Ex parte Alexanders* (1824), 2 L.J.O.S.Ch. 159; *Williams v. Rawlinson* (1825), 3 Bing. 71. Applied: *Pemberton v. Oakes* (1827), 4 Russ. 154. Distinguished: *Stoveld v. Eade* (1827), 4 Bing. 154. Followed: *Field v. Carr* (1828), 5 Bing. 13. Distinguished: *Taylor v. Kymer* (1832), 3 B. & Ad. 320. Applied: *Solarte v. Maes Hilbers* (1832), 1 L.J.K.B. 196; *Smith v. Wigley and Tunncliffe* (1833), 3 Moo. & S. 174. Considered: *Wilson v. Hirst* (1833), 4 B. & Ad. 760. Explained and Distinguished: *Smith v. Ure* (1833), 2 Knapp, 188. Distinguished: *Chitty v. Naish* (1834), 2 Dowl. 511. Considered: *Nottidge v. Pritchard* (1834), 8 Bli. N.S. 493. Followed: *Toulmin v. Copland* (1834), 2 Cl. & Fin. 681. Distinguished: *Whittington v. Jennings* (1834), 6 Sim. 493. Considered: *Walker v. Hardman* (1837), 11 Bli. N.S. 229. Applied: *Copland v. Toulmin* (1840), 7 Cl. & Fin. 350. Considered: *Bower v. Marris* (1841), Cr. & Ph. 351. Distinguished: *Re Biddulph, Ex parte Eyre* (1842), 3 Mont. D. & De G. 12. Considered: *Henniker v. Wigg* (1843), Dav. & Mer. 160. Distinguished: *Re Wright, Ex parte Eyre* (1843), 1 Ph. 227. Applied: *Pennell v. Defell* (1853), 4 De G.M. & G. 372. Considered:

- Nash v. Hodgson* (1855), 6 De G.M. & G. 474. Distinguished: *Wickham v. Wickham* (1855), 2 K. & J. 478. Considered: *Bell v. Buckley* (1856), 11 Exch. 631. Applied: *Cavendish v. Greaves* (1857), 24 Beav. 163. Approved: *Re Medewe's Trust* (1859), 26 Beav. 588. Distinguished: *Hipkins v. Amery* (1860), 2 Giff. 292. Followed: *Merriman v. Ward* (1860), 1 John. & H. 371; *Siebel v. Springfield* (1863), 3 New Rep. 36. Distinguished: *Denison v. Avison* (1865), 12 L.T. 340. Applied: *Laing v. Campbell* (1865), 36 Beav. 3. Followed: *Brown v. Adams* (1869), 21 L.T. 71. Applied: *Re Hammond, Ex parte Brook* (1869), 20 L.T. 547; *Re Boys, Eedes v. Boys, Ex parte Hop Planters Co.* (1870), L.R. 10 Eq. 467. Distinguished: *Thompson v. Hudson* (1871), 6 Ch. App. 320. Applied: *Re Devonport and South Devon Steam Flour Mill Co., Bateman's Case* (1873), 42 L.J.Ch. 577. Distinguished: *City Discount Co. v. McLean* (1874), L.R. 9 C.P. 692. Applied: *Hooper v. Keay* (1875), 1 Q.B.D. 178. Distinguished: *Lacey v. Hill, Leney v. Hill* (1876), 4 Ch.D. 537. Applied: *Re Hamilton, Ex parte Smith* (1877), 25 W.R. 760. Considered: *Re Taurine Co., Anning and Cobb's Claim* (1877), 38 L.T. 53. Applied: *Kinnaird v. Webster* (1878), 10 Ch.D. 139. Distinguished: *Browning v. Baldwin* (1879), 40 L.T. 248. Considered: *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch.D. 696. Applied: *London and County Banking Co. v. Ratcliffe*, [1881-5] All E.R. Rep. 486. Explained: *Blackburn Building Society v. Cunliffe Brooks* (1882), 22 Ch.D. 61. Distinguished: *Re Sherry, London and County Banking Co. v. Terry* (1884), 25 Ch.D. 692. Considered: *Parr v. Bradbury* (1885), 1 T.L.R. 285; *Re Companies Acts, Ex parte Watson* (1888), 21 Q.B. 301. Applied: *Dreyfus v. Peruvian Guano Co.* (1889), 61 L.T. 180. Distinguished: *Hancock v. Smith*, [1886-90] All E.R. Rep. 306. Applied: *Parkinson v. Wakefield* (1889), 5 T.L.R. 562. Distinguished: *Re Wood, Anderson v. London City Mission*, [1894] 2 Ch. 577. Considered: *Re London and General Bank*, [1895] 2 Ch. 673. Applied: *Re Stenning, Wood v. Stenning* (1895), 73 L.T. 207. Distinguished and Explained: *Cory Bros. & Co., Ltd. v. Turkish Steamship Mecca (Owners), The Mecca*, [1895-9] All E.R. Rep. 933. Distinguished: *Mutton v. Peat*, [1899] 2 Ch. 556. Applied: *Bank of New South Wales v. Goulburn Valley Butter Co., Proprietary, Ltd.*, [1900-3] All E.R. Rep. 935; *Egg v. Craig* (1903), 89 L.T. 41. Considered: *Re Oatway, Hertslet v. Oatway*, [1903] 2 Ch. 356; *Smith v. Betty*, [1903] 2 K.B. 317; *Seymour v. Pickett*, [1905] 1 K.B. 715; *Bannatyne v. MacIver*, [1904-7] All E.R. Rep. 425; *Re Bourne, Bourne v. Bourne*, [1906] 1 Ch. 113; *Davis v. Petrie*, [1906] 2 K.B. 786; *Deeling v. Lloyds Bank*, [1910] 1 Ch. 648. Distinguished: *Galula v. Pintus* (1911), 16 Com. Cas. 185. Considered: *Re O'Shea, Ex parte Lancaster*, [1911-13] All E.R. Rep. 628. Distinguished: *Re British Red Cross Balkan Fund, British Red Cross Society v. Johnson*, [1914-15] All E.R. Rep. 459. Considered: *Re Hodgson's Trusts, Public Trustee v. Milne*, [1919] 2 Ch. 189. Applied: *Re Lord Westbury's Settlement, Westmacott v. Bethell*, [1943] 2 All E.R. 463. Distinguished: *Re Hobourne Aero Components, Ltd.'s Air Raid Distress Fund, Ryan v. Forrest*, [1945] 2 All E.R. 711. Considered: *Re Diplock's Estate, Diplock v. Wintle*, [1948] 2 All E.R. 318. Applied: *Re Diplock's Estate, Simpson v. Lilburn*, [1948] 2 All E.R. 428. Considered: *A.M.K.M.K. v. Chettiar*, [1955] A.C. 230; *Re Footman Bower & Co., Ltd.*, [1961] 2 All E.R. 161. Applied: *Re Yeovil Glove Co., Ltd.*, [1964] 2 All E.R. 849. Considered: *Re James R. Rutherford & Sons, Ltd.*, [1964] 3 All E.R. 137. Referred to: *Mills v. Fowkes* (1839), 5 Bing. N.C. 455; *Smith v. Nicolls* (1839), 8 L.J.C.P. 92; *Jones v. Broadhurst* (1850), 9 C.B. 173; *Scott v. Beale and Bishop* (1859), 6 Jur. N.S. 559; *Fenton v. Blackwood* (1874), L.R. 5 P.C. 167; *Re Pollard, Ex parte Dickin* (1878), 8 Ch.D. 377; *Re Miller, Ex parte Official Receiver* (1893), 1 Q.B. 327; *Re Hallett, Ex parte Blane*, [1894] 2 Q.B. 237; *Re Head, Head v. Head* (1894), 63 L.J.Ch. 549; *Ascherson v. Tredegar Dry Dock and Wharf Co.*, [1908-10] All E.R. Rep. 510; *Bradford Old Bank v. Sutcliffe* (1918), 88 L.J.K.B. 85; *Albemarle Supply Co. v. Hind*, [1927] All E.R. Rep. 401; *Holder v. I.R. Comrs.*, [1932] All E.R. Rep. 265; *Philadelphia National Bank v. Price*, [1937] 3 All E.R. 391; *Westminster*

A *Bank, Ltd. v. Cond* (1940), 46 Com. Cas. 60; *Re Primrose (Builders), Ltd.*, [1950] 2 All E.R. 334; *Re E. J. Morel* (1934), *Ltd.*, [1961] 1 All E.R. 796.

As to appropriation of payments on current accounts generally and in the case of banking accounts, see HALSBURY'S LAWS (3rd Edn.), vol. 8, pp. 214–217, and vol. 2, pp. 171, 172, respectively. For cases see 12 DIGEST (Repl.) 536 et seq., and 3 DIGEST (Repl.) 192, 193.

B Cases referred to :

(1) *Goddard v. Cor* (1743), 2 Stra. 1194; 93 E.R. 1122; 12 Digest (Repl.) 542, 4107.

(2) *Wilkinson v. Sterne* (1744), 9 Mod. Rep. 427; 88 E.R. 551; 12 Digest (Repl.) 539, 4081.

C (3) *Newmarch v. Clay* (1811), 14 East, 239; 104 E.R. 592; 12 Digest (Repl.) 546, 4147.

(4) *Peters v. Anderson* (1814), 5 Taunt. 596; 1 Marsh. 238; 128 E.R. 823; 12 Digest (Repl.) 539, 4083.

(5) *Meggot v. Mills* (1697), 1 Ld. Raym. 286; 91 E.R. 1088; 25 Digest (Repl.) 218, 353.

D (6) *Dawe v. Holdsworth* (1791), Peake, 64; 4 Digest (Repl.) 16, 76.

Consideration of Report of Master made in administration proceedings.

By the decree made on the hearing of these causes on Mar. 2, 1812, it was referred to the Master in the second cause to take an account of what was due at the death of William Devaynes, deceased, from the partnership of the said William Devaynes, John Dawes, William Noble, R. H. Croft, and Richard Barwick, to the plaintiffs, and all such other persons as were creditors of the partnership at the time of the death of Devaynes, and also of what was due, at the time of making the decree, from the partnership to such creditors, and to inquire whether such creditors, or any and which of them, continued to deal with the surviving partners after the death of Devaynes, and what sums of money were paid by the surviving partners to such creditors, respectively, from the death of Devaynes to the bankruptcy of the surviving partners, and what had since been received by them respectively, and also whether such creditors, or any and which of them, had, by such subsequent dealings, released the estate of Devaynes from the payment of their respective debts, or what (if anything) remained due in respect thereof.

G William Devaynes, deceased, for many years prior to the time of his death carried on business as a banker in partnership with John Dawes, William Noble, R. H. Croft, and Richard Barwick, under the firm of Devaynes, Dawes, Noble & Co. He died on Nov. 29, 1809, possessed of a considerable real and personal estate, leaving the plaintiff, William Devaynes, his son and heir-at-law. From and after the death of Devaynes, Dawes, Noble, Croft and Barwick continued to carry on the banking business under the same firm name of Devaynes, Dawes, Noble & Co., on their own account, the representatives of Devaynes deceased having no continuing share or interest in the business or in the profits thereof, but being entitled by the partnership agreement only to his share of the profits to that period and his share of the then subsisting joint capital and effects, after payment of all the partnership debts and charges then charged and chargeable thereon. On July 30, 1810, the surviving partners became bankrupt and the defendants Wilson, Morris, and Dorian

H were appointed assignees in the bankruptcy.

I A class of creditors, customers of the bank, represented by one Clayton consisted of those who, after the death of Devaynes, continued to deal with the surviving partners both by drawing out and paying in money, payments being made by the surviving partners before they received any money of the creditors, and the balance varying from time to time, sometimes increased, and sometimes diminished, but upon the whole considerably increased by the subsequent transactions.

At the death of Devaynes, Clayton had a balance of £1,713 on his cash account with the banking-house. Prior to the death of Devaynes he had deposited with

the partners two exchequer bills for £500 each, without giving them any power or authority to sell or dispose of the same except as it was mutually agreed and understood between him and them, that, when the exchequer bills should be paid off, they, the partners, were to buy with the produce, or take in exchange, other exchequer bills, to be held by them in the same manner. Contrary to this agreement or undertaking, and without the consent or knowledge of Clayton, the partners did, in the lifetime of Devaynes (on June 19, 1809), sell these bills for £1,035, which produce they applied to their own use. Of this transaction Clayton had no notice until after the bankruptcy of the surviving partners. A

After the death of Devaynes and before Clayton paid in any further sums to his account with the bankers he drew out sums to the amount of £1,260, thereby reducing his cash balance to £453 and a fraction. From this time to the bankruptcy, Clayton both paid in and drew out considerable sums, but his payments were so much larger than his receipts that at the time of the bankruptcy his cash balance in the hands of the surviving partners exceeded £1,713, the amount of the cash balance at Devaynes's death. (And this, exclusively of the exchequer bills and their produce, which were put out of the question in the consideration of this exception.) By the amount of the dividends received since the bankruptcy (those dividends being apportioned to the whole debt proved under the commission) the balance of £1,713 would be reduced to £1,171 and a fraction, and it was this last sum which Clayton claimed against Devaynes's estate, and as to which the Master had reported that Clayton had, by his subsequent dealings with the surviving partners, released the estate. On the argument of an exception to the Master's report that claim was abandoned to the whole extent of the cash balance at Devaynes's death above £453, the sum to which it had been reduced by drafts upon the house previous to any fresh payments made to it, and the money which was now claimed was this sum of £453, minus its proportion of the dividends. B

On the subject of this claim, the Master reported his opinion to be that the subsequent payments made by the surviving partners ought to be applied to the account of the cash balance due at the death of Devaynes and that Clayton had, by his subsequent dealings and transactions with the surviving partners, released the estate of Devaynes from the payment of the said cash balance, and every part thereof. C

Bell, Palmer, Fonblanque and Clayton supported the exception. D

Hart, Wetherell, Sidebottom and Hazlewood, for different parties, against the exception. E

July 26, 1816. **SIR WILLIAM GRANT, M.R.**—Though the report, following (I presume) the words of the inquiry directed by the decree, states the Master's opinion to be that Mr. Clayton has, by his dealings and transactions with the surviving partners, subsequent to the death of Mr. Devaynes, released his estate from the payment of the cash balance of £1,713, yet the ground of that opinion is, not that the acts done amount constructively to an exoneration of Mr. Devaynes's estate, but that the balance due at his death has been actually paid off, and, consequently, that the claim now made is an attempt to revive a debt that has once been completely extinguished. To a certain extent it has been admitted at the Bar, that such would be the effect of the claim made before the Master and insisted upon by the exception. To that extent it is, therefore, very properly abandoned, and all that is claimed is the sum to which the debt had at one time been reduced. It would, indeed, be impossible to contend that, after the balance, for which alone Mr. Devaynes was liable, had once been diminished to any given amount, it could, as against his estate, be again augmented, by subsequent payments made, or subsequent credit given, to the surviving partners. On the part of Mr. Devaynes's representatives, however, it is denied that any portion of the debt due at his death now remains unsatisfied. That depends on the manner in which the payments made by the house are to be considered as having been applied. In all, they have F

A paid much more than would be sufficient to discharge the balance due at Devaynes's death, and it is only by applying the payments to subsequent debts that any part of that balance will remain unpaid.

This state of the case has given rise to much discussion as to the rules by which the application of indefinite payments is to be governed. Those rules we, probably, borrowed in the first instance, from the civil law. The leading rule with regard to the option given, in the first place to the debtor and in the second to the creditor, we have taken literally thence. But, according to that law, the election was to be made at the time of payment as well in the case of the creditor as in that of the debtor, "in re præsentī; hoc est statim atque solutum est:—cæterum, postea non permittitur": Dig. Lib. 46, tit. 3, Qu. 1. 3. If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And, as it was the actual intention of the debtor that would, in the first instance, have governed, so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was: What application would be most beneficial to the debtor? The payment was, consequently, applied to the most burdensome debt, to one that carried interest rather than to that which carried none, to one secured by a penalty rather than to that which rested on a simple stipulation, and, if the debts were equal, then to that which had been first contracted.

E "In his quæ præsentī die debentur, constat, quotiens indistincte quid solvitur, in graviorem causam videri solutum. Si autem nulla prægravet—id est, si omnia nomina similia fuerint—in antiquiorem": (Dig. Lib. 46, tit. 3, Qu. 5).

It has been contended that in this respect our courts have entirely reversed the principle of decision, and that, in the absence of express appropriation by either party, it is the presumed intention of the creditor that is to govern, or, at least, that the creditor may, at any time, elect how the payments made to him shall retrospectively receive their application. There is, certainly, a great deal of authority for this doctrine. With some shades of distinction it is sanctioned by *Goddard v. Cox* (1); by *Wilkinson v. Sterne* (2); by the ruling of Lord ELLENBOROUGH, C.J., in *Newmarch v. Clay* (3); and by *Peters v. Anderson* (4), in the Common Pleas. From these cases I should collect that a proposition which, in one sense of it, is indisputably true, namely, that if the debtor does not apply the payment, the creditor may make the application to what debt he pleases, has been extended much beyond its original meaning, so as, in general, to authorise the creditor to make his election when he thinks fit instead of confining it to the period of payment and allowing the rules of law to operate where no express declaration is then made.

H There are, however, other cases which are irreconcilable with this indefinite right of election in the creditor, and which seem, on the contrary, to imply a recognition of the civil law principle of decision. Such are, in particular, *Meggot v. Mills* (5) and *Dawe v. Holdsworth* (6). The creditor, in each of these cases, elected, ex post facto, to apply the payment to the last debt. It was, in each case, held incompetent for him so to do. There are but two grounds on which these decisions could proceed—either that the application was to be made to the oldest debt or that it was to be made to the debt which it was most for the interest of the debtor to discharge. Either way, the decision would agree with the rule of the civil law, which is that, if the debts are equal, the payment is to be applied to the first in point of time; if one be more burdensome or more penal than another, it is to it that the payment shall be first imputed. A debt on which a man could be made a bankrupt, would undoubtedly fall within this rule. The Lord Chief Justice of the Common Pleas explains the ground and reason of *Dawe v. Holdsworth* (6) in precise conformity to the principle of the civil law.

The cases, then, set up two conflicting rules—the presumed intention of the debtor, which, in some instances at least, is to govern, and the ex post facto election of the creditor which in other instances is to prevail. I should, therefore, feel myself a good deal embarrassed if the general question of the creditor's right to make the application of indefinite payments, were now necessarily to be determined. I think the present case is distinguishable from any of those in which that point has been decided in the creditor's favour. They were all cases of distinct insulated debts between which a plain line of separation could be drawn. The present is the case of a banking account where all the sums paid in form one blended fund the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying: This draft is to be placed to the account of the £500 paid in on Monday, and this other to the account of the £500 paid in on Tuesday. There is a fund of £1,000 to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other.

Upon that principle, all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not, been discharged but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards and strike the balance at the head, instead of the foot, of it. A man's banker breaks, owing him, on the whole account, a balance of £1,000. It would surprise one to hear the customer say: "I have been fortunate enough to draw out all that I paid in during the last four years, but there is £1,000, which I paid in five years ago, that I hold myself never to have drawn out, and, therefore, if I can find anybody who was answerable for the debts of the banking-house, such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the £1,000 that I paid in last week." This is exactly the nature of the present claim. Mr. Clayton travels back into the account till he finds a balance for which Mr. Devaynes was responsible, and then he says: "That is a sum which I have never drawn for. Though standing in the centre of the account, it is to be considered as set apart, and left untouched. Sums above it, and below it, have been drawn out, but none of my drafts ever reached or affected this remnant of the balance due to me at Mr. Devaynes's death." What boundary would there be to this method of re-moulding an account? If the interest of the creditor required it, he might just as well go still further back and arbitrarily single out any balance as it stood at any time, and say that it is the identical balance of that day which still remains due to him. Suppose there had been a former partner, who had died three years before Mr. Devaynes, what would hinder Mr. Clayton from saying: "Let us see what the balance was at his death? I have a right to say that it still remains due to me, and his representatives are answerable for it, for, if you examine the accounts, you will find I have always had cash enough lying in the house to answer my subsequent drafts, and, therefore, all the payments made to me in Devaynes's lifetime, and since his death, I will now impute to the sums I paid in during that period, the effect of which will be to leave the balance due at the death of the former partners still undischarged." I cannot think that any of the cases sanction such an extravagant claim on the part of a creditor.

If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments, so placed in opposition to debts, that, on the ordinary principles on which accounts are settled, this debt is extinguished. If the usual course of dealing was, for any reason, to be inverted, it was surely incumbent on the creditor to signify that such was his intention. He should have

- A said to the bankers either: "Leave this balance altogether out of the running account between us," or: "Always enter your payments as made on the credit of your latest receipts so that the oldest balance may be the last paid." Instead of this he receives the account drawn out as one unbroken running account. He makes no objection to it, and the report states that the silence of the customer after the receipt of his banking account is regarded as an admission of its being correct.
- B Both debtor and creditor must, therefore, be considered as having concurred in the appropriation.

There is this peculiarity in the case—that it is not only by inference from the nature of the dealings and the mode of keeping the account that we are entitled to ascribe the drafts or payments to this balance, but there is distinct and positive evidence that Mr. Clayton considered and treated the balance as a fund out of which, notwithstanding Devaynes's death, his drafts were to continue to be paid. For he drew, and that to a considerable extent, when there was no fund, except this balance, out of which his drafts could be answered. What was there in the next draft he drew which could indicate that it was not to be paid out of the residue of the same fund, but was to be considered as drawn exclusively on the credit of money more recently paid in? No such distinction was made, nor was there anything from which it could be inferred. I should, therefore say, that, on Mr. Clayton's express authority, the fund was applied in payment of his drafts in the order in which they were presented. Even independently of this circumstance, I am of opinion, on the grounds I have before stated, that the Master has rightly found that the payments were to be imputed to the balance due at Mr. Devaynes's death, and that such balance has, by those payments, been fully discharged. The exception must, therefore, be overruled.

Exception overruled.

COOK v. COLLINGRIDGE AND OTHERS

F

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), June 4, 7, July 16, 1822, January 27, 1823]

[Reported Jac. 607; 1 L.J.O.S.Ch. 74; 37 E.R. 979]

- Executor—Profit from executorship—Partnership—Testator deceased partner—Appointment of son as executor—Sale by executors to surviving partners of testator's share in partnership—Admission of son as partner—Validity of sale.*
- G *Partnership—Death of partner—Appointment of son as executor—Sale by executors to surviving partners of testator's share in partnership—Admission of son as partner—Validity of sale—Rights of persons interested in estate—Account of profits—Sale of stock.*

H The law will not permit persons invested with a trust to deal with it so as to benefit themselves, and this principle will affect third persons who lend themselves to such a transaction. Trustees and executors must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves that the court will not inquire whether it has been done or not, but at once says that such a transaction cannot stand.

I

By his will the testator, a partner in a trading firm, appointed his son, W., one of his partners, J., and a third person, S., to be his executors. The executors had the partnership valued, and, by an indenture made between J., S., and W., as executors, of the one part, and the surviving members of the partnership, of the other part, the executors purported to assign to the surviving partners the testator's share in the partnership property in consideration of the payment of the sum at which that share had been valued. By a further deed, dated two days later, that share was purported to be assigned by the

surviving partners to the son W. in consideration of the payment by him of the same sum. W. was then admitted as a member of the partnership. A

Held: the two purported assignments were to be regarded as one transaction, and the sale must be set aside: it being admitted that it would be more beneficial to the persons interested in the testator's estate that the partnership should be considered as not having been terminated, those persons would be entitled to have it so considered, to an account of the profits, and to have the stock sold. B

Notes. It has been held in an Irish case that the valuation of a deceased partner's share should take place as at the date of realisation, not at the date of death: *Meagher v. Meagher*, [1961] I.R. 96.

Considered: *Crawshay v. Collins* (1826), 2 Russ. 325; *Cookson v. Cookson* (1837), 8 Sim. 529. Applied: *Wedderburn v. Wedderburn* (1838), 4 My. & Cr. 41; *McDonald v. Richardson*, *Richardson v. Morten* (1864), 10 L.T. 166; *De Cordova v. De Cordova* (1879), 4 App. Cas. 692. Referred to: *Willett v. Blanford* (1842), 1 Hare, 253; *Portlock v. Gardner* (1842), 6 Jur. 795; *Travis v. Milne*, *Milne v. Milne* (1851), 9 Hare, 141; *Wedderburn v. Wedderburn* (1856), 22 Beav. 84; *Vyse v. Foster* (1874), L.R. 7 H.L. 318. *Re Norrington*, *Brindley v. Partridge* (1879), 13 Ch.D. 654. C

As to a sale by executors to one of themselves, see 16 HALSBURY'S LAWS (3rd Edn.) 364; and for cases see 24 DIGEST (Repl.) 621, 622.

Case referred to:

(1) *Featherstonhaugh v. Fenwick* (1810), 17 Ves. 298; 34 E.R. 115; 36 Digest (Repl.) 529, 929. E

Also referred to in argument:

Crawshay v. Collins (1808), 15 Ves. 218; 33 E.R. 736, L.C.; 36 Digest (Repl.) 541, 1024.

Heathcote v. Hulme (1819), 1 Jac. & W. 122; 37 E.R. 322; 24 Digest (Repl.) 615, 6119.

Burden v. Burden (1813), 1 Ves. & B. 170; 35 E.R. 67, L.C.; 24 Digest (Repl.) 652, 6438. F

Bill to set aside the sale of a testator's share in a partnership firm, and for an account.

In 1803 William Cook, Thomas Collingridge, James Collingridge, Thomas Rowley, and George Mansell entered into a partnership for seven years in the business of coachmakers. At the expiration of the term Thomas Collingridge retired from the business, receiving his share of the capital, and a sum of £2,000 for his share of the goodwill. The other four renewed the partnership for another term of seven years, from Jan. 1, 1811, to Jan. 1, 1818, and articles of agreement for this second partnership were drawn up, dated in September, 1812. G

By these articles, after reciting the proportions of the partnership property belonging to the different partners, it was agreed that James Collingridge should be entitled to two fifths of the stock and profits, and Cook, Rowley and Mansell, to one fifth each. Collingridge was to draw out of the business quarterly the sum of £350 for his maintenance and the other three £175 each. It was provided that at the end or other sooner determination of the partnership, the accounts and concerns of the trade should be settled, and after payment or making provision for payment of all rents, arrears of rents, and all other debts owing from the partnership, and making all just allowances and deductions, all the joint stock, property, leases, and effects whatsoever, and all debts, moneys, bonds, bills, notes and other securities belonging or owing to them, should be divided, received, and taken by the partners or their executors and administrators rateably and in proportion to their respective rights and interests therein. In case any one or more of the partners should die during the continuance of the partnership it was provided that the surviving partners or partner should carry on the partnership trade for the remainder of the term of seven years H
I

A for the joint benefit of themselves or himself and the personal representatives of the deceased partner or partners, in the same proportions and in like manner as if such deceased partner or partners had continued living. All debts, sums of money, cash, bonds, bills, notes, and other securities for money, claims, and demands whatsoever then owing or belonging to the partnership were to be collected and got in by the surviving partners with all convenient speed, consistent with the interest
B of the partnership trade, and all proper steps and remedies were to be taken by them for that purpose. When got in, they were, in the first place, to be applied in paying and discharging all debts owing by the partnership, and after payment thereof and retaining so much as should be necessary for carrying on the partnership trade, the residue was from time to time to be accounted for by the surviving partners and divided among them and the executors or administrators of the deceased partner rateably and in proportion to their respective shares and interests, reserving only so much thereof as should be necessary for well and effectually carrying on the trade. If the debts owing and belonging to the partnership should be insufficient to discharge the demands upon it, the deficiency was to be made up by the surviving partners and the executors or administrators of the deceased partner, rateably and in proportion to their shares. It was also provided that if all
D the partners should happen to die during the continuance of the term, then, upon the decease of the last, the like course, order, and manner of proceeding should be observed with respect to the accounts and concerns as was agreed upon in case of the partnership determining by effluxion of time.

William Cook died in August, 1813, having by his will directed his executors during the continuance of the partnership term of seven years to receive his quarterly allowance of £175, which they were to divide among his wife and his two sons, William Cook, junior, and John Cook, the plaintiff, in certain proportions. He directed his executors to purchase £10,000 3 per cent. consols, and to pay the dividends of it to his wife for her life, the principal, after her death, to sink into the residue of his estate. He gave the residue to his executors upon trust by any ways and means they in their discretion should think fit to convert it into money, and to pay one third of it to his son, William Cook junior, and another third part to his son John Cook. As to the other third part he directed that C. L. Gray, the husband of his daughter Maria Gray, should receive £500, and that the remainder of it should be invested upon trusts for the separate use of his daughter for her life, upon her death to be divided among her children. He appointed his son William Cook junior, his partner James Collingridge, and Samuel Collingridge, to be his executors.
F

After the death of the testator the business was carried on by the surviving partners upon the footing of the partnership articles until the expiration of the term of seven years, in January, 1818. Some time before that period disputes arose between the surviving partners and William Cook junior, on one side, and John Cook, on the other. The partners had determined to take William Cook junior into the concern, but refused to accede to the wishes of John Cook to become a member of the firm. In consequence of these disagreements, he, in January, 1817, gave a notice to the executors of his father, the testator, requiring them at the expiration of the seven years' term to sell all the partnership stock in trade and effects as the only means of producing the full value. Negotiations took place afterwards, but no agreement was come to.
H

Soon after the expiration of the term the executors of the testator determined to sell his share of the partnership property at a valuation. They named one appraiser for the purpose of making the valuation, and another was named by Mansell and Rowley. The two persons thus appointed valued the stock in trade at £24,146 18s., and the leasehold premises belonging to the trade at £9,106. The goodwill was not valued, but it was agreed that it should be estimated at £11,000. On Mar. 17, 1818, Samuel Collingridge, one of the executors, wrote to John Cook junior enclosing this valuation and stating that it was the intention of the executors to sell the testator's interest in the stock in trade and goodwill to the surviving partners for the sum of
I

£8,850 11s. 7d., being a fifth of the valuation. To this letter no answer was returned. The sale was carried into effect by an indenture dated May 27, 1818, made between James Collingridge, Samuel Collingridge, and William Cook junior, as executors of the testator, of the one part, and the said James Collingridge, Mansell, and Rowley, the surviving partners, of the other part, by which the former assigned the testator's share of the partnership property to the latter, in consideration of the payment of £8,850, 11s. 7d. By another deed, dated May 29, one fifth part of the partnership property was assigned to William Cook junior in consideration of the same sum, which was paid by him, and he was then admitted into the partnership with James Collingridge, Mansell, and Rowley.

John Cook was informed by letter of the sale to the surviving partners having been effected. In March, 1819, he filed the bill in this cause against James and Samuel Collingridge, William Cook junior, Mansell and Rowley. C. L. Gray, his wife and their two infant children, were also made defendants as being entitled to one third of the residue of the testator's estate. The bill alleged that the sale of the testator's interest in the partnership property was collusively managed, and that the full value was not obtained; it prayed that the sale might be set aside, that there might be a re-sale, and an account of the profits of the trade. It also contained charges as to the circumstances under which the testator's will was made, and complained that hopes of being admitted into the partnership had been held out to the plaintiff, but no relief was prayed on these points. The defendants, by their answers, insisted that the sale was fair and bona fide, that the full value had been obtained, and that a more beneficial mode of disposing of the testator's share of the partnership property could not have been adopted. They admitted the profits of the trade since 1818 to have been considerable, amounting to more than £10,000 per annum. The defendants, the Grays, by their answer, said they believed the property was fairly sold to the surviving partners at a proper valuation and that the sale was advantageous, and they had, therefore, declined to join in the suit. Witnesses were examined on the part of the defendants to prove the mode in which the valuation was made. They stated that the full value was set upon the property, and that in any other mode of selling it, so large a price could not have been obtained. The testator's legacies had been paid, and several sums had been also paid by the executors to the plaintiff on account of his share of the residue.

The cause was heard in November, 1821, before SIR JOHN LEACH, V.-C., who was of opinion that the residuary legatees of the testator were entitled to set aside the sale and to have a fifth part of the profits of the trade from January, 1818, but, as the children of C. L. Gray and his wife, who were interested in the residue, being infants, were not competent to elect, a decree was made which, after directing the usual accounts of the testator's estate, referred it to the Master to inquire whether it would be most beneficial to the testator's estate to confirm the sale of his interest in the partnership concern made by the executors or to have it considered that the partnership business had, since Jan. 1, 1818, been carried on, as to one fifth share, on account of his estate, and that his residuary legatees were entitled to insist upon a sale of the whole partnership stock and effects, in order to ascertain the utmost value of his share.

The defendants, the executors and partners, appealed from the part of the decree which directed this inquiry and moved to stay the proceedings pending the appeal.

Sir Robert Gifford, Heald, Shadwell, Roupell, Rose and Koe for the appellant defendants.

Grant for the defendants, the Grays.

Hart and Romilly for the plaintiff.

Jan. 27, 1823. **LORD ELDON, L.C.**—This is an appeal from a part of the decree made in this cause by the vice-chancellor by which he directed the Master to inquire whether it will be most for the benefit of the parties interested in the testator's estate to confirm the sale of his interest in the partnership property which has

A been made or to have it considered that the business has been carried on as to one fifth part on account of his estate. The gravamen of the appeal is that this reference implies that, if it is found most beneficial not to confirm the sale, a decree is to be made for an account of one fifth of the profits, and that some mode is to be adopted for a new sale. In making this reference, the vice-chancellor was guided by the consideration that the plaintiff, John Cook, was the only party
B complaining of the sale, he being interested in the question together with other persons, and it seems to have been his opinion that, if it should be found to be more beneficial to all the parties interested not to disturb what had been done, he ought not to allow the plaintiff alone to disturb it on any notion of his liking something else better, intending to confirm it or not according to what might be most beneficial for the parties and not to set it aside only because the plaintiff desired it. He appears
C to have collected from the answer of the Grays that they were satisfied with what had been done, though it does not seem so to me unless they stated *ore tenus* at the Bar that they were so. Their answer does not prove that they knew what it was that had been done. They appear to have considered the transaction as a sale to the surviving partners, not as what it appears to me it really was, a sale to William Cook junior, one of the executors.

D The case depends upon the will of the testator and articles of partnership which are not very capable of being literally carried into execution. The articles, dated in 1812, begin in the usual manner with stating the agreement of the parties to become partners and their shares of the capital, and then follow clauses providing for what was to be done upon the determination of the partnership or the death of any of the partners. They first put the case of its ending by the expiration of the term of seven
E years or other sooner determination. In that event the property of every description belonging to the business was to be divided, received and taken by them respectively according to their respective interests. The property of the partnership consisted of leasehold premises, of materials necessary for the manufacture and other stock in trade, and of what would be still more difficult to deal with according to these articles, a number of agreements with customers to provide them with
F carriages for certain periods at specified rates. It is difficult to conceive what was to be done according to the articles with these engagements, unless they happened to end at the expiration of the seven years. This, however, was the agreement on which the partnership was formed. Another case is then put, of the death of one or more of the partners during the term of seven years. The trade was then to be carried on till the end of the term, and, in the meantime the outstanding debts were
G to be collected and divided with as much expedition as could be, reserving enough to carry on the trade. This again would not be very easy to manage as it would be very likely to be a matter of dispute how much would be necessary for that purpose. Another case is then put, that of the death of all the partners within the term. Then it was provided that the same course should be pursued to assign the proportion of
H each as in the case of a determination by effluxion of time.

I William Cook, the testator, died in 1813, having previously made his will. There is a good deal introduced into the pleadings and evidence with the view of showing that his sons John Cook and William Cook junior were intended to be partners. But I pass that over, it not being within the authority of the court to declare what might have been fit to have been done as to taking them into the business, and the fact being that neither of them was a partner and neither of them had a right to become one. The case must be looked at only with reference to the articles, the will, and the acts of the parties. The will notices the articles of partnership, and directs the quarterly payments which the testator was entitled to during the continuance of the trade to be paid to his wife and sons. He gives the residue of his property to his executors upon trust to convert it into money by any ways and means which they should think fit. On this clause we may observe that each of them is invested with the character of trustee as well as with that of executor, and a large discretion is given to them as to the mode of sale—as large as this court can permit to be given

having regard to the rules which the court has established with respect to trustees selling to themselves. But this is certainly not a discretion authorising them to do that which the rules of equity will not allow. A

How has this discretion been dealt with? I should be sorry to be understood to impute any wrong motive to anyone, for I believe they all meant well. Their intention appears to have been that William Cook junior should become a partner, and in a sense he was a partner from January, 1818, though the deeds were not executed till May. They were aware that the sale could not be made to William Cook junior, that the executor could not sell to the executor; the form in which it was done was that the executors sold to the surviving partners and they sell to William Cook junior, and I confess that, according to my notion of the rule of the court, if it were clear that, according to the articles of partnership, the stock was to be valued and sold at a valuation, it would be difficult even then to say that the sale could stand, if in truth, whatever were the form, it was a sale by one executor, who was a partner, to another executor who was also a selling party and was about to become a partner, for it was fully understood that William Cook junior was to be a partner. B

The manner in which they go to work is this. On the one side there was James Collingridge, who was both a partner and an executor; Samuel Collingridge, an executor; and William Cook junior, an executor and about to become a partner. On the other side were the then partners. Two persons are appointed to make a valuation of the leases, materials, and other stock. On May 27, 1818, the testator's share is assigned to the surviving partners as if for themselves, and on May 29 it is assigned to William Cook junior, it being recited that the other partners had agreed to take him into partnership. There was only one intermediate day. It is impossible not to see that this was all one transaction, and that, on the part of James Collingridge and William Cook junior, it was that species of transaction which the law will not permit. I mean that the law will not permit parties invested with a trust to deal with it so as to benefit themselves, and this principle, as far as it goes, will affect third persons who lend themselves to such a transaction. C

This view makes it not very material what is the meaning of the articles. It might be the meaning literally that the leases, stock, and engagements were to be divided, and that the partners were to take a share of each article. The vice-chancellor thought the division was to be by means of a sale. Being myself of opinion that it is impossible to act upon the articles taken literally, the general law of partnership must be applied, which appears to me to be properly laid down in *Featherstonhaugh v. Fenwick* (1). To the doctrine there laid down by SIR WILLIAM GRANT as to adjusting the affairs of a partnership on its dissolution I entirely accede. D

I cannot say that this was such a sale as should have been made, and the valuation was such that it would be difficult for anyone to say that it was proper, for the valuers valued the property, putting a distinct value upon each article. But the question was, not what each individual article was worth, but what was the value of the whole, every part being valued in connection with every other. It does not rest there, for if William Cook junior, the executor, was to be the buyer, he ought to have consulted his cestuis que trust as to who should be the valuers and as to the principle on which the valuation should be made. One of the most firmly established rules is that persons dealing as trustees and executors must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves that the court will not inquire whether it has been done or not, but at once says that such a transaction cannot stand. Therefore, it being admitted that it will be more beneficial to the persons interested in the testator's estate that the partnership should be considered as not having been terminated, I think they are entitled to have it so considered. They will be entitled to an account of the profits, and to have the stock sold. With respect to the mode of sale, it would be very desirable that the parties should agree upon it: but if they cannot, I do not know any way of managing, except by referring it to the Master to inquire what will be the most beneficial manner of disposing of it. E

DAVIS v. DUKE OF MARLBOROUGH

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), January 15, 29, March 4, 1818]

[Reported 1 Swan. 74; 36 E.R. 303]

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), June 22, 1818, April 3, 6, 8, 29, May 27, June 10, August 5, 9, November 12, 1819]

[Reported 2 Swan. 108; 36 E.R. 555]

Pension—Alienation—Pension to support grantee in dignity of position and performance of future duties.

A pension for past services may be alienated, but a pension for supporting the grantee in dignity of his position and the performance of future duties is inalienable.

Receiver—Equitable creditor—Appointment of receiver without prejudice to prior beneficial interests — Equitable encumbrancers — Inquiry to determine priorities.

The court will on motion appoint a receiver for a creditor who represents that he has only an equitable estate which does not entitle him to recover at law without prejudice to persons who have prior beneficial interests, in this sense, without prejudice to persons having prior legal estates, that it will not prevent their proceeding to obtain possession if they think proper, and, with regard to persons having prior equitable estates, the court takes care in appointing a receiver not to disturb prior equities, and for that purpose directs inquiries to determine priorities among equitable encumbrancers, permitting legal creditors to act against the estates at law and selling the priorities of equitable creditors. Provided it is satisfied in that stage of the cause that the relief prayed by the bill will be given when a decree is pronounced, the court will not expose parties claiming that relief to the danger of losing the rents by not appointing a receiver of an estate on which it is admitted they cannot enter.

Receiver—Court—Appointment by—Appointment on behalf of all parties—Action on priorities of persons interested according to determination of Master.

A receiver appointed by the court is appointed on behalf of all parties. A receiver under a deed must act according to the terms of the deed; a receiver appointed by the court acts according to the determination of the Master on the priorities of persons interested, and the fact that such a question is to be submitted to the Master deserves regard when the court is considering whether a receiver should be appointed.

Equity—Deed—Oppressive deed—Relief—Tender of money received under deed and interest.

Per LORD ELDON, L.C.: No one can come into a court of equity to be relieved against an oppressive deed [e.g., an annuity deed], even in the character of heir apparent dealing for his expectations, except on tender of purchase-money and interest.

Heir—Heir apparent—Protection—Reasonableness of bargain—Burden of proof.

If a person has dealt with an heir apparent for interests of which he was not in present possession the court extends to the heir the benefit of the principle that it does not rest on him to show that the bargain was unreasonable and improvident, but it is on them to show that it was reasonable.

Per LORD ELDON, L.C.: According to the decisions in this court I do not think that years [i.e., the age of the heir] make much difference in the protection afforded to an expectant.

Notes. Considered: *Cooper v. Reilly* (1829), 2 Sim. 560; *Grenfell v. Windsor* (1840), 2 Beav. 544; *Hill v. Paul* (1841), 8 Cl. & Fin. 295; *Bromley v. Smith, Boustead*

v. *Bromley*, *Smith v. Bromley* (1859), 26 Beav. 644; *Re Marlborough's Parliamentary Estates* (1891), 8 T.L.R. 179; *Re Marlborough's Blenheim Estates and Settled Land Acts* (1892), 8 T.L.R. 582. Referred to: *Portmore v. Taylor* (1831), 4 Sim. 182; *Westmeath v. Westmeath* (1834), 3 Knapp, 42; *King v. Hamlet* (1835), 9 Bli. N.S. 575; *Pelly v. Wathen* (1849), 7 Hare, 351; *Paynter v. Carew* (1854), Kay, App. XXXVI; *Mansfield v. Ogle* (1855), 24 L.J.Ch. 450; *Webster v. Cooke* (1867), 36 L.J.Ch. 753; *O'Rorke v. Bolingbroke* (1877), 2 App. Cas. 814; *Re Fry, Fry v. Lane*, *Whittet v. Bush*, [1886-90] All E.R. Rep. 1084; *Cadogan v. Lyric Theatre* (1894), 63 L.J.Ch. 755.

As to pensions generally, see 7 HALSBURY'S LAWS (3rd Edn.) 431 et seq., and for cases see 8 DIGEST (Repl.) 563-567. As to receivers, see 32 HALSBURY'S LAWS (3rd Edn.) 380 et seq.; and for cases see 39 DIGEST (Repl.) 5 et seq.

Cases referred to :

- (1) *Hutchinson v. Lord Massareene* (1811), 2 Ball & B. 49, 55; 39 Digest (Repl.) 75, *277.
- (2) *Duke of Bolton v. Williams* (1793), 2 Ves. 138; 4 Bro. C.C. 297; 30 E.R. 561, L.C.; 32 Digest (Repl.) 311, 508.
- (3) *Jones v. Harris* (1804), 9 Ves. 486, L.C.
- (4) *Ex parte Wright* (1812), 19 Ves. 255; 1 Rose, 308; 34 E.R. 513; 35 Digest (Repl.) 293, 131.
- (5) *Angell v. Hadden* (1817), 2 Mer. 164.

Motion for a reference to a Master for the appointment of a receiver.

By letters patent dated May 5, 1705, Queen Anne (having been enabled by the private Act 3 & 4 Anne, c. 6) granted the honour and manor of Woodstock and the hundred of Wootton to John Duke of Marlborough, his heirs and assigns for ever. By the statute 5 Anne, c. 3. (intituled "an Act for the settling of the honours and dignities of John Duke of Marlborough upon his posterity, and annexing the honour and manor of Woodstock and House of Blenheim to go along with the said honours for perpetuating the memory of the great actions performed by the duke"), after enacting that the titles and dignities which had been granted to him and the heirs male of his body should on failure of issue male be vested in his daughters successively in a course of devolution therein particularly described, it was enacted, to the intent that the honour, manor, and park of Woodstock, and the house then erecting there called Blenheim, and the hundred of Wootton, should always go along and be enjoyed with the titles and dignities aforesaid, that the duke should be seized of the said honour, manor, etc., for life; and that after his decease the same should remain to Sarah his duchess for life, and after her decease to the heirs male of the body of the duke, and for default of such issue to all and every the daughters of the duke in such manner as the titles were thereinbefore limited. By s. 4 of the Act a power of leasing was given to the then duke and duchess, and s. 5 contained the following proviso:

"That neither the said Duke of Marlborough, or the heirs male of his body, nor any of his daughters, or the heirs male of their bodies, or any other person to whom the premises shall come or descend by virtue of the limitations aforesaid, shall have any power by fine or recovery, or any other act, assurance, or conveyance in the law, to hinder, bar, or disinherit any the person or persons to or upon whom the said manors, house, lands, tenements, hereditaments, or premises, are hereby vested or limited, from holding or enjoying the same, according to the limitations before in this Act mentioned, other than and except such leases as the said duke and duchess may make, by virtue of the powers hereinbefore mentioned, and such other leases as tenants in tail may . . . make . . ."

By the statute 5 Anne, c. 4 (intituled "an Act for settling upon John Duke of Marlborough, and his posterity, a pension of £5,000 per annum, for the more honourable support of their dignities, in like manner as his honours and dignities, and the honour and manor of Woodstock, and house of Blenheim, are already limited and

A settled"), reciting, among other things, the wish of the House of Commons to make some provision for the more honourable support of the duke's dignities in his posterity, a pension of £5,000 (issuing out of the revenues of the Post Office) was granted to the duke for life, and after his decease to Sarah, his duchess, for life, and after her decease to such persons severally and successively to whom, and in such manner as, the title, honours, and dignities, were by the preceding act limited.

B After directing that the annuity should be paid by the postmasters, etc., to John Duke of Marlborough, and "to all others severally and successively to whom the same should, after the decease of the said duke, come," the Act contained a proviso

C "that neither the said Duke of Marlborough, or any person to whom the said annuity or yearly pension of £5,000 hereby enacted to be paid as aforesaid, shall come, descend, remain, or belong, by virtue of the limitations aforesaid, shall have power by any act, assurance, or conveyance in the law whatsoever, to whom the said annuity or yearly pension is, by virtue of this Act, limited or appointed to come, descend, or remain, from holding, enjoying, receiving, or taking the same, according to the limitations thereof made by this Act, but that

D every such act, assurance, or conveyance shall be, and is hereby declared and enacted to be, void."

The bill stated that by indenture of Mar. 21, 1811, George Duke of Marlborough, then Marquis of Blandford, in consideration of the sum of £999, granted to the plaintiff an annuity of £155 for the term of 99 years, and for securing payment of the annuity conveyed to a trustee the manors and hereditaments comprised in the Act of

E Anne, and the pension of £5,000 per annum, for a term of 500 years, to commence from the death of the then Duke of Marlborough, together with certain other estates for the residue of the respective terms to which the duke was entitled therein upon trust, among other things, if the annuity should be in arrear for 50 days, by the rents and profits of the estates, or by felling timber, or by sale of underwood or fixtures on the premises, to raise sums for payment of the arrears, with power of sale if the

F annuity should be in arrear for three months, and, by the same indenture, the duke assigned the pension of £5,000 (from the decease of the then duke) to the same trustee upon trust to secure the plaintiff's annuity, and nominated the trustee his attorney to demand and receive the pension; and the duke and the trustee appointed Robert Withy their receiver of the rents and profits of the premises conveyed, with a proviso that Withy should not act unless the annuity should be in arrear for six

G months.

After further stating the death of the duke on Jan. 30, 1817, and that the annuity had been unpaid and in arrear since Sept. 21, 1815, the bill charged that the duke had confessed judgments to divers persons, alleged to be creditors of the duke, for divers sums, whose names and the particulars of whose demands the plaintiff was

H unable to set forth, but whom he believed not to be bona fide creditors of the duke, and that they had sued out and executed writs of elegit against the hereditaments, estates, and premises comprised in the indenture of Mar. 21, 1811, and were then in possession of the said estates, and that by reason of the prior encumbrances affecting the said estates, and, particularly, of a term of 500 years created by an indenture of Mar. 18, 1811, to secure an annuity of £155 granted by the duke to one Philips,

I the plaintiff was deprived of his legal remedies against the same. The bill prayed an account of the arrears of the plaintiff's annuity, and payment (according to its priority) of the amount, by sale or mortgage of the premises comprised in the indenture of Mar. 21, 1811, a provision for the security of the future payments, and the appointment of a receiver of the rents and profits of the estates, and of the pension of £5,000.

On Jan. 15, 1818, *Hart* and *Seton* for the plaintiff, moved that it might be referred to the Master to approve a proper person to be the receiver of the rents and profits and of the pension.

Sir Samuel Romilly, Bell and Hampson opposed the motion. A

The counsel for the plaintiff not having expected opposition to the motion for a receiver on the ground taken, desired time to refer to the authorities.

LORD ELDON, L.C.—A case involving so many important questions certainly requires full discussion. A pension for past services may be alienated, but a pension for supporting the grantee in the performance of future duties is inalienable. Can it be contended that the Lord Chancellor could alienate his pension, payable out of the revenue of the Post Office, granted for sustaining the dignity of the office? This case differs from that of a grant to the grantee and his assigns. The pension being granted to the individual, in what mode can the assignee recover out of funds which are not accessible by the common forms of law? If a subject gives land to A. for his life, he gives to A. and his assigns, but where property is granted by a warrant from the Crown does it follow that the warrant extends to a person who is in no way described in that instrument? Considering the many important doctrines on the effect of grants by warrant, and by sign-manual, regard being had to the funds out of which the grant is made, I must be cautious not to confound the law on a point of so much moment. B
C

Further argument in support of the motion took place on Jan. 29. D

LORD ELDON, L.C.—The decision on the question whether a receiver shall be appointed will determine much of the rights of the parties. These grants were made for services performed, and for the support of dignities then created. The statute of 5 Anne, c. 5, converts the duke into a tenant in tail of estates of which he was then tenant in fee. If the legislature intended that the rents and profits should be enjoyed by the duke for the time being, that conclusion will depend, I think, more on policy than on the terms of the Act. Confining the construction to those terms, I am of opinion that the legislature has not used words sufficient to prevent alienation of the rents and profits. If such was the intention, *quod voluit non dixit*. If on the construction of this statute creditors may have execution by writs of *elegit* against the estate, it must be competent to this court to grant a receiver. But creditors can have no execution at law against the pension, and analogy to the law, therefore, will not support their claim in the instance of the pension, as of the land. E
F

Mar. 4, **THE LORD CHANCELLOR**, without further observation, granted the order for a receiver as to the estates (without prejudice to the rights of the judgment creditors in possession), but refused it as to the pension. G

June 22, 1818. The plaintiff moved that the order for the receiver might be varied, and extended to the judgment creditors.

Hart and Seton in support of the motion.

Bell and Roupell against the motion, applied that Mr. Withy might be declared at liberty to propose himself as receiver, on the ground that, in the annuity deed, it had been agreed by the plaintiff and the duke that he should hold that office. H

LORD ELDON, L.C.—A receiver appointed by the court is appointed on behalf of all parties, not of the plaintiff or of one defendant only: [see *Hutchinson v. Lord Massareene* (1)]. I see no reason for releasing Mr. Withy from any difficulties which prevent his appointment.

April 6, 1819. *Sir Arthur Piggott, Wray and Hampson* moved on behalf of the duke to discharge the receiver. I

Hart and Seton for the plaintiff.

Wetherell and Tinney for prior encumbrancers.

April 8, 1819. **LORD ELDON, L.C.**—If this case is to be decided on that policy which is acknowledged only in courts of equity, the policy extending a peculiar protection to heirs, it is purely a question of equity; if, on the other hand, it is to be decided on the construction of the Acts of Parliament, and it is insisted that

A under that construction no creditors can lay hold of Blenheim House even during the life of the duke, so as to exclude him and prevent his excluding them if he thinks proper, that is a legal question, and the difficulty under which the duke there labours is that the case is presented to me when two judgment creditors, by virtue of their judgments, have taken possession of the house and park.

B The point at issue is simply whether I ought to discharge the receiver. That depends, first, on the question whether he ought to have been appointed, regard being had to the nature of the plaintiff's claim and the nature of the Duke's estate. If the nature of the estate is to be considered as to the question whether an equitable execution can be levied, if I may use that expression, against the house and park, that may be properly argued here on principles peculiar to a court of equity, but the question on the meaning of the Acts of Parliament is a legal question, C and I have no concern with that except to take the opinion of a court of law unless there are equitable grounds for protecting the duke, not as heir apparent, but as Duke of Marlborough. The construction of the Acts must be the same in courts of law and equity, but there may be a peculiar principle which this court will apply to the Acts, though it agrees in the construction with the court of law.

D HIS LORDSHIP dealt with the construction of the private Acts, and continued: The other point requires more consideration, namely, whether, without advertng to the Acts of Parliament, this is a case in which the court should have granted a receiver. The rule I take to be that the court will on motion appoint a receiver for an equitable creditor or a person having an equitable estate without prejudice to persons who have prior estates, in this sense, without prejudice to persons having prior legal estates, that it will not prevent their proceeding to obtain possession if E they think proper, and, with regard to persons having prior equitable estates, the court takes care in appointing a receiver not to disturb prior equities, and for that purpose directs inquiries to determine priorities among equitable encumbrancers, permitting legal creditors to act against the estates at law, and settling the priorities of equitable creditors. Provided it is satisfied in that stage of the cause that the relief prayed by the bill will be given when a decree is pronounced, F the court will not expose parties claiming that relief to the danger of losing the rents by not appointing a receiver of an estate on which it is admitted they cannot enter. The question then will be whether, considering the provisions of this deed, the court, in the present stage of the cause, is to interpose by the appointment of a receiver. That may be put thus, whether it is sufficiently clear that the court will, on the hearing, lend its aid to a plaintiff such as the present.

G The grant of the annuity first recognises in the duke, then Marquess of Blandford, the character to which the court applies, what it calls its policy, that is, the character of eldest son and heir-at-law. Beyond doubt he is dealing for his expectancy and reversion, because he is dealing for what the legislature endeavoured to annex to the dignities of which he was expectant heir. Feeling, as I profess to feel, that H in many cases those who obtain relief from their annuities, have really taken as much advantage of the annuitants as those annuitants have taken of them, I must still admit it to be clearly established that, if a person has dealt with an heir apparent for interests of which he is not in present possession, this court extends to the heir the benefit of this principle with reference to those so dealing with him, and that it does not rest on him to show that the bargain was unreasonable and I improvident, but it is on them to show that it was reasonable. The mere fact that the annuity was bought at six years' purchase cannot render the grant improvident: many annuities purchased at that price, have not been set aside. Whatever may be the estimated value in the tables, where, I understand, fifteen years' purchase are allowed, I believe that six years have been considered, to use an expression which, though it should never have come into this court, cannot now be thrown out of it, as the market-price of an annuity.

According to the decisions in this court, I do not think that years make much difference in the protection afforded to an expectant heir.

The duke, in his answer, has offered to repay the consideration-money, but I think that I must now look at the case as if the plaintiff declined to receive it. If there is a question whether the duke has not the incidents belonging to an estate for life, that arises precisely under this deed, because, if he has not, the demise and charge are bad; if he has, independently on the other objections, they are good. On the former occasion I determined not to appoint a receiver of the pension, because the appointment would have been useless. The pension is payable only into the hands of the duke, and the receipt of the receiver would not be a sufficient discharge. If the policy of these Acts operates to the extent which has been contended for, it would be impossible for the annuitant to put in execution the power of distress against any part of the property within their protection.

With reference to heirs apparent dealing for their expectancies, it is too late to urge in this court, that the grantee may insure or omit to insure the grantor's life. LORD THURLOW in one case said that insurance might now be made with so much ease and certainty that he would always pay attention to the circumstance whether it was to be made at the expense of the party granting the annuity. Here it is to be made at the duke's expense; at least in case, by his leaving the country, or other acts, it becomes necessary to pay a larger premium than if he appeared personally at the insurance-offices, those increased expenses are to be sustained by him.

If the court is to consider whether the plaintiff can take timber by virtue of the demise and covenant, a considerable question will arise, but the doctrine stated from COMYNS'S DIGEST is very material, because the question would be, whether, if the estate of the Marquess of Blandford was not subject to impeachment of waste, and he demised for years not expressly declaring that the lessee should not be subject to impeachment of waste, but with a declaration of trust, amounting to a licence to fell timber, the lessee would be authorised to fell. But the doctrine of that case is to be observed on with a distinction, for this question must be considered with reference to the peculiar estate of the Duke of Marlborough, and to what might raise a doubt between a future Marquess of Blandford on the subject of felling timber, the duke being not tenant for life, but tenant in tail, subject to such restraints as the policy of the Acts may be understood to impose on him, and with this distinction too, that White Knights is granted, as it is held, not subject to impeachment of waste. I think it due to the argument to say that, if the policy of the Acts raises no objection, much of the difficulty in my mind is removed.

None of the previous annuitants is a party to this deed, and this, therefore, is not the instrument that can inform the court who ought to be the receiver. If Mr. Withy is receiver under the deed, he will be bound to satisfy all the annuitants, according to the trusts of the deed, whereas if a receiver is appointed in the Master's Office, the Master will have the opportunity of declaring who should or should not be paid. A receiver under the deed must act according to the terms of the deed; a receiver appointed by the court acts according to the determination of the Master on the priorities of the annuitants, and the fact that such a question is to be submitted to the Master deserves regard when we are considering whether a receiver should be appointed.

It has been argued that in this case it cannot indeed be denied that the duke has been dealing for his expectations, and is clothed with the character of an expectant heir, but that it is a present grant of an annuity, charged not immediately on estates in expectation, but in part on estates in possession. The case has a singularity in that respect, but the grantor, appearing on the instrument, to be in the situation of an expectant heir and in a situation in which his personal security is scarcely worth having, and the bulk of the securities being expectant property, I should certainly hesitate long before I lay it down as a principle that, if an heir apparent, dealing substantially for his expectations, is dealing also for a present obligation, which it is hardly possible that he should discharge, or throwing in a present possession worth but a small proportion of the whole, he is not entitled

A to the protection given to his heirs apparent, dealing for their expectations. Such a proposition would lead to most enormous mischief and go far to destroy the principle itself.

B Under these circumstances, remembering, on the one hand, the nature of the grant, and by whom it is made, and not forgetting, on the other hand, that all parties are entitled to the utmost judicial consideration, it appears to me very doubtful whether I can support the receiver. Certainly, until the decree, I shall go no further, but on that point I reserve final decision.

C June 10, 1819. **LORD ELDON, L.C.**—The principle on which the court appoints a receiver I may state to be this, that where a plaintiff, in his bill, represents that he has only an equitable estate which, consequently, does not entitle him to recover at law, if it be clear that he has that equitable estate, on which he may recover in equity, the court will appoint a receiver, not disturbing prior beneficial interests. It is now insisted that the receiver should be discharged on the ground that this deed is such as a court of equity will not enforce—not by decree on hearing; a fortiori not on motion. The validity of the memorial is also questioned, and it is clear that, without a good memorial, this deed, as an annuity deed, would D be void, the rule of the court being settled that such a deed, if not good as an annuity deed, gives no lien on the estate for the price paid for the annuity, although that may be recovered at law accounting for what has been received: [See *Duke of Bolton v. Williams* (2); *Jones v. Harris* (3); *Ex parte Wright* (4); *Angell v. Hadden* (5)].

E The case, therefore, resolves itself into the questions whether the memorial is good, and, if it is, whether this deed is so oppressive in its nature that the court will not act on it. I think that the objections to the memorial cannot be sustained. I must, therefore, take this to be a valid annuity deed, and the question is: Will this court refuse to act on it considering it as an oppressive deed and recollecting that the duke executed it in the situation of an heir apparent dealing for his expectations? It strikes me as, in some instances, extremely oppressive, but F then we return exactly to the same result. No one can come into a court of equity to be relieved against an oppressive deed, even in the character of heir apparent dealing for his expectations, except on tender of the purchase-money and interest, and when the duke attacks this deed as evidence of a bargain which ought not to have been made with an heir apparent, he cannot be heard on any other terms. The consequence is that till that amount is offered, and either accepted or refused, G the question whether the receiver shall be discharged is premature. To the extent of that amount, considering this as a mere deed, not as an annuity deed, I think there is a lien.

A tender of the amount due to the plaintiff having been accepted, the judgment of the court was on Aug. 5 prayed.

H **LORD ELDON, L.C.**—I am of opinion that the receiver must be discharged. If the duke had tendered, and the plaintiff refused to accept, what would be found due on an account taken of the accruing payments of the annuity on one side and the price and interest on the other, I think that would authorise me to discharge the receiver.

I *Tinney*, for three defendants, creditors of the duke, on Aug. 9, applied to be heard against the order for discharging the receiver, stating that two of the defendants had annuities prior to the plaintiff's, and were, therefore, more entitled than the plaintiff in the appointment of a receiver; that they had also the legal estate, of the advantage of which they had been deprived by the order for a receiver, and as a substitute, they were entitled to the benefit of that order; and that the direction to the Master to state priorities, was founded on the prayer of the bill at least that the defendants were entitled to a like tender with the plaintiff.

LORD ELDON, L.C.—I apprehend that with the right of the plaintiff to have

the receiver must fall the rights of the other parties. It would be most extraordinary, if, because a receiver has been appointed on behalf of the plaintiff, any defendant is entitled to have a receiver appointed on his behalf. My decided opinion is that the order for a receiver must be discharged, and that all falls together. The defendants may file a bill, but the appointment of a receiver would not have affected their legal estate. A

Hart for the plaintiff, on Nov. 12, proposed to vary the order discharging the receiver by inserting a declaration that the sum tendered by the duke was accepted, without prejudice to any question between the parties. B

Wray for the duke, insisted that the sum must be understood to be accepted, as it was tendered by the answer, in satisfaction of the plaintiff's claim.

LORD ELDON, L.C.—I can make no declaration that the money was received without prejudice, though it was my intention to have said something on that subject. I meant that the receipt should be without prejudice in this sense—that the receipt should itself be a fact, which would on the hearing raise a question in the cause that would not have arisen if the receipt had not passed. I did not mean that the fact of the receipt should not be considered when the merits of the case came to be discussed on the hearing. I have no objection to the plaintiff's repaying the money, and reinstating the cause in precisely the same situation as before the receipt, the receiver being restored, subject to the question whether he should be continued. The receiver must have his costs. C

R. v. JOLIFFE

[COURT OF KING'S BENCH (Abbott, C.J., Holroyd and Best, JJ.), June 9, 1823] F

[Reported 2 B. & C. 54; 3 Dow. & Ry. K.B. 240; 1 L.J.O.S.K.B. 232;
107 E.R. 303]

Custom—Proof—Regular usage for twenty years, unexplained and uncontradicted—Immemorial custom.

A regular usage for twenty years, unexplained and uncontradicted, **held** to be sufficient to warrant a jury in finding the existence of an immemorial custom. G

Notes. Considered: *Morgan v. Palmer* (1824), 2 B. & C. 729. Referred to: *Arkwright v. Cantrell* (1837), 7 Ad. & El. 565; *Brocklebank v. Thompson*, [1903] 2 Ch. 344.

As to essential characteristics of custom, see 11 HALSBURY'S LAWS (3rd Edn.) 160 et seq.; and for cases see 17 DIGEST (Repl.) 8 et seq. H

Case referred to:

(1) *Crane v. Holland* (1627), Cro. Car. 138.

Also referred to in argument:

Prior of Montague's Case (1428), Y.B. 7 Hen. 6, 12 B.

Wood v. Loveatt (1796), 6 Term Rep. 511.

Rule Nisi obtained by the Crown for a new trial or to enter a verdict for the Crown non obstante veredicto, on an information, in the nature of a writ of quo warranto, calling on the defendant to show on what authority he claimed to exercise the office of mayor of the borough of Petersfield. I

The defendant pleaded that Petersfield was an ancient borough, that from time immemorial there had been a court leet or view of frankpledge holden in and for the borough. The jury sworn and serving at that court had presented a fit person to be mayor of the borough for one whole year, and the person so presented had

A always been sworn in at that court before the steward and, being so presented and sworn, had executed the office of mayor for one year. At the court leet duly holden certain persons were then and there duly sworn as and for the jury, then and there to serve as the jury, and did serve as the jury at the court; and, being so sworn and so serving, presented the defendant to be mayor. He being so presented, was duly sworn before the steward and, by virtue of the premises, claimed to be mayor.

B To this plea there were eighteen replications, but the eighth only was material, viz., that the court leet of the borough had immemorially presented a fit person to be bailiff who was always attendant on the court. At the court mentioned in the plea, the steward nominated the fourteen persons mentioned in the plea who served on the jury, and issued his precept to the bailiff to summon those persons. C The bailiff did accordingly summon them, whereas, by the law of the land, the steward should have issued his precept to the bailiff to summon a jury, and the particular persons should have been selected by the bailiff.

Rejoinder that, from time immemorial the steward had been used to nominate the jurors.

D At the trial before BURROUGH, J., the defendant proved that, for more than twenty years, the precept to the bailiff had always contained a list of persons whom the steward directed him to summon as jurors. No evidence was given for the Crown to show that any other practice had ever prevailed in the borough. The learned judge told the jury that slight evidence, if uncontradicted, became cogent proof, and they found a verdict for the defendant. A rule nisi was obtained for a new trial on the ground that there was not sufficient evidence to warrant the finding of the jury, or to enter judgment for the Crown, non obstante veredicto, on the ground E that the custom set out in the rejoinder was bad in law.

Scarlett, Adam, C. F. Williams and Mereweather for the defendant, showed cause against the rule.

Serjeant Pell, Gaselee, Coltman and Carter for the Crown, supported the rule.

F **ABBOTT, C.J.**—I am of opinion that this rule must be discharged. There is not any ground for a new trial. On the evidence given, uncontradicted and unexplained, I think that the learned judge did right in telling the jury that it was cogent evidence, on which they might find the issue in the affirmative. If his expression had gone even beyond that and had recommended them to find such a verdict, I should have thought that the recommendation was fit and proper. G A regular usage for twenty years, not explained or contradicted, is that on which many private and public rights are held, there being nothing in the usage to contravene the public policy. Taking, therefore, the issue to be properly found, we must consider that by the immemorial custom of this court leet the steward has been in the habit of pointing out to the bailiff the persons who are to be summoned on the jury. If that custom be against any known rule or principle of law it cannot stand, however great its antiquity may be. But I am of opinion that it is not; and I adopt in a great degree what has been said respecting the ancient constitution and practice of the tourn and leet. All residents were bound to attend, and many did attend; and not till they were assembled was any jury selected. Then the sheriff in the one case, and the steward in the other, named to his officer the persons who were to be impanelled and to serve on the jury. If it were the ancient practice to select a jury in that mode without summons, there does not appear to be any sound reason why certain persons should not be summoned to serve as jurors. I

Various Acts of Parliament have been referred to, as showing something inconsistent with this. The first of them is 11 Hen. 4, c. 9 [the part relating to jurors was repealed by Juries Act, 1825, s. 62]. By that Act, it appears that a practice had crept in for other persons than the sheriff or bailiff of a franchise to nominate to the judges those who should serve on the grand juries, which was found very

mischievous. It was, therefore, provided by that Act, that none should serve but those who were returned to the judges by the sheriff or bailiff, without the nomination of any other person. Then came the statute Ric. 3, c. 4 [repealed by the Juries Act, 1825, s. 62], whereby it was enacted in s. 1:

“that if the bailiff should return or impanel to serve as jurors in the tourn any persons not having the qualifications there mentioned,”

he should forfeit 40s.; and by s. 2 a similar fine is imposed on the sheriff. Put this case. The bailiff impanels persons not duly qualified: Is the sheriff to allow them to serve and so incur the fine, or to leave the business of the tourn undone; or is he to select others who are duly qualified? No doubt the latter would be the proper course. Allusion has also been made to the statute 3 Hen. 8, c. 12 [also repealed by Juries Act, 1825, s. 62]. That statute gives power to justices of gaol delivery to amend a panel precisely in the manner in which I think that the sheriff ought to do in his tourn under the circumstances before supposed.

Crane v. Holland (1), which has been cited, also shows that the same person may, by custom, be the judge of a court for one purpose and the officer for another. But a passage in *HAWKINS, PLEAS OF THE CROWN* (7th Edn.), bk. 2, c. 10, s. 15, has been relied on as showing that the bailiff is to select the jury, because the sheriff may fine him for not making a panel. But there is nothing inconsistent in saying that it is the bailiff's duty to make the panel, although the sheriff decides on the persons to be named in it. There is also another answer to the argument, viz., that the passage may refer to the traverse jury and not the grand inquest. In other cases, as in writs of inquiry and re-disseisin, the sheriff nominates the jury and presides as judge; can we then say that there is anything in the custom now under consideration which is at variance with any known rule or principle of law? The usual mode may be different, but that is the whole argument; and to infer thence that no other mode can be legal is not consistent either with good logic or good law.

On the whole, therefore, I am of the opinion that there is nothing unreasonable or illegal in this custom which has been established by the verdict, and that the judgment ought not to be entered for the Crown.

HOLROYD, J.—I am of opinion that the observations of the learned judge and the verdict of the jury were well warranted by the evidence in the cause. The remaining question is whether the custom found be contrary to law and, therefore, void. The common and ordinary course is for the bailiff to nominate the jury; and, in the absence of any custom to the contrary, that would be held to be a part of his duty. But here it is found that a custom has immemorially existed for the steward, and not the bailiff, to nominate the jury. It appears to me that the authorities which have been cited and the usage which has prevailed on writs of inquiry, and in some other instances, establish clearly that the custom is not inconsistent with any principle of law.

The statute 3 Hen. 8, c. 12, giving judges the power to amend panels, shows that the legislature did not think it against the principles of law that judges should interfere with the nomination of the persons who were to serve. Unless, then, some Act of Parliament can be found depriving the steward of such a privilege as that now claimed, it is plain that he may enjoy it. The statute 11 Hen. 4, c. 9, is the only one that at all bears on the question; but that was intended to remedy the abuse which had been introduced of nominations by persons without any authority, and was not meant to apply to such cases as this. The latter part of it runs thus:

“And that from henceforth no indictment be made by any such persons but by inquest of the king's lawful liege people, in the manner as was used in the time of his noble progenitors, returned by the sheriffs or bailiffs of franchises, without any denomination to the sheriffs or bailiffs or franchises before made

A by any person of the names which by them should be impannelled; except it be by the officer of the said sheriffs or bailiffs of franchises, sworn and known to make the same, and other officer to whom it pertaineth to make the same according to the law of England."

B In this case, by the custom which existed before the time of legal memory and, therefore, by the law of England, it pertained to the steward to nominate the jury. *Crane v. Holland* (1) is, I think, decisive of the principle; for it is there held that one may be judge and officer, *diversis respectibus*.

For these reasons, I am of opinion that the rule must be discharged.

C **BEST, J.**—We are not called on to lay down any general rule in this case, but merely to say whether the special immemorial custom found by the jury be or be not consistent with the principles of law. No direct authority has been cited to show that the custom is bad. The form given by SCROGGS, C.J. [see SCRIVEN ON COPYHOLD TENURES (1st Edn.), vol. 2, p. 839], by which it appears that the bailiff usually selects the jury, may prove what the general practice is, but does not impugn the custom. *Crane v. Holland* (1), cited at the Bar, is in support of the custom. It was there held that, in a corporation, the bailiffs might, by custom, be both judges and ministerial officers of the court. An attempt was made to show that this case differed from that and the cases where the sheriff presides as judge, because here the lord is entitled to the fines and amercements; but that argument, if valid, would also show that the sheriff cannot properly select the jury in such cases, because he is appointed by the Crown to which the fines imposed in his court belong. So also in corporations the fines for the most part belong to the body corporate, and yet the mayor and the corporation sit as judges in the corporate courts and impose fines.

F Of the statutes which have been referred to, one only appears to touch the question, and that furnishes an answer to this application. It is true that the statute 11 Hen. 4, c. 9, says that jurors in indictments shall be returned by the sheriff or bailiffs, because these are the officers whose duty it is in general to return them; but this statute was not intended to prevent any other properly authorised officer from returning jurors, but only such as were not officers of the court from nominating persons to the court to serve as jurors. The statute 1 Ric. 3, c. 4, only provides for the return of jurors who were properly qualified, and makes no regulation as to the returning officer. It speaks of bailiffs and other officers. But G the statute 1 Eliz., c. 17 [repealed by various statutes], which gives the steward of a leet a power to nominate a second jury in case of misconduct in the first [s. 10 (2)], warrants us in saying that a custom for the steward to nominate the first is not unreasonable or illegal. The legislature would not have directed the steward to nominate the second jury if it had considered him as so dependent on the lord who is to receive the fines imposed in the court as not fit to be trusted to return the jury who are to impose them. This, therefore, is a complete answer H to the only objection that appears to me to be even specious. If the steward be a proper person to name the second jury, he cannot be so unfit to return the first as to make an immemorial custom that he is to return the jury at the leet bad in point of law.

Rule discharged.

CRAWSHAY v. MAULE AND OTHERS MAULE AND OTHERS v. CRAWSHAY

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), June 9, 10, 27, July 11, 23, 31, 1818]

[Reported 1 Swan. 495; 1 Wils. Ch. 181; 36 E.R. 479]

Partnership—Dissolution—No term specified in agreement for duration of partnership—Immediate dissolution on notice—Continuance of partnership to wind-up business.

Partnership—Dissolution—Death of partner—Absence of term in agreement providing for continuance in event of death.

Where no term is expressly limited in a partnership agreement for the duration of the partnership the partnership may be dissolved at a moment's notice by any one or more of the partners. By that notice the partnership is dissolved to the extent that the court will compel the parties to act as partners in a partnership existing only for the purpose of winding-up the partnership affairs.

The death of a partner dissolves the partnership, in the absence of agreement by the partners to the contrary.

Partnership—Sale of partnership property—Some party with clear right to dissolution—Interlocutory order for sale—End of partnership required by evident interest of parties—Difference among partners as to mode of carrying on trade—Appointment of manager.

In a suit instituted for the dissolution of a partnership, it being clear that some party has a right to a dissolution, a sale of the partnership property in the manner most beneficial for all parties interested may be directed. Such an order may be made on motion where the partnership is clearly dissolved. On general principles it is in such circumstances the practice at once to put an end to the partnership where that measure is required by the evident interest of the parties.

Per LORD ELDON: On the dissolution of a partnership by the death of a partner the general rule is not to wait for a decree before disposing of the partnership property if the concern is of such a nature that it cannot be wound-up at once, but, at least if the parties differ as to the mode of carrying on the trade, the court will, without reference to an objection for want of parties, appoint a manager.

Partnership—Dissolution—Manager—Use of partnership property inconsistent with purpose of winding-up—Appointment of manager.

If a partnership is actually ended by death, notice, or any other mode of determination, no person can make any use of the property inconsistent with the purpose of winding-up the concern. If any person conducts it otherwise, the court will appoint a manager to wind-up the concern.

Partnership—Duration—Implication of term in agreement—Purchase of leases—Continuance of partnership so long as leases endure—Lease part of stock in trade.

A term may be implied in a partnership agreement as to the duration of the partnership. Partners may so purchase leasehold interests as to imply an agreement to continue the partnership as long as the leases endure, but there is no general rule that partners purchasing a leasehold interest must be understood to have entered into a contract of partnership commensurate with the duration of the lease. For ordinary purposes a lease is no more than stock in trade, and, as part of the stock, must be sold when the partnership is dissolved.

Partnership—Dissolution—Sale of partnership property—One partner an infant.

On the dissolution of a partnership the infancy of one partner will not prevent a sale of the partnership concern and interest.

- A Notes.** Considered: *Fereday v. Wightwick* (1829), 1 Russ. & M. 45; *Roberts v. Eberhardt* (1853), Kay, 148. Applied: *Wild v. Milne* (1859), 26 Beav. 504. Referred to: *Randall v. Randall* (1835), 7 Sim. 271; *Laycock v. Bulmer* (1843), 2 L.T.O.S. 101; *Baxter v. Brown* (1845), 7 Man. & G. 198; *Dale v. Hamilton* (1846), 5 Hare, 369; *Ricketts v. Bennett* (1847), 4 C.B. 686; *Fripp v. Chard Rail. Co.*, *Fripp v. Bridgwater and Taunton Canal, etc., Co.* (1853), 11 Hare, 241; *Ekins v. Brown* (1854), 1 Ecc. & Ad. 400; *Frost v. Moulton* (1856), 21 Beav. 596; *Darby v. Darby* (1856), 3 Drew. 495; *Griffiths v. Bracewell* (1865), 35 Beav. 43.

As to dissolution of partnership, see 28 HALSBURY'S LAWS (3rd Edn.) 562 et seq.; and for cases see 36 DIGEST (Repl.) 605 et seq.

Cases referred to:

- C** (1) *Harding v. Glover* (1810), 18 Ves. 281; 34 E.R. 323, L.C.; 36 Digest (Repl.) 594, 1523.
 (2) *Gillespie v. Hamilton* (1818), 3 Madd. 251; 56 E.R. 501; 36 Digest (Repl.) 608, 1695.
 (3) *Vulliamy v. Noble* (1817), post; 3 Mer. 593; 36 E.R. 228, L.C.; 36 Digest (Repl.) 492, 603.

D Cross-Actions for declarations.

By articles of agreement dated July 31, 1794, between Antony Bacon and Richard Crawshay, Bacon agreed to assign to Crawshay all his interest in certain lands and mines of coal, and iron ore, situated at Cyfarthfa in the county of Glamorgan (of which he was then in possession under three leases for terms of 99 years each, commencing respectively in the years 1763, 1765, and 1768), subject, after Sept. 29, 1815, to an annual rent of £5,000 and a payment of 15s. a ton on all pig iron, annually made on the premises, beyond 6,400 tons. Richard Crawshay accordingly took possession of the premises and carried on ironworks there, and in 1801, intending an extension of the works and the erection of new furnaces, it was agreed between him and Bacon that the payment of 15s. a ton beyond 6,400 tons should cease at 10,700 tons. Disputes having arisen on the subject of that agreement, in 1808, Richard Crawshay filed a bill to compel specific performance. The decree pronounced in March, 1810, directed Bacon to execute to Richard Crawshay an underlease of the premises, for all the times which he, or the trustees under his marriage settlement, had therein, except the last day, subject to the yearly payments stipulated.

G Richard Crawshay being seised and possessed of considerable real and personal estate, including the ironworks at Cyfarthfa and the buildings and machinery thereon, and a leasehold wharf at Cardiff used for shipping iron, by his will dated Sept. 26, 1809, after giving among other legacies, £100,000 to his son William Crawshay, gave to Joseph Bailey £25,000

H "to be transferred from my account on the ledger to his, intended as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works so long as the lease endures, with the principal and profits therefrom to be his own for ever."

He then gave to Benjamin Hall and his wife, and to their heirs for ever, all the residue of his estate, real and personal, and appointed Mr. Hall sole executor. By a codicil dated May 4, 1810, the testator gave to his son William Crawshay

I "three-eighth shares of my concerns at this ironworks, and of the premises at Cardiff; so the partnership will stand at my demise, William Crawshay three-eighths, Benjamin Hall three-eighths, Joseph Bailey two-eighths."

The testator died on June 27, 1810. Mr. Hall proved his will, and William Crawshay, Hall, and Bailey took possession of the ironworks, and carried them on as co-partners in the shares bequeathed to them under the firm of Crawshay, Hall, and Bailey, but without any articles of partnership. In October, 1812, William Crawshay purchased the share of Bailey for £30,000, and from that time the

works were conducted by William Crawshay and Hall, till the death of the latter under the name of Crawshay and Hall. No written articles of partnership were ever executed or prepared between them, but they verbally agreed that the future capital of the concern should be £160,000, which consisted of an imaginary or estimated value of the whole of the partnership property (£100,000 standing to the credit of William Crawshay, in respect of his five-eighth parts, and £60,000 to the credit of Mr. Hall, in respect to his three-eighth parts), and that the books should be balanced on Mar. 31 in each year, and the annual profits drawn out by William Crawshay and Hall, in proportion to their shares. A B

No underlease having been executed in the life of Crawshay, by indenture of May 21, 1814, Bacon, and his trustees, in obedience to the decree of 1810, assigned to Hall, his executors, etc., all the premises, for the residue of the respective terms except the last day of each, subject to the annual rent of £5,000 and the payment of 15s. a ton on all pig iron made yearly on the premises above 6,400 tons and not exceeding 10,700 tons, and by a deed dated June 1, 1814, and endorsed on the assignment Hall declared that he would stand possessed of the premises, as to three-eighth parts in trust for himself, and as to five-eighth parts in trust for William Crawshay; and Hall and William Crawshay entered into covenants for payment of their respective proportions of rent and for mutual indemnity. By an indenture dated May 23, 1814, Bacon, in consideration of £32,500 paid three-eighths by Hall and five-eighths by William Crawshay, assigned to Joseph Kaye, his executors, etc., in trust for Hall and Crawshay, in the proportion of three-eighths to the former and five-eighths to the latter, the rent of 15s. per ton on iron, then due or to become due. By another indenture of the same date, Bacon, in consideration of £62,500 assigned to Kaye, in trust for William Crawshay, his reversionary interest in the premises, and the annual rent of £5,000. On June 1, 1814, Bailey, in execution of the agreement of October, 1812, assigned to William Crawshay his share in the partnership property. C D E

On July 31, 1817, Mr. Hall died, leaving four sons (the eldest of the age of fifteen years) and a daughter. By his will, dated July 8, he devised to George Maule, John Llewellyn, and Joseph Kaye, all his freehold, copyhold, and leasehold estates (except trust and mortgage estates, and the estates in which he was interested as a partner with William Crawshay at Cyfarthfa), in trust, subject to the payment of debts and legacies in aid of his personal estate, for the benefit of his children. He then declared that, if he should have one or more son or sons living at his decease, or born in due time after, but no such son should then have attained the age of 21 years, it should be lawful for his trustees, and the survivors and survivor of them, and the executors, etc., of such survivor, to carry on the iron-works, and other mercantile or trading concerns in which he should be concerned at his decease, if they should judge it for the benefit of the persons interested in his property under his will, and that, if they should carry them on, then, during such time as his having such a son should be in suspense, it should be lawful for them to cause or permit any part of the stock in trade or effects which should be employed in or belong to the said works or concerns at his decease, to be employed in carrying on the same, and he exempted the stock in trade and effects so to be employed from the payment of his debts, to the extent and in the manner therein-after mentioned. The testator also declared that if his son, who first or alone should attain the age of twenty-one years, should be desirous to have the ironworks and concerns or any of them continued, and should signify such desire to his trustees by any writing under his hand, the amount of the stock and effects then employed therein should be valued, and his said son should pay (or secure in manner therein mentioned) to the trustees the money at which such stock and effects should be estimated. The testator appointed Maule, Llewellyn, and Kaye, executors of his will, and guardians and managers of the estate of his children during their minorities, and he also appointed his executors and his wife guardians of the persons of his children. He authorised his trustees to employ any persons F G H I

A in the management of the ironworks and concerns at such salary, and to repose in them such trust or authority in conducting the trade and in the management and disposal of the estate employed, or to be employed, and in the receipt of any debts to be contracted therein, as his trustees should in their discretion think fit. On Aug. 12, 1817, William Crawshay sent a written notice to the executors of Hall that he considered the partnership absolutely dissolved by Hall's death

B and would not consent to carry on the works in conjunction with his representatives.

The bill in the first cause, filed by William Crawshay against the executors of Mr. Hall, prayed a declaration that the partnership between him (Crawshay) and Hall in the ironworks and all the trade and business thereof became absolutely dissolved, or determined, by the death of Mr. Hall, or from that period; an account of the partnership dealings, from the foot of the last settlement thereof, previous

C to his death, and payment of the balance (after satisfaction of the partnership debts) between him (Crawshay) and the executors of Mr. Hall according to their respective interests; a sale of all the partnership effects, and a division of the proceeds.

The defendants, the executors of Hall, admitted that no written articles were ever entered into between William Crawshay and Hall, any such articles, as they believed, being considered unnecessary inasmuch as the proportions to which the parties were entitled in the leasehold premises and the leases sufficiently ascertained their rights and interests as long as the leases endured. They denied that by the death of Hall his interest in the premises and ironworks determined or was in any respect affected, submitting that they were entitled to the premises and ironworks as tenants in common with William Crawshay for the residue

E of the terms of years for which they were holden, and to carry on ironworks for the benefit of the family of Hall in the same manner as he carried on the same with William Crawshay, and according to the directions of his will until one of his sons should attain the age of twenty-one years. They stated that the ironworks were absolutely necessary to the beneficial enjoyment of the leasehold premises, and they

F insisted that it appeared from his will and codicil to be the intention of Richard Crawshay, that his legatees should, for themselves and their representatives and families respectively have an interest in the leasehold premises and ironworks commensurate with the terms for which they were holden; that the joint interest which William Crawshay and Hall had therein was not an interest in an ordinary trading partnership, but an interest given by Richard Crawshay to them for the benefit of themselves and their respective families commensurate with the terms

G of years for which the leasehold premises were holden; and that, therefore, no sale of the property ought to be directed by the court in opposition to the bequest of Richard Crawshay and to the will of Hall whose family would in that event be deprived of the benefits intended and contemplated by him to be derived from the leasehold premises and ironworks.

H The bill in the second cause, filed by the executors and the children of Mr. Hall against William Crawshay, prayed a declaration that the executors were entitled to the leasehold premises and ironworks for three-eighth parts thereof as tenants in common with William Crawshay (who was entitled to the other five-eighth parts), until one of the sons of Hall should attain the age of twenty-one years, and to carry on the ironworks with William Crawshay for the benefit of the family

I of Hall in the same manner as Hall carried on the same and according to the directions of his will until one of his sons should attain the age of twenty-one years, and that then such son, if he chose, would be entitled to the said leasehold premises and ironworks for three-eighth parts thereof as tenant in common with William Crawshay for the remainder of the said term of years and to carry on the ironworks with William Crawshay accordingly. The bill also prayed the consequential accounts and directions.

On June 9, 1818, a motion was made on behalf of William Crawshay, that it might be referred to the Master to consider and approve a proper plan for the sale

and disposal of the whole of the partnership ironworks, property, estate, and effects, including the goodwill of the joint trade, and that the Master might proceed to a sale thereof immediately. A

Sir Samuel Romilly, Bell, Horne and Rigby supported the motion.

Sir Arthur Pigott, Hart and Winthrop opposed the motion.

LORD ELDON, L.C.—The object of this motion is a sale of the partnership property, and, in whatever terms expressed, the court, if it directs a sale, will so direct it that the property may be sold in the manner most beneficial for all parties interested. Where a suit is instituted for the dissolution of a partnership, and where it is clear on the bill and answer that all or some of the parties have a right to a dissolution, it is not contrary to the course of practice to direct a sale on motion. The two modes of proceeding for obtaining an immediate order for a sale, either to set down the cause for hearing on bill and answer or to apply by motion, are the same in effect, though different in form. The reason of that practice is that, if one partner has a right to consider the partnership as at an end, it may continue for the purpose of winding-up the affairs but, being by death, or notice, or any other mode of determination, actually ended, no person in possession of the property can make any use of it inconsistent with that purpose. If any person, therefore, conducts it otherwise, the court will appoint a manager to wind-up the concern: *Harding v. Glover* (1), and will direct inquiries in what manner it can be wound-up most beneficially to those interested. The object of this motion, therefore, might be obtained notwithstanding the objection of form, and the difficulty with regard to parties might also be remedied, by allowing the case to stand over for the bill to be amended, and the question is to be considered on the part of Mr. Crawshay as if the infant children of Mr. Hall had applied for a declaration that the partnership is not dissolved. B
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The general rules of partnership are well settled. Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party. By that notice the partnership is dissolved to the extent that the court will compel the parties to act as partners in a partnership existing only for the purpose of winding-up the affairs of the partnership. So death terminates a partnership: *Gillespie v. Hamilton* (2), and notice is no more than notice of the fact that death has terminated it: see *Vulliamy v. Noble* (3). Without doubt, in the absence of express, there may be an implied, contract, as to the duration of a partnership, but I must contradict all authority if I say that wherever there is a partnership the purchase of a leasehold interest of longer or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument the court holding, that a lease for seven years is proof of partnership for seven years and a lease of fourteen of a partnership for fourteen years, must hold that, if the partners purchase a fee simple, there shall be a partnership for ever. It has been repeatedly decided that interests in lands purchased for the purpose of carrying on trade are no more than stock in trade. [By s. 22 of the Partnership Act, 1890. land which has become partnership property is, unless a contrary intention appears, to be treated as between the partners and their representatives as personal estate.] F
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The doctrine, that death or notice ends a partnership, has been called unreasonable. It is not necessary to examine that opinion, but much remains to be considered before it can be approved. If men will enter into a partnership, as into a marriage, for better and worse, they must abide by it, but if they enter into it without saying how long it shall endure, they are understood to take that course in the expectation that circumstances may arise in which a dissolution will be the only means of saving them from ruin, and considering what persons death might introduce into the partnership, unless it works a dissolution, there is strong reason for saying that such should be its effect. Is the surviving partner to receive into the partnership at all hazards, the executor or administrator of the deceased, his I

A next of kin, or possibly a creditor taking administration, or whoever claims by representation or assignment from his representative?

If Mr. Crawshay, the testator and owner of this property, had thought proper, by his will, to declare that his legatees should continue the partnership as long as the longest of the leases should endure, no person, I agree, claiming under that will, could enjoy the benefits conferred by it, without submitting to the inconveniences which it imposed, but I find nothing to that effect in his will. It might have been plausibly, though, I think, not effectually, contended, that Bailey and Hall were bound to continue partners as long as they lived, but the words cannot be represented as imperative on any other person. The difficulty on the part of those who insist that the partnership is to continue as long as the leases, is that they cannot insist that it is to continue between the original partners and their representatives, for they have admitted, and must admit, that each partner might assign his interest, and assign it to any number of individuals in any number of shares, so that, in truth, the partnership, within two years after its formation, might not contain either an original partner or a representative of any one of the original partners, but might consist entirely of a multitude of assignees.

D In another view of this question it becomes important accurately to know the nature of the business. It seems difficult to establish that this is an interest in land distinct from a partnership in trade—a mere interest in land, in which a partition could take place, for when persons, having purchased such an interest, manufacture and bring to market the produce of the land as one common fund to be sold for their common benefit, it may be contended that they have entered into an agreement which gives to that interest the nature, and subjects it to the doctrines, of a partnership in trade. Such is my present view, but both on the merits and on the objections of form, the case deserves further consideration.

June 27, 1818. **LORD ELDON, L.C.**—It may be assumed, though the observation is not material to the purposes of this application, that the desire of Mr. Crawshay, the testator, was to keep the concern together. He gives the sum of £25,000 to Mr. Bailey as capital for him to become a partner with his executor, Mr. Hall; the rest of his interest in the trade, if he had not made a codicil, would have passed by the will to Hall and his wife. The effect of the will and codicil combined is this. By the former, the testator being possessed of the entire concern, bequeathed two-eighths to Bailey, the rest, including the three-eighths given by the codicil to William Crawshay, would have devolved under the residuary clause to Hall and his wife. The codicil, continuing the gift of two-eighths to Bailey, disposes of three-eighths to William Crawshay and of the remaining three-eighths to Hall, in exclusion, as I understand, of his wife. Such being the state of the concern at the death of the testator, it appears that Bailey sold his share to William Crawshay, and it has not been disputed in the course of the discussion that every one of the legatees was at liberty to sell his interest. The consequence is that the individuals forming the partnership may be changed as often as the partners think proper. The question on these pleadings is whether, supposing this the hearing of the cause, the court could order the property to be sold, and whether the nature of the concern and of the interest of the several parties in it is not such that, each being at liberty to sell his own share, they yet cannot, more particularly by interlocutory application, call on the court for a sale of the whole. Mr. Crawshay, having bought the interest of Mr. Bailey, carried on the business jointly with Mr. Hall, till the death of the latter. His will seems to me to devolve on his executors the discretion of continuing or discontinuing this concern as they should think most for the benefit of his family; and he considers himself at liberty (for the will states as much) to introduce three executors as partners with Mr. Crawshay, and various branches of his family as cestuis que trust of those executors, as they must be, if the partnership is continued. It is impossible to contend that Mr. Hall may thus impose on Mr. Crawshay the necessity of continuing in partnership with his

three executors and their cestuis que trust without admitting that on the same principle he might have imposed the obligation of receiving as partner any person who might now sustain, or hereafter acquire, the character of executor or administrator to any of the trustees or of their cestuis que trust, and that Mr. Crawshay might have exercised a similar power. If this case is to be considered subject to the principles which govern partnerships in general, I cannot say that such was the situation of either party.

On the death of Mr. Hall, there being no articles of partnership or agreement for its continuance, without any notice, and for every purpose except that of winding-up the concern, the partnership would cease unless the surviving partner and the representatives of the deceased entered into some agreement for its continuance, and in the absence of articles, or stipulation to the contrary, Crawshay in the life of Hall, or Hall in the life of Crawshay, might, on the common principles of the contract, by notice have terminated the partnership. It is contended that the late Mr. Crawshay, having formed this business, must have had an intention to keep it together as one concern, though he distributed different interests in it among different members of his family. Had he so said, without doubt, those who took his bounty must have taken it on the terms which he imposed, but there is no such expression in his will or codicil, nor is the effect of those instruments more than to give an interest in aliquot shares and proportions in this concern. He has said, indeed, that Bailey should have an interest to the amount of £25,000, and should be partner with his executor, but neither the terms nor the intent of the will impose on Bailey or on his executor an obligation to carry on the partnership, except as between themselves, and if Bailey thought proper to sell to Crawshay his interest, a question might have arisen, as long as the executor was living, whether Crawshay, purchasing the interest of Bailey, did not purchase subject to the obligation which, it is said, this will imposes on Bailey, but it seems to me impossible to contend that when the executor was dead either Crawshay or Bailey were bound to carry on the trade with the executors of that executor, a proposition which cannot be maintained without asserting that they were bound to carry on the trade with the successive executors of that executor to the expiration of the leases.

It has also been insisted that the purchase of leases must be considered as evidence of a contract for the continuance of the concern. Unquestionably partners may so purchase leasehold interests as to imply an agreement to continue the partnership as long as the leases endure, but it is equally certain that there is no general rule that partners purchasing a leasehold interest must be understood to have entered into a contract of partnership commensurate with the duration of the leases. For ordinary purposes a lease is no more than stock in trade, and, as part of the stock may be sold; nor would it be material that the estate purchased by a partnership was freehold, if intended only as an article of stock; though, a question might in that case arise on the death of a partner, whether it would pass as real estate, or as stock, personal estate in enjoyment, though freehold in nature and quality [but see now Partnership Act, 1890, s. 22]. It is impossible, therefore, in my opinion, to hold that, there being many leases, some long, some of short duration, and others intermediate, the partnership is to subsist during the term of the leases or of the longest lease. By the will of Mr. Hall, the question whether his executors and trustees should continue in partnership is left to their discretion—clear evidence of his opinion, that his interest might be separated from Crawshay's. If so, Crawshay's might be separated from his, and upon that construction of the will of the late Mr. Crawshay the argument is that he meant the whole concern to be kept together, but cared not who were to be the partners—an intention not to be imputed to him unless unequivocally expressed in the words of his will.

The question then resolves itself into this: What is the nature of this partnership property? The general doctrine with respect to a trading partnership is that where there is no agreement for its continuance any one of the partners may terminate it, and, admitting the serious inconveniences which sometimes ensue, it becomes

A us to recollect the formidable evils which would attend the opposite doctrine, nor is it clear that a better rule could be suggested, but, whatever is its policy, the principle of law being established, it is incumbent on those who engage in partnership to protect themselves by contract against its inconveniences. If they omit that precaution, courts of justice have no right to redeem them from the penalties of their imprudence. With respect to mere joint-interests in land, I apprehend the rule to be different. The parties then becoming tenants in common, each cannot call on his companions to concur in a sale, but must sell his own interest. It is said that this is only the case of tenancy in common of a mine; if so, I think that the doctrine with respect to land would apply and not the doctrine with respect to trading partnerships, but a very difficult question may arise whether, if the parties, being originally tenants in common of a mine, agree to become jointly interested in the manufacture of its produce for the purpose of sale, they continue mere tenants in common of the mine; still more, if not only carrying the produce of their own mine to market, they become purchasers of other property of a like nature, to be manufactured with their own. On such a case in bankruptcy it might be a question whether they were purchasers for the mere purpose of better bringing to market the produce of their own mine, or for the purpose also of bringing a distinct subject to market as traders. On the evidence before me the case is left somewhat doubtful, though, I think, that the language of Mr. Hall's will, and of all the instruments, describes this as a trading concern, but under the circumstances it will not be wrong to have the nature of the business explained by affidavit. If this is a trading partnership the common principles must be applied. [As to land as partnership property and the interest of partners in assets see 28 HALSBURY'S LAWS (3rd Edn.) 531.]

Then comes the question: Can the court in such a case direct a sale by interlocutory order on motion? I have considered that question much, and I think that the court not only can, but in many instances does, order a sale on motion in the instance of a trading partnership actually dissolved. Consider the inconveniences of a contrary proceeding. By the hypothesis, the court has before it the case of a trading partnership clearly dissolved, and nothing remains, therefore, but to wind up the concern. We must then weigh the consequences of permitting the business of a partnership, actually dissolved, to proceed until a decree for a sale; a decree which, in those circumstances, must necessarily be pronounced. A universal rule that the trade, whether beneficial or not, should be carried on till the decree would render the jurisdiction of the court in many cases extremely mischievous, and on general principles, therefore, it is the practice, in the instance of a trading partnership clearly dissolved, at once to put an end to the trade, where that measure is required by the evident interest of the parties.

July 23, 1818. LORD ELDON, L.C.—This application, whether granted or refused, is one of the most important with which I have lately had to deal. The motion is made in two causes, to neither of which is the widow of Mr. Hall a party. The first bill prays a declaration that the partnership is dissolved; the object of the second is to compel its continuance, omitting to advert to a fact which, in any view of the case, seems clear, that Crawshay could not be constrained to remain a partner, but had the same right to dispose of his interest which was exercised by Mr. Hall over his own. I am perfectly satisfied that the relief sought by that bill cannot be given, that is, that the executors of Mr. Hall cannot bind Crawshay to them. Whether he can compel dissolution is quite another question.

Mr. Hall having by his will disposed of his own share and attempted to introduce new partners, there is obviously no equity to constrain these parties to continue in partnership unless it arises from express or implied contract or from directions in the will under which they all claim. In that will I find no such direction. It is calculated only to render Bailey a partner in the trade, but imposes no conditions on Crawshay. On that point, however, it may be sufficient to say that had any

such conditions been imposed, yet when the interests of Bailey and Crawshay became united in one person and the executor was dead, having made such a will as appears in these pleadings, it would be impossible to maintain that an obligation existed among the parties to continue in partnership during the remainder of the leases. A

I am also of opinion that, if this is to be considered as a partnership in trade, the utmost that can be made from the purchase of leases of longer or shorter duration is to propose that as a circumstance of evidence, from which may be inferred an implied contract that the partnership should last as long as those leases, but I find nothing here to authorise the conclusion that such was the intention. The purchase of a lease by a partnership is no more than the purchase of an article of stock, which, when the partnership is dissolved, must be sold. There is sufficient in the wills of Crawshay and of Hall, to call on the plaintiffs in the second cause, to show that this was not a trading partnership if they meant to insist on that proposition. At present, I think that this was a trade. B C

HIS LORDSHIP referred to neither Mrs. Hall nor Mr. Hall's eldest son being before the court, and continued: That brings it again to the question whether this is a partnership in trade or a tenancy in common in land, and, if a partnership in trade, whether the ordinary rule of the court is, on dissolution by the death of a partner, to wait till a decree before disposing of the partnership property if the concern is of such a nature that it cannot be wound-up at once. I consider it clear, that the general rule is not to wait for a decree; but, at least if the parties differ as to the mode of carrying on the trade, the court will, without reference to the objection for want of parties, appoint a manager. Whether they will give notice of a motion for that purpose, which they shall be at liberty to do, or call on the court for its opinion and a reference to the Master to state the best mode of winding-up the concern, is what the parties will determine. Mr. Crawshay says what I think is not unreasonable, that he will not carry on the trade five-eighths for himself and three-eighths for the benefit of others. If Mr. Crawshay will not carry on the trade, it is for the benefit of all parties interested, that a manager should be appointed, and it is clear that the court possesses the power of making the order on motion without waiting for a decree. D E F

July 31, 1818. **LORD ELDON, L.C.**—Is it clear that the partnership was dissolved by the death of Hall, or am I to say that his executors, or any of them, are partners at this day in this concern? After repeated consideration I entertain no doubt either that this is to be regarded as a trading concern or that the partnership was ended by Hall's death. The consequence is Crawshay would be justified in dealing with the property, since Hall's death as a person who is to wind-up the concern. That introduces the question, whether I am to place a manager on the estate, or to leave Crawshay to deal with the property as surviving partner. In that character he is at liberty to deal with it for the purpose of winding-up the concern. It is true that other parties are at liberty to deal with it in the same way, and in the event of differences between them the court can only appoint a manager to act under its direction. If application was made for a manager, it would be the duty of the court, with regard to the infants, to consider whether that appointment is for their benefit, or whether there should be a reference to inquire the expediency of appointing a manager to wind-up the business or ordering a sale. The state of the market varies so much that a sale, which might be beneficial at one moment and prejudicial at another, cannot be ordered without inquiry. I think that I shall not do wrong in directing a reference to the Master to inquire whether it is for the advantage of all parties that this property should be sold, and, if so, on what terms, without prejudice to any question. G H I

By his report, dated Dec. 11, 1818, the Master, after stating that it was admitted that it would be highly injurious to all parties interested to stop the works or to carry them on merely for the purpose of winding-up the concern, or to put them

- A** up for sale otherwise than as going works, and that William Crawshay had offered to purchase the whole of Mr. Hall's share for £90,000, certified that it would be for the benefit of the infants and of all other parties concerned in the works that the whole of the shares and interests in the leasehold and other estates, vested in the executors of Mr. Hall should be sold to Mr. Crawshay at that price.
- B** By an order of the vice-chancellor, on the petition of Mr. Crawshay, the report was confirmed, and it was "ordered that the defendants, G. Maude, J. Llewellyn, and J. Kaye, as executors of the said B. Hall, the testator in the pleadings named, be at liberty to sell and dispose of to the petitioner by private contract at the sum of £90,000, all the estate, shares, right, and interest of them the said defendants as such executors as aforesaid of and in the said ironworks and the said late partnership of Crawshay and Hall, and in the leases, farms, lands, and buildings, wharf, machinery, etc."
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D

EARL OF CARDIGAN v. ARMITAGE

[COURT OF KING'S BENCH (Bayley, Holroyd and Best, JJ.), Trinity Term, 1823]

[Reported 2 B. & C. 197; 3 Dow. & Ry. K.B. 414; 107 E.R. 356]

- E** *Deed—Grant—Exception—Construction against grantor—Implication of terms necessary to implement exception.*

Deed—Grant—Enlargement—Words tending to enlarge—Construction.

Minerals—Exception from sale of land—Liberty to get and remove coal—Effect of liberty on general exception.

- F** An exception to a grant in a deed is always taken in favour of the grantee and against the grantor.

When anything is excepted all things which depend on it and are necessary for the obtaining of it are also excepted.

Words tending to enlarge a grant shall not, in the absence of very plain intention, be taken to restrain.

- G** X. enfeoffed to Y. certain closes of which he was seised in fee, excepting and reserving to himself, his heirs and assigns, the coal thereunder "together with" liberty "during the time that X. and his heirs should continue owners and proprietors of the demesne lands of the F. manor" to get and remove the coal. After the death of X. his heir conveyed the manor to the defendant.

- H** **Held:** the exception was by tenant in fee to himself and his heirs, and it, therefore, retained the coal in him and his heirs in fee simple with power incident or implied for him, his heirs and assigns, to take the coal away when they would; that power could not be restrained by a special power given in the affirmative; and so the words of limitation in the power as to time did not operate to narrow or restrain the general exception, and the liberty to get and remove the coal passed to the defendant.

- I** *Deed—Grant—Exception—Part of thing granted—Reservation—Thing newly created and reserved.*

An exception to a grant in a deed is part of the thing granted and of a thing in esse. A reservation is of a thing not in esse, but newly created and reserved out of the thing granted.

Notes. Considered: *Bullen v. Denning* (1826), 5 B. & C. 842. Applied: *Rogers v. Taylor* (1857), 1 H. & N. 706. Distinguished: *Clegg v. Clegg* (1861), 3 Giff. 322; *Gould v. Great Western Deep Coal Co.* (1865), 2 De G. J. & Sm. 600. Considered: *Hamilton v. Graham* (1871), L.R. 2 Sc. & Div. 166; *Savill v. Bethell*,

[1902] 2 Ch. 523; *Ellis v. Noakes*, [1930] All E.R. Rep. 382; *Re Wilson Syndicate Conveyance*, *Wilson v. Shorrock*, [1938] 3 All E.R. 599. Referred to: *Scrutton v. Brown*, [1824-34] All E.R. Rep. 59; *Blackett v. Royal Exchange Assurance*, [1824-34] All E.R. Rep. 468; *Doe d. Douglas v. Lock*, [1835-42] All E.R. Rep. 13; *Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 856; *Proud v. Bates* (1865), 6 New Rep. 92; *Thomson v. St. Catharine's College, Cambridge and Mappin's Masbro' Old Brewery*, etc. (1918), 118 L.T. 758. A
B

As to exceptions and reservations in a deed, see 11 HALSBURY'S LAWS (3rd Edn.) 433-435, and as to exceptions of minerals from a grant of land and implication of powers in working mines, see *ibid.*, vol. 26, pp. 414, 415, 425, 432, 433. For cases see 17 DIGEST (Repl.) 298 et seq., 388-391; 33 DIGEST (Repl.) 741-745, 856-859.

Cases referred to: C

(1) *Hodgson v. Field* (1806), 7 East, 613; 3 Smith, K.B. 538; 103 E.R. 238; 17 Digest (Repl.) 307, 1136.

(2) *Gerrard v. Cooke* (1806), 2 Bos. & P.N.R. 109; 127 E.R. 565; 19 Digest (Repl.) 126, 794.

(3) *Winter v. Loveden* (1697), 5 Mod. Rep. 378; Freem. K.B. 507; 1 Com. 37; Carth. 427; Holt, K.B. 414; 1 Ld. Raym. 267; Comb. 371; 2 Salk. 537; 12 Mod. 147; 87 E.R. 717; sub nom. *Loveday v. Winter*, 5 Mod. Rep. 244; 40 Digest (Repl.) 776, 2603. D

(4) *Stukeley v. Butler* (1614), Hob. 168; 80 E.R. 316; sub nom. *Stewkley v. Butler*, Moore, K.B. 880; 17 Digest (Repl.) 306, 1130.

Also referred to in argument: E

Idle v. Cooke (1705), 2 Ld. Raym. 1144; Holt, K.B. 164; 11 Mod. Rep. 57; 1 P. Wms. 70; 2 Salk. 620; 92 E.R. 257; 38 Digest (Repl.) 845, 594.

Corbet's Case, *Corbet v. Corbet* (1600), 1 Co. Rep. 83 b; Moore, K.B. 633; 2 And. 134; 76 E.R. 187; 38 Digest (Repl.) 835, 478.

Horneby v. Clifton (1567), 3 Dyer, 264 b; 1 And. 52; 73 E.R. 586; sub nom. *Haver v. Clifton*, Ben. & D. 181; 17 Digest (Repl.) 389, 1925. F

Cudlip v. Rundle (1691), Carth. 202; Comb. 177; Holt, K.B. 410; 4 Mod. Rep. 9; 12 Mod. Rep. 14; 3 Salk. 156; 1 Show. 310; 90 E.R. 721; 31 Digest (Repl.) 30, 1873.

Action for trespass by breaking and entering three closes of the plaintiff, and digging pits and raising coal. G

The defendant pleaded that the said closes were parcel of the manor of Farnley, that Sir Thomas Danby was seised of the manor and the demesne lands thereof, with the appurtenances and all coal mines lying under the manor, in fee, and that he, on Jan. 16, 1649, enfeofed the then Earl of Sussex of the said three closes in the declaration mentioned, except and always reserved unto Sir Thomas, his heirs, and assigns out of the feoffment unto the said Sir Thomas and his heirs all the coals in all or any of the lands, woods, grounds, and premises, transferred together with free liberty for them, Sir Thomas and his heirs, and his and their assigns and servants, from time to time, and at all times thereafter during the time that Sir Thomas and his heirs should continue owners and proprietors of the demesne lands of Farnley, to sink and dig pits or otherwise to get coals in all and every the said lands, woods, grounds, and premises, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the coals at his and their pleasure, Sir Thomas Danby and his heirs paying to the earl, his heirs and assigns, such sufficient satisfaction for such damage as he, the earl, and his heirs should from time to time sustain by reason of the digging, sinking of pits, getting, and carrying away the coals as two gentlemen, neighbours thereunto, being indifferently chosen by the earl and Sir Thomas, their heirs, and assigns, should from time to time award to be paid. Subject to this the premises were to be held to the earl, his heirs, and assigns, for ever. By virtue of this H
I

A feoffment the earl became seised of the closes in which Sir Thomas was entitled to the coal.

Sir Charles Danby died on Aug. 8, 1660, whereupon the closes in question vested in one W. Danby, who in 1800, by lease and release, in consideration of a certain sum of money, conveyed the manor and lordship of Farnley and its demesne lands, and all the coal mines in or under, among other lands, the said three closes to

B James Armitage in fee, who thereby became seised in fee of the manor and owner and proprietor of the demesne lands, and so entitled to the coals excepted and the liberty hereinbefore mentioned. James Armitage died intestate, and the defendant, as his eldest son and heir-at-law, became seised in fee of the manor and owner and proprietor of the demesne lands, and entitled to the coals with liberty for him and his servants to sink and dig pits, or otherwise to get coals in the closes and to carry away the same, paying the specified compensation.

C The defendant justified the breaking and entering the closes to sink and dig pits, and averred that he was willing to make the satisfaction agreed on for the damage sustained by reason of the supposed trespasses. The second plea only justified the breaking and entering the closes because the plaintiff had wrongfully dug large quantities of coal lying under the closes and had deposited the same on the said closes, wherefore defendant entered to take them away. To these pleas D there was a general demurrer and joinder.

Tindal for the plaintiff.

Littledale for the defendant.

Cur. adv. vult.

E **BAYLEY, J.**, delivered the following judgment of the court.—The first plea raises two questions—(i) whether Mr. Armitage is entitled to the coals under the closes in question, he not claiming by descent under Sir Thomas Danby, but by purchase; and (ii) whether, for the purposes of getting them, he is entitled to use the means stated in the first plea. The second plea raises the former of these two questions F only. Both questions depend upon the effect of the exception set out in the plea. The plaintiff contends that that exception gave nothing beyond a limited right to continue so long only as Sir Thomas Danby and his heirs should continue owners of the Farnley demesnes, and the defendant that it either gave an absolute and perpetual right in fee-simple to the coals, or at least that it gave the special liberty G so long as the owner of the coals should also be owner of the Farnley demesnes. Counsel for the plaintiff, if I understood him right, disclaimed all formal exceptions to the pleas, and stated the object to be to ascertain whether Mr. Armitage had a right to the coals, and, if he had, whether he had also a right to get them. To these questions, without considering whether there are any formal objections to the pleas, my observations will be directed.

H The exception in question contains the words “except and always reserved,” and Co. LITR. 47 a. points out the distinction between an exception and a reservation. An exception, he says, is ever of part of the thing granted (and so says SHEPPARD’S TOUCHSTONE, 78) and of a thing in esse. The latter, a reservation, is always of a thing not in esse, but newly created and reserved out of the thing granted :

I “potest enim quis rem dare, et partem rei, vel partem de pertinentiis retinere et illa pars quam retinet semper cum eo est et semper fuit.”

Another rule as to exceptions is to be found in SHEPPARD’S TOUCHSTONE, 100 :

“The exception is always taken most in favour of the feoffee and lessee, &c., and against the feoffer, lessor, &c. And yet it is a rule, that what will pass by words in a grant, will be excepted by the same or the like words in an exception. And it is another true rule, that when anything is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also: as if a lessor except the trees, he may bring his chapman

to view them, if he desires to sell them, and he or the vendee may cut them and take them away."

The same rule applies to grants: *Plowd.* 15, 16; *Vin. Abr.* Tres. (M e); *Hodgson v. Field* (1); *Gerrard v. Cooke* (2). The language of this feoffment is "except and always reserved" out of the said feoffment unto Sir Thomas Danby and his heirs all the coals. The coals were part of the thing granted, part of the land, and in esse at the time. The consequence, therefore, according to Co. Litt. is that, if this, which in words was an exception, operated in point of law as an exception, the coals *semper cum* Sir Thomas Danby fuerunt. They were never out of him, and without the words of inheritance, "and his heirs," would have remained as before in him and his heirs. According to the rule I have last mentioned from *SHEPPARD'S TOUCHSTONE*, a right, as incident, to get the coals, and to do all things necessary for the obtaining of them would have been excepted also. It was, indeed, conceded in the argument that, if the exception had stopped after excepting and reserving the coals to Sir Thomas and his heirs and had contained no words to give him an express liberty for sinking pits and doing other works to get them the exception would have enured without any restriction to Sir Thomas in fee, and that he, his heirs, and assigns, would have had a right for ever to do what should be necessary to get the coals, but it is upon the ground, that the express liberty is limited and restrictive of the former exception that the plaintiff makes his claim.

The question, therefore, is whether the express liberty restrains the former exception, and, if it does, to what extent it restrains it. One objection which occurs is this. The pleas purport to set out the feoffment according to its legal operation. That operation is stated to be, that Sir Thomas Danby excepted the coals to him and his heirs. Is it open to the plaintiff upon his demurrer to contend that this was not the operation of the exception? Is there any instance in which a party has been allowed upon demurrer, without setting out the instrument at large, or traversing the operation ascribed to it, to raise the question whether the deed has the operation ascribed to it upon the pleadings? I know none, and I mention this because, if it be intended to carry this case to a court of error, it is desirable that the plaintiff should consider whether the case is at present as advantageously set out as it might.

But independently of this point and assuming that the exception, as stated upon the pleas, is in the very words stated upon the feoffment, how stands the case? The express liberty is introduced by the words "together with," as if the intention were to increase what had preceded, not to diminish it, and I take it to be a general rule that words tending to enlarge shall not (unless the intention is very plain) be taken to restrain: *Winter v. Loveden* (3) (1 *Ld. Raym.* at p. 269). The express liberty here is for Sir Thomas and his heirs, and his and their assigns and servants, during the time that he and his heirs should continue owners of the demesne lands of Farnley, to sink pits, to get the coals, and sell and carry away the coals or otherwise to dispose of them at their pleasure, Sir Thomas and his heirs making such satisfaction to the earl, his heirs, and assigns, as two gentlemen neighbours, to be indifferently chosen by them, their heirs, and assigns, should award. It may be taken as clear that an express liberty does not always control what would otherwise exist, especially if the express liberty goes beyond what would be implied. To give it a controlling power, the intention that it should have that effect must be very plain. *Stukeley v. Butler* (4) (Hob. 168) is a strong authority upon this point. In that case the Earl of Sussex, as lord of the manor of Cleave, had demised certain woodlands of that manor for three lives (excepting all timber trees), and then he bargained and sold to one George all the trees growing in and upon his manor of Cleave and covenanted that George and his assigns, during five years, might sell and carry the trees without interruption of the earl or any others, and might make saw-pits, and square and cut the timber upon the ground during the said term. George covenanted to fill up the pits and make all things fair.

- A and amend the fences that should be broken during the said term. The grant to George was general, not fixing any limit within which he was to cut the trees. He did not cut them till after five years from the time of the bargain and sale, and, an action of trespass being then brought, one question upon a special verdict was whether the covenant on Lord Sussex's part, that George might take the trees within the five years should so check and control the grant that he might not take the trees after the five years.

HOBART, C.J., who reports his own opinion, held clearly that it did not, but that, as the trees were absolutely given, George and his assigns might take them when they would. His opinion is founded upon two reasons which are strongly applicable to the present case. He says (Hob. at p. 173):

- C "First it is clear that by the grant of the trees by a tenant in fee-simple they are absolutely passed from the grantor and his heirs and vested in the grantee and go to his executors or administrators, being, in understanding of law, divided as chattels from the freehold, and the grantee hath power incident and implied to fell them when he will without any other licence, which [i.e., the power incident and implied] can never be restrained by a power given by the grantor in the affirmative which the grantee had before."

D He then cites 8 Ass. 10 and 1 DYER, 19 b, and refers to the known rule that statutes that are taken by intent shall not by an affirmative take away a former power.

- E The case in 8 Ass. 10 was strong. Ten marks of rent were granted to husband and wife; if she survived, she was to have 40s. rent, and, if the husband survived, he was to have 40s. rent. The wife survived, and if she should have the ten marks or the 40s. was the question. On adjournment from the assizes into banc it was held she should have the ten marks because the words that she and her husband should have ten marks were not restrained by the subsequent words that she should have 40s., it not being said that she should have the 40s. and no more. In 1 DYER, 19 b, lessor covenanted that lessee should have thorns for hedges growing on the land by assignment of lessor's bailiff, and whether the lessee might take the thorns without such assignment was the question. It seemed to BALDWIN and FITZHERBERT that he might, because the law gave him the right by implication in the lease.

- F HOBART, C.J.'s second reason is that the covenant on the earl's part had its necessary use though it worked nothing in the restraint of the time for felling, for it gives power to dig and make saw-pits and square the timbers there, which the grantee could not have done without such special warrant, and it contained a general warranty that the grantee might take the timber without the interruption of any person or persons whatsoever.

- G Apply both these reasons to the case in question. First, the exception here is by tenant in fee, to himself and his heirs. It, therefore, retains the coals in him and his heirs in fee-simple, with power incident and implied (as they are absolutely excepted) for him, his heirs, and assigns, to take them away when they will, and this power cannot be restrained by a special power given in the affirmative. As to the second, the special power here also has its necessary use, for it goes beyond the incidental power which the law would imply. The incidental power would warrant nothing beyond what was strictly necessary for the convenient working of the coals; it would allow no use of the surface, no deposit upon it to a greater extent or for a longer duration than should be necessary, no attendance upon the land of unnecessary persons. It would be questionable at least whether it would authorise a deposit upon the land for the purposes of sale, and whether it would justify the introduction of purchasers to view the coals. The express power gives great latitude in these respects. It authorises Sir Thomas and his heirs, at their will and pleasure, to dig pits and get the coal, and to sell and carry away or otherwise to dispose of. It removes the question, upon the making of a new pit or sough, whether such pit or sough was necessary: it allows the selling and carrying away,

or otherwise disposing of, and, consequently, warrants a deposit and continuance upon the land for the purposes of sale and authorises the introduction of customers for the purposes of sale. It has, therefore, its necessary use, in the language of HOBART, C.J., though it work nothing in restraint of the incidental right which Sir Thomas Danby and his heirs would otherwise have had.

This case, therefore, is, as it seems to me, a strong authority against the point for which the plaintiff contends—the narrowing and restraining the general exception by the words of the express power, and *Hodgson v. Field* (1) is also a strong authority to the same effect. There liberty was granted to carry a sough to a colliery, and to make two sough pits in given parts to carry up the tail of the sough. Those pits were accordingly made, and after some time, a new pit being necessary to repair the sough, the grantee made it, and trespass was brought against him. It was urged for the plaintiff on demurrer, that the special privilege of making the two pits in the places specified superseded the right to make any other pits, but the court held clearly that it had no such effect, that the right of repairing was incident to the grant, and that, as it was not specially restrained, the grantee was entitled to do whatever was necessary for such repairs, and, the pit in question being necessary, the defendant was warranted in making it.

But whether the express liberty in this case has or has not restrained the incidental right, we are of opinion that, upon the true construction of the deed, even if we are at liberty to assume that the plea stated its very words, the express liberty is still a subsisting liberty, and that, under that liberty, the first justification may well be supported. It cannot be collected from the feoffment that it was the intention of the parties to limit and restrain the liberty to the period that the Farnley demesnes should continue in the heirs of Sir Thomas in a course of descent. To restrain what is *prima facie* unlimited, the words should be plain and the intention clear. The limitation in the express power in this case is during the time that Sir Thomas Danby and his heirs should continue owners and proprietors of the demesne lands of Farnley, and the question immediately occurs: What is meant by the expression “Sir Thomas Danby and his heirs?” If these words are used in the most restrictive sense, the liberty would end the moment the demesnes were diverted from a course of descent, and what the law generally leans against, *viz.*, a restraint upon alienation, would, without any very clear motive, be encouraged. The moment a settlement or a devise was made, the course of descent would be broken, and the liberty would cease. Can any rational ground be suggested for such a provision? If the object were to secure the working out the mines within some reasonable time, why not specify the period? Why leave its continuance to an event which might not happen for many generations, or might occur within the shortest space? Why put so capricious a check upon the ordinary arrangements applicable to estates? If the word “heirs” is used in this sentence in its ordinary extensive sense and in the sense in which it would *prima facie* be taken in the exception to Sir Thomas and his heirs, it would include assigns as well as heirs; the express power would continue as long as the coals and the demesnes belonged to the same person, whether by descent from Sir Thomas or by purchase, and would, therefore, still be a subsisting power, and it is in this sense, we are of opinion, the words were intended to be used.

The stress laid in the argument upon the insertion of the word “assigns” in some parts of this feoffment and the omission of it in others (assuming that the pleas state the very words of the feoffment) appears to us to furnish no solid or safe ground to regulate our decision. It is inserted in the exception as to the tithes, but it is uselessly inserted there. Without that word the exception would have enured, not merely to Sir Thomas and his heirs, but to his and their assigns. It is omitted in the exception as to the coal: it was unnecessary there, and why may not the framer of the deed have credit for knowing that it was useless? Is it a safe rule of construction to say that the introduction of a useless word in one clause and the omission of it in another will justify putting different constructions upon

A the two clauses? Because a useless word is inserted in one clause, is it necessary to insert it in every other which is intended to have the same effect? There are, however, other parts of this feoffment which show how unsafe it would be to act in this case upon the omission or insertion of the word "assigns." The liberty of working is to extend to Sir Thomas, and his heirs, and his and their assigns and servants, and compensation is to be made for the damage to be done, but, though

B the damage may be done by the assignee of Sir Thomas, or of his heirs, there is no provision in terms for satisfaction by such assignee, but the satisfaction is, according to the words of the feoffment, to be by Sir Thomas and his heirs. Again, satisfaction is to be paid to the earl, his heirs, and assigns, but for what damage? For such damage as he and his heirs should sustain. So that, if the earl were to alien in fee and his alienee were to sustain damage, there would be no words, were

C the letter to be adhered to, to give him satisfaction, because the damage would not be sustained by the earl or his heirs. This is sufficient to show that no safe reliance can be placed upon the insertion or omission of the word "assigns," and furnishes ground for supposing that the word "heirs" is used in its larger sense, so as to include assigns.

D Upon the whole, therefore, we are of opinion that the defendant, Mr. Armitage, is entitled to the coals, and, if he is not entitled to the incidental right of getting them, we think that he is still entitled to the liberty expressly reserved by the feoffment because the defendant, to whom the coals belong, is also owner of the demesnes, and though they have not come to him by descent from Sir Thomas, we are of opinion that the liberty is not confined to those who take by descent, but

E enures also to those who take by purchase. The consequence is that upon both the pleas there must be judgment for the defendant.

Judgment defendant.

F

BLUNDELL v. CATTERALL

[COURT OF KING'S BENCH (Abbott, C.J., Best, Holroyd and Bayley, JJ.), November 7, 1821]

G

[Reported 5 B. & Ald. 268; 106 E.R. 1190]

Sea—Bathing—No common law right to bathe—No right to pass over seashore.

In the absence of custom or usage or prescriptive right the public have no common law right to bathe in the sea and to pass over the seashore (i.e., the shore between the ordinary high and low water marks) for that purpose on foot or with horses or vehicles notwithstanding that the shore is vested in a particular

H individual, even where (i) that can be done without creating any nuisance, and (ii) the soil of the shore is in the Crown and so clothed with the *jus publicum*.

Per HOLROYD, J.: Where the soil remains the King's and where no mischief or injury is likely to arise from the enjoyment or exercise of such a public right of bathing it is not to be supposed that an unnecessary or injurious restraint upon the subjects would be enforced by the King.

I

Sea—Navigable river—Public right of passage with ships and boats—Common of fishery—Places for embarking and landing persons and goods.

Per HOLROYD, J.: By the common law all the King's subjects have in general a right of passage over the sea with their ships, boats and other vessels, for the purposes of navigation, commerce, trade, and intercourse, and also in navigable rivers, and they have also, *prima facie*, a common of fishery there, but they may be excluded from the latter right, though not now by charter, at least by immemorial custom or prescription . . . For the purpose of the King's subjects

getting on the sea and the navigable rivers to exercise their unquestionable rights, there are not only the ports of the kingdom, established from time to time by the King's prerogative, but also public places for embarking and landing themselves and their goods. It was not by the common law lawful to come with or land or ship customable goods in creeks or havens or other places out of the ports unless in cases of danger or necessity, nor fish or land other goods not customable where the shore is private property unless upon the person's own soil or with the leave of the owner thereof.

Notes. Followed: *Llandudno Urban Council v. Woods*, [1895-9] All E.R. Rep. 895; *Brinckman v. Matley*, [1904-7] All E.R. Rep. 941. Considered: *Williams-Ellis v. Cobb*, [1934] All E.R. Rep. 465. Referred to: *Benest v. Pipon* (1829), 1 Knapp, 60; *Duke of Beaufort v. Swansea Corpn.* (1849), 3 Exch. 413; *A.-G. v. Chambers*, [1843-60] All E.R. Rep. 941; *A.-G. v. Hanmer* (1858), 27 L.J.Ch. 837; *Whitstable Free Fishers v. Gann* (1863), 13 C.B.N.S. 853; *A.-G. v. Tomline* (1879), 40 L.T. 775; *Ilchester v. Raishleigh* (1889), 61 L.T. 477; *Parker v. Clegg* (1903), 2 L.G.R. 608; *Mercer v. Denne*, [1904-7] All E.R. Rep. 71; *Behrens v. Richards*, [1905] 2 Ch. 614; *Foster v. Warblington U.D.C.*, [1904-7] All E.R. Rep. 366; *Fitzhardinge v. Purcell*, [1908] 2 Ch. 139; *Denaby and Cadeby Main Collieries v. Anson*, [1911] 1 K.B. 171; *Bournemouth-Swanage Motor Road and Ferry Co. v. Harvey & Sons (No. 2)* (1929), 24 J.P. 10.

As to rights relating to the seashore, see 39 HALSBURY'S LAWS (3rd Edn.) 557 et seq.; and for cases see 44 DIGEST 66 et seq.

Cases referred to:

- (1) *Ball v. Herbert* (1789), 3 Term Rep. 253; 100 E.R. 560; 44 Digest 109, 879.
- (2) *Young v. —* (1698), 1 Ld. Raym. 725; 91 E.R. 1384, N.P.; 44 Digest 109, 877.
- (3) *R. v. Cluworth (Inhabitants)* (1704), 6 Mod. Rep. 163; 1 Salk. 359; Holt, K.B. 339; 91 E.R. 313; 26 Digest (Repl.) 382, 913.
- (4) *Carter v. Murcot* (1768), 4 Burr. 2162; 98 E.R. 127; 25 Digest (Repl.) 21, 185.
- (5) *Case of the Royal Fishery of Banne* (1610), Dav. Ir. 55; 25 Digest (Repl.) 18, *70.
- (6) *Bagott v. Orr* (1801), 2 Bos. & P. 472; 126 E.R. 1391; 44 Digest 78, 592.

Also referred to in argument:

Constable's Case (1601), 5 Co. Rep. 106a; Stuart Moore's Law of Foreshore & Seashore, 233; 77 E.R. 218; 44 Digest 74, 547.

Digges v. Hamond (1575), 3 Dyer, 326b.

Stockwell v. Terry (1748), 1 Ves. Sen. 115; 27 E.R. 927; 19 Digest (Repl.) 509, 3492.

Warwick v. Collins (1814), 2 M. & S. 349.

Vooght v. Winch (1819), 2 B. & Ald. 662; 106 E.R. 507; 44 Digest 119, 960.

R. v. Cross (1812), 3 Camp. 224, N.P.; 26 Digest (Repl.) 485, 1707.

Action for trespass by breaking and entering the plaintiff's close (described, first, as a close called the seashore, within the manor of Great Crosby, and secondly, as a close between the high-water mark and the low-water mark of the river Mersey, in Great Crosby, in the county of Lancaster) and walking and with horses and bathing-machines, carts, and other vehicles, passing over, tearing up, and damaging the sand, gravel, and soil of the said close. The defendant pleaded, as to the trespasses committed on the seashore and on the land between the high and low water marks, a public right of way on foot and with vehicles, and, secondly, as to the same trespasses, that all the liege subjects of the King had been used and accustomed to have and enjoy, and still had, the right and liberty of bathing in the sea at all seasonable and convenient times for their health and recreation, and for that purpose of passing and repassing into, through and over the said close with their servants, vehicles, bathing-machines, and horses drawing the same to the sea and back again. The

A plaintiff took issue on these pleas, and also newly assigned that the defendant committed the trespasses on other occasions and for other purposes than those in the pleas mentioned.

At the trial at Lancaster Assizes, before BAYLEY, J., a verdict was found for the defendant on the first set of pleas, for the plaintiff on the new assignment, and on all the other pleas, subject to the opinion of the court on a Special Case. The plaintiff was the lord of the manor of Great Crosby, which is bounded on the west by the river Mersey, an arm of the sea. As lord of the manor he was the owner of the shore and had the exclusive right of fishing thereon with stake nets. The defendant was the servant at an hotel erected in 1815, upon land in Great Crosby, fronting the shore, and bounded by the high-water mark of the river Mersey, the proprietors of which kept bathing-machines for the use of persons resorting thither who were driven by the defendant in bathing-machines, across the shore into the sea for the purpose of bathing. The defendant received a sum of money from the individuals so bathing for the use of the machines and for his service and assistance. No bathing-machines were ever used upon the shore in Great Crosby before the establishment of the hotel, but it had been the custom for the public to cross it on foot for the purpose of bathing. The defendant contended for a common law right for all the King's subjects to bathe on the seashore, and to pass over it for that purpose, on foot, and with horses and vehicles.

Gregson for the plaintiff.

Joy for the defendant.

Cur. adv. vult.

E Nov. 7, 1821. **BEST, J.**, delivered a judgment in which he differed from the other members of the court, expressing the opinion that the defendant was entitled to judgment.

HOLROYD, J.—The question put in this case for our opinion is the general question whether there is a common law right for all the King's subjects to bathe in the sea, and to pass over the seashore for that purpose on foot and with horses and carriages. But, coupled with the facts stated in the Case, the question really is whether there is a common law right in all the King's subjects to do so in the locus in quo, though the soil of the seashore and an exclusive right of fishing there in a particular manner (namely, with stake nets) are private property belonging to a subject, and though the same have been a special peculiar property from time immemorial.

G The plaintiff being stated to be the owner of the soil of the shore and to have the exclusive right of fishing thereon with stake nets as lord of the manor, the soil, as parcel of or belonging to the manor, must, according to 2 BLACKSTONE'S COMMENTARIES 92, have been so from before the time of passing the statute, *Quia Emptores Terrarum* [i.e., Statute of Westminster III (1290): 18 Edw. 1, c. 1], in the time of Edward I, since which time no manor can have been created, and, the plaintiff being stated to have the exclusive right of fishing, as lord of the manor, this can only be as appendant or appurtenant to the manor. It must, therefore, be by prescription, and, consequently, there has been an exclusive right of fishing there from time immemorial. The question, too, is as to the public right to the extent above stated, independently of usage and custom. The right is claimed on the pleadings as founded not on usage or custom, but upon the supposed general law only, and the usage, as stated in the Special Case, is found to have been for the public to cross the seashore on foot only for the purpose of bathing, no bathing machines having ever been used in Great Crosby, where the locus in quo is situate, before the establishment of the present hotel. My opinion, therefore, on this case, will not affect any right that has been or can be gained by prescription or custom, either by individuals or by either the permanent or temporary inhabitants of any vill, parish, or district.

I The claim upon the pleadings, respecting the public highway along the shore, and the verdict, and facts found in the Special Case respecting the same, make no

difference, but leave the question with respect to the right of bathing and the right incident thereto (if any) of passing over the seashore for that purpose, on foot and with horses and carriages, the same as if no such claim of a general public highway existed or was put upon the record, as the jury have found a verdict for the plaintiff upon the new assignment that the trespasses complained of were committed in the locus in quo on other occasions and for other purposes than as a general public highway and out of the highway there. A

It was contended in argument at the Bar that, by the common law of England, all the King's subjects had a right, not only to traverse the ocean itself in every direction, as well for commerce, trade, and intercourse, as for every other lawful purpose, but, also, that they had a general public right of way over the seashore to and from the sea, that they had it as well during the recess as during the flux of the tide for all lawful purposes, and that the King could not grant the shore so as to supersede or to deprive the public of the exercise of that right over the seashore. It was further contended that, even if the public right was not so extensive, yet that, at all events, the King's subjects had a right of bathing on the seashore so that it be exercised in such a way as is conformable to decency, and that they had also, as incident thereto, a right to pass over the seashore, not merely on foot, but with horses and carriages—that is to say, with bathing-machines for that purpose, whether the seashore belonged to the King as public property or to any individual as being now or even immemorially private property, and that such public right could not be superseded by the King's grant of the seashore as private property. B

The earliest authority cited for this purpose was from BRACTON, who copied it from the civil law. But whatever may be found to be the civil law upon this subject and whatever may have been stated by some of our law writers from the civil law or may be found to have dropped as dicta from some of our judges, yet it appears, I think, that the civil law, as applicable to this subject, differs from the common law of England; that its principles have not only been adopted into the common law, but are at variance with it, and are, therefore, no guide to us; that the public right, to the extent claimed in this case, is not only not found to be established by our law, but that the established principles of our law are inconsistent with it. The question is with regard to the shore—that is to say, the land between the high and the low water mark—and, according to SIR MATTHEW HALE's definition of the seashore, between those marks at ordinary tides, that is to say, between the ordinary flux and reflux of the sea. C

In BRACTON, lib. 1, c. 12, s. 6, it is thus laid down: D

"Publica vero sunt omnia flumina et portus, ideoque just piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est jure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in iis reponere, cuius liberum est, sicut per ipsum fluvium navigare; sed proprietates earum, illorum est, quorum prædiis adhærent et eadem de causâ arbores in eisdem natæ corundem sunt. Sed hæc intelligenda sunt, de fluminibus perennibus; quia temporalia possunt esse privata." E

This passage is quite general, and is not confined to tidal or navigable rivers. The doctrine as to the banks of rivers is contrary to *Ball v. Herbert* (1) respecting the right of towing paths, where LORD KENYON says (3 Term Rep. at p. 261): F

"That there is such a custom on most of the navigable rivers, no person doubts, but still the right was founded solely on the custom." G

There the court determined against the general common law right claimed. It is, indeed, supported by the dicta of HOLT, C.J., in *Young v. ———* (2), and *R. v. Cluworth (Inhabitants)* (3), in the former of which cases he ruled: H

"that every man, of common right, may justify the going of his servants or his I

A horses upon the banks of navigable rivers, for towing barges, to whomsoever the right of the soil belongs,"

and in the latter :

"that if one has land adjoining on a common river, every one that uses that river has, if occasion be, a right to a way by brink of water over that land, or further in if necessary."

B But both these authorities were cited and commented on in *Ball v. Herbert* (1), and expressly overruled by the court. The passage in BRACTON is taken from JUSTINIAN, INST. lib. 2, tit. 1, ss. 2 and 4, and is in his very words, except with the addition of the last sentence. But besides the difference between our law and the civil law in regard to what is even there laid down by BRACTON, the variance between the common law and the civil law in other respects as to marine properties and rights shows that the civil law cannot be any guide or afford any illustration to us in these matters. Therefore, though JUSTINIAN in s. 1 of that book and title says : "Nemo igitur ad littus maris accedere prohibetur," yet his doctrine cannot have any weight or authority in that respect with us unless it be found to be confirmed or adopted by our own lawyers, and, particularly, if it be found not to be consistent with and conformable to the doctrines and principles of the common law.

D That there is this great difference between the civil and the common law will appear from stating what is laid down in JUSTINIAN in some of the other sections of that book and title, and comparing it with what is undoubtedly the common law as to that species of property. In JUSTINIAN, the shore is thus defined :

E "Est autem littus maris quatenus hybernus fluctus maximus excurrit."

By the common law, we know it is confined to the flux and reflux of the sea at ordinary tides. In JUSTINIAN this is laid down under *De usu et proprietate littorum*, s. 5 :

F "Littorum quoque usus publicus est et juris gentium, sicut et ipsius maris; et ob id cuilibet liberum est casam ibi ponere in quam se recipiat, sicut retia siccare, et ex mari deducere : Proprietas autem eorum potest intelligi nullius esse, sed ejusdem juris esse, cujus et mare, et quæ subjacet mari terra vel arena."

By the common law, no such right exists in the public of erecting on the seashore any building for drying their nets, and instead of the property in the shore being in no one it is *prima facie* in the King, and may be in a subject. So may even an arm of the sea, a *districtus maris*, as SIR MATTHEW HALE, *DE JURE MARIS*, p. 31, says :

G "a place in the sea between such points, or a particular part contiguous to the shore, or a port, or creek, or arm of the sea,"

H though, as he also there lays it down, in the main sea itself, adjacent to his dominions, the King only hath the propriety, but a subject hath not, and, indeed, cannot have that property in the sea through the whole tract of it that the King hath, because, without a regular power, he cannot possibly possess it. So by the civil law, s. 18 :

"Lapilli et gemmæ et cetera quæ in littore maris inveniuntur jure naturali statim inventoris fiunt."

I By our law, we know that wrecks and things found upon the seashore do not belong to the finder, but, where the owner cannot be discovered, to the King or his grantee, or to some person by prescription which presupposes such grant. So by the civil law, s. 22 :

"Insula quæ in mari est, quod raro accidit [there he is speaking of an island newly rising from the sea] occupantis fit; nullius enim esse creditur."

SIR MATTHEW HALE, *DE JURE MARIS*, p. 36, shows how the common law differs from this :

"As touching islands arising in the sea, or in the arms, or creeks, or havens thereof, the same rule holds which is before observed, touching acquests, by the reliction or recess of the sea, or such arms, or creeks thereof. Of common right and prima facie, it is true, they belong to the Crown; but where the interest of such districtus maris, or arm of the sea, or creek, or haven, doth, in point of propriety, belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject, will belong to the subject, according to the limits and extents of such propriety."

By the common law all the King's subjects have in general a right of passage over the sea with their ships, boats, and other vessels, for the purposes of navigation, commerce, trade, and intercourse, and also in navigable rivers, and they have also, prima facie, a common of fishery there, but they may be excluded from the latter right, though not now by charter, at least by immemorial custom or prescription. These rights are noticed by SIR MATTHEW HALE, but whatever further rights, if any, they may have in the sea or in navigable rivers it is a very different question whether they have, or how far they have, independently of necessity or usage, public rights upon the shore (that is to say, between the high and low water mark), when it is not sea or covered with water and especially when it has from time immemorial been, or has since become private property. For the purpose of the King's subjects getting upon the sea and upon the navigable rivers to exercise their unquestionable rights of commerce, intercourse, and fishing, there are not only the ports of the kingdom, established from time to time by the King's prerogative, and called by SIR MATTHEW HALE the Ostia Regni, but also public places for embarking and landing themselves and their goods. It was not by the common law, nor is it by statute, lawful to come with or land or ship customable goods in creeks or havens or other places out of the ports, unless in cases of danger or necessity, nor fish or land other goods not customable, where the shore or the land adjoining is private property, unless upon the person's own soil, or with the leave of the owner thereof who, SIR MATTHEW HALE says, may in such case take amends for the trespass in unloading upon his ground, though he may not take it as a certain common toll, because, for so doing, it appears in SIR MATTHEW HALE's treatise *DE PORTIBUS MARIS*, p. 51, that one Morgan was fined 100 marks. No such amends could be taken, if there was a public right of coming there for that purpose in particular or for purposes in general. In a case of necessity (as SIR MATTHEW HALE, in his treatise *DE PORTIBUS MARIS*, p. 53, says) either of stress of weather, assault, or pirates, or want of provisions, any ship might put into any creek or haven. He further says:

"In case of necessity, and for the supply of fishermen, all places were to that purpose and end ports,"

that is, for the purpose of finding provisions for ships and mariners.

This is not consistent with the general right contended for as being in the public of coming on the shore for their purposes in general as and when they please. It is said, indeed, in FITZHERBERT'S *ABRIDGMENT*, Barre, 93 (which cites *Y.B. 8 Edw. 4*, at fo. 19, pl. 30, per DANBY, J.) that

"the fishers who fish in the sea may justify their going upon the land adjoining to the sea because such fishery is for the common wealth and for the sustenance of all the kingdom; wherefore this is the common law . . ."

But in BROOKE'S *ABRIDGMENT*, Customs, 46, the same case is more fully stated, where the doctrine appears to have been laid down on a question which arose upon a custom. That was trespass for digging land, and the defendant pleaded that it was four acres adjoining to the sea and that all the men of Kent, from time immemorial, had used, when they fished in the sea, to dig in the land adjoining and pitch stakes for hanging their nets to dry. NELE (of counsel) said: "He ought to show what men." CHOKE, C.J., and LITTLETON, J.: "This is not the custom, for it is against common right and reason." DANBY, J.: "Fishers may justify going upon the land

A to fish, for this is commonwealth, and for the sustenance of man, and is the common law, which was granted. FAIRFAX (of counsel): "Digging is destruction of the inheritance, therefore it is not a custom."

This appears more fully still by recurring to the YEAR BOOK itself, and SIR MATTHEW HALE, DE PORTIBUS MARIS, 86, treats it as arising upon a custom, for he there says:

B "Look at the book of 8 Edw. 4, fo. 18, for the custom of Kent, for fishermen to dry their nets upon the land, though it be the soil of private men."

The case, as stated in the Year Books, 8 Edw. 4, fos. 18, 19, after stating the pleadings as in BROOKE, proceeds as follows:

C "NELE: He hath said that the men have used, &c., and this is not a good prescription, being, he ought to show who, &c. CHOKE, C.J.: This custom cannot be good; for it is against common right to prescribe to dig in my land; but there are other customs, which are used throughout the whole land, and such customs are lawful; as of innkeepers, &c., and also a neighbour negligently keeping his fire, &c., and such customs are good, &c. LITTLETON, J.: A custom which runs through the whole land is the common law, as the cases that you have put are, &c.; and, sir, such custom, which may stand with reason, shall be suffered, as in the case where the younger son ought to inherit; for there is a reason for this, &c. But this custom is against reason; for if he may dig in one place, he may dig in another place; and so, if a man hath a meadow adjoining the sea, they may, by such custom, destroy all the meadow, which would not be reasonable. DANBY, J.: Those who are fishers in the sea may justify their going on the land adjoining to the sea; for such fishery is for the commonwealth, and for the sustenance of all the realm, &c.; wherefore this is common law, quod fuit concessum."

This, it may be observed, as far as it extends to the land above high-water mark, is contrary to *Ball v. Herbert* (1), unless where it is founded on custom. Such a custom may be good where a right to dig is not claimed, or the doing so may be justified under such circumstances as I shall afterwards state from SIR MATTHEW HALE. CHOKE, C.J., went on to say:

G "If I have land adjoining to the sea, so that the sea ebbs and flows on my land, when it flows, everyone may fish in the water which has flowed on my land, for then it is parcel of the sea, and in the sea everyone may fish of common right, &c.; and, sir, when the sea is ebbcd, then in this land, which was flowed before, peradventure he may justify his digging, &c.; for this land is of no great profit to me, &c."

H It, therefore, clearly appears that this case proceeded entirely upon a particular custom, and the doctrine laid down by CHOKE, C.J., may be true where there is such a custom. Such custom, confined to the seashore, may perhaps be good, but, if founded solely on the common law, it is inconsistent with many passages in SIR MATTHEW HALE. By the common law, though the shore, that is to say, the soil betwixt the ordinary flux and reflux of the tide, as well as the sea itself, belongs to the King, yet it is true that the same are also *prima facie publici juris*, or clothed with a public interest. But this *jus publicum* appears from SIR MATTHEW HALE to be the public right in all the King's subjects of navigation for the purposes of commerce, trade, and intercourse, and also the liberty of fishing in the sea or the creeks or arms thereof, which SIR MATTHEW HALE, DE JURE MARIS, p. 11, says, the common people of England have regularly, as a public common of piscary, and which, he says, they may not without injury to their right be restrained of, unless in such places, creeks, or navigable rivers where either the King or some particular subject has granted a propriety, exclusive of that common liberty. Neither in SIR MATTHEW HALE's treatise, nor elsewhere, does it appear that there is a common law right in the King's subjects in general, or any of them, to appropriate the seashore, or

the soil even below the low-water mark, for general purposes, though temporary only, to their own use, without the King's grant or licence, even where that can be done without nuisance to his subjects. Such an appropriation by any of the King's subjects, without his grant or licence, though it were not in law a nuisance, would be (see SIR MATTHEW HALE, *DE PORTIBUS MARIS*, 85), where the soil remains the King's, a purpresture, an encroachment, and intrusion upon the King's soil, which he may either demolish or seize, or arent, at his pleasure, and though it were even by building below the low-water mark, it would not, as SIR MATTHEW HALE there says, be ipso facto a common nuisance, unless it be a damage to the port or navigation, but where it is a common nuisance, as he also there says, even the King himself cannot license it. This shows that by the common law the King's subjects have not a general right of using or appropriating the soil of the seashore or of the sea itself, as they please, even where the soil remains the King's, clothed with the *jus publicum*, and where that use or appropriation is effected in such a manner as not to be a nuisance to the public right of others.

But, further, such a general public right in all the King's subjects, to use the seashore for all such temporary purposes as they please would be, I think, inconsistent with the nature of permanent private property, or with the seashore becoming such permanent private property. If, therefore, the right of bathing, and the right of passing over the seashore on foot and with carriages, claimed as incident thereto, be claimed under the supposed general right of the public to use the sea, and the shore, for all such temporary legal purposes as they may please, such a public right of general appropriation is inconsistent with the fact of the locus in quo being private property, and of the fishing therein being also a private exclusive right as stated in the Case. And if the right of bathing, and of the incident foot and carriage way claimed for that purpose cannot be established under such a general claim of right as I have before stated, it can only be supported under the specific claim of a public right of bathing and of a carriageway, as incident thereto, for to that extent it must be established in order to entitle the defendant to the judgment of the court. Then, I ask, where is such a right of bathing on the seashore, where it has become private property and may immemorially have been so and of a carriageway for that purpose as incident thereto, when sought for, to be found as existing at common law independently of usage and custom, a right, too, which is here claimed beyond the extent of the usage actually found in the case? Where the soil remains the King's and where no mischief or injury is likely to arise from the enjoyment or exercise of such a public right, it is not to be supposed that an unnecessary and injurious restraint upon the subjects would, in that respect, be enforced by the King, the *parens patriæ*. Where there is, and has hitherto been, a necessity, or even urgency, for such a right, it must, or most probably will have, usage and custom in the place to support, regulate, limit, and modify it, for, whenever there has been a necessity for it, there, as far as such necessity has existed, some usage must have prevailed.

In *Ball v. Herbert* (1), LORD KENYON, in speaking of common law rights, says (3 Term Rep. at p. 261):

"Common law rights are either to be found in the opinions of lawyers delivered as axioms, or to be collected from the universal and immemorial usage throughout the country."

ASHURST, J., says (*ibid.* at p. 262):

"It seems extraordinary (if there be any such right) that it is not defined with greater certainty in any of our law books; for it is a right that in its nature must, if it existed, be subject to some restrictions, as, that it should be exercised only on one, and that the most convenient side of the river; for it would, in many instances, be a very oppressive right, if it could be claimed on both sides."

BULLER, J., says (*ibid.* at p. 263):

A "This being claimed as a common law right, it can only be proved to exist by one of the means mentioned by my Lord. As to general usage throughout the kingdom, of which the court is obliged to take notice, that clearly does not exist. Then the question is, whether in our books, or on records, that right is established for which the defendant contends. The case in LORD RAYMOND [*Young v. —* (2)] is a very loose and inaccurate note. Another
B authority cited is a passage in BRACTON, and quoted by CALLIS: that plainly appears to have been taken from JUSTINIAN, and is only part of the civil law; and whether or not that has been adopted by the common law is to be seen by looking into our books, and there it is not to be found."

The present claim, to the extent to which it is necessary to establish it on
C the part of the defendant, is not, therefore, as it appears to me, supported either by necessity, by general usage of the realm, which forms the common law, or by special usage in the particular place, nor is it to be found in our law books. Nor, if it were, would it follow that it was such a common law right as might not, by prescription at least, be otherwise appropriated. That general common law rights are frequently so appropriated, we all know to be the fact, and that this may
D lawfully be established, by prescription at least, will appear from authority. The public common law rights, too, with respect to the sea, etc., independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea and on the seashore, when covered with water; and though, as incident thereto, the public must have the means of getting to and upon the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have
E appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking where they please upon the seashore, or the land adjoining thereto, except in case of peril or necessity. In *Carter v. Murcot* (4), YATES, J. (speaking of a prescription for a several fishery, claimed in a navigable river), says:

"Such a right may be proved. By the law of England, what is otherwise
F common may, by prescription, be appropriated. GROTIUS owns that navigable rivers may be appropriated. *The Case of the Royal Fishery of Banne* (5), in SIR JOHN DAVIS' REPORTS, is agreeable to this; and it is a very good case."

Many passages in SIR MATTHEW HALE's treatises are inconsistent with the existence of such a general right at common law of bathing and of a passage over the shore with carriages, as is here claimed, and show that, whatever the general
G public rights are, they are only such as are upon and in the water and not upon the dry land, unless in places sanctioned by usage, whether they be parts of the shore or not, at least that they exist not upon the land when not covered with water where it has become private property, and, more especially, where it has immemorially been private or special property. I shall state a few of those passages. It appears from SIR MATTHEW HALE that the King may license the erecting of
H quays or other buildings on the sea coasts, even below the low-water mark, where they are not in fact annoyances or nuisances: HALE, DE PORTIBUS MARIS, 85; so weirs: HALE, DE JURE MARIS, 22. As to the making of ports and the three-fold right therein, especially the right of an individual subject by charter or prescription in a port and previously in a creek or haven, particularly in bringing in his own goods where he is owner of the soil: HALE, 72, 73. As to the owner's right to
I improve the shore, it is laid down that the King cannot grant a right to lade or unlade on the ripa or bank without the owner's consent; there cannot, therefore, be any common law right to lade or unlade on the quay or shore, or land adjacent in the port: HALE, 51, 76. Evidence to prove the shore parcel of a manor, etc., disproves the general right of all the King's subjects on the shore, at least when and where it is not covered with water. So, as to having the right of royal fish and wreck, it is a great presumption that the shore is part of the manor, or otherwise he could not have them: HALE, 26, 27. This would not be the case if

the King's subjects had a prior general right to come when they pleased upon the shore. A

These passages from SIR MATTHEW HALE appear to me to be inconsistent with the general right contended for, independently of custom, for all the King's subjects to come as and when they please upon the shore, particularly where it has been either from time immemorial or where it has since become private or special property, especially where it is not covered with the tide or water. SIR MATTHEW HALE notices B and establishes the public right of navigating and fishing upon and in the water, and the right of resort to the ports, and of lading and unlading, landing and embarking therein, either at the public places appointed or by usage established for those purposes, or, with consent, upon the land either of the King or of individuals, but C no further. This right of bathing, and of a carriageway as incident thereto, is nowhere noticed, and it does not, I think, exist by the common law upon the locus in quo, the private property of the plaintiff, unsupported as it is by usage and custom. I am, therefore, of opinion, in this case, that the plaintiff is entitled to the judgment of the court.

BAYLEY, J.—The question in this case is whether there is a common law right for all the King's subjects to bathe upon the seashore and to pass over it for that purpose upon foot and with horses and carriages, notwithstanding the part on which the right is claimed, is, as to its soil, vested in a particular individual, and although that individual has an exclusive right of fishing in that place with stake nets and of driving these stakes into the soil, that they may support the nets. I am of opinion that there is no such common law right. By the seashore, I understand the space between the ordinary high and low water marks, and the property in this is, *prima facie*, in the King. It may, indeed, by grant or prescription belong to a subject, but until the contrary is shown, the presumption is that it belongs to the King. Many of the King's rights are to a certain extent for the benefit of his subjects, and that is the case as to the sea in which all his subjects have the right of navigation and of fishing. It is so in highways along which all his subjects have the right of passage, and the King can make no modern grants in derogation of those rights. D E F

I have mentioned the rights of navigation and of fishing, because I can find no trace of such a right as that now claimed recognised in any of our books. It is material to distinguish between the different descriptions of rights, and the public may have a right of navigation, which is for the general benefit of all the kingdom, and a right of fishing which tends to the sustenance and beneficial employment of individuals, but it does not thence follow that they have also the right of bathing. G The existence or the extent of the subject's right is to be collected in this, as in other instances, from the manner in which the seashores throughout the kingdom have from time immemorial been used, and from legal authorities upon the subject. The right, as claimed, is not confined to any particular place, if it exists at all, but it must exist upon every part of the seashore. Every private building, then, H erected upon the seashore, and even wharfs and quays, would be an obstruction to that right, and, of consequence, abateable or indictable. Yet, in how many instances are such buildings, wharfs, and quays erected? Every embankment by which land is redeemed from the sea would obstruct the exercise of this right and be a nuisance, and so would the erection of stakes for holding nets, and yet, I how frequently are such embankments made and such stakes set up? A distinction has, indeed, been contended for between wharfs and quays and other erections for public benefit and for the interests of trade and commerce, and erections for private purposes, but in how many instances are there buildings for private purposes on the seashore? Where an erection is made on the seashore without authority, the Crown may treat it as a purpresture and prosecute it accordingly, but it has never yet been held abateable or indictable because it happens to interfere with a supposed common law right of bathing. Indeed, this is the first time, as far

A as I can learn, that such a right was ever stated upon any pleadings or contended for in any court of law, and the inconveniences which would result from such a right afford to my mind a strong argument against its existence.

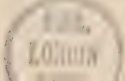
In sea-bathing, as it now prevails, particular regulations are desirable—the restriction of particular machines to particular spots, a separation of those which are for men from those which are for females, and the prevention of contests as to particular situations. Bathers who do not use machines should be in places of greater privacy and at a distance from those parts which are generally used for the recreation of walking, and yet the existence of this common law right would be a great obstruction to any such regulations. Indeed, if an individual had the grant of the seashore from the Crown, and were using it for recreation or bathing, he or his family might be interrupted and deprived of all privacy by the exercise of this common law right. Let it be observed, too, that the whole shore cannot be necessary for the exercise of this supposed right, and that it may be desirable to apply parts of the seashore to other purposes. The King, for the public welfare, may suffer such a right to be exercised in those parts of the shore which remain in his hands to any extent which the convenience of the public may require, but may he not also allow other rights to be exercised on other parts? If the soil is vested in an individual, is he to be deprived of the right of saying how that soil shall be used, and of the privilege of making any regulations he may think fit? In those places in which convenience has required the right, and it has continued from the time of legal memory, there will be a right by custom, and, where that is not the case, the Crown or its grantees are not likely to withhold it, upon proper terms and under proper regulations.

E *Bagott v. Orr* (6) seems to me to conclude nothing on the right in question. The defendant there justified trespassing on the rocks and sands lying within the flowing and reflowing of the tide on the ground that every subject of the realm had the liberty and privilege of getting and taking away shell-fish and shells which had been left there by the tide. The general right of the public to take fish of the sea was admitted in argument, but the right to take shells cast on the shore was denied, and it was insisted, besides, that the general right was excluded where the shore was parcel of a manor. The court thought that the plaintiff should have replied specially to have raised the question as to excluding the general right, but they thought the claim as to the shells so questionable that they offered the defendant leave to amend by confining his claim to the sea-fish, and that offer the defendant accepted. The claim, therefore, in that case, was very different from the present. It was a claim for something serving to the sustenance of man, not a matter of recreation only, a claim to take, when left by the water, what every subject had an undoubted right to have taken while they remained in the water, and upon that claim there was no regular judgment.

H But it would by no means follow because all the King's subjects have a right to pick up fish on the shore, that they have, therefore, a right to pass over the seashore for the purpose of bathing. The passages cited from SIR MATTHEW HALE's treatise, *DE JURE MARIS*, pp. 22 and 36, in which it is laid down

I "that the *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers or arms of the sea are affected for public use "

leave the question untouched, because the question in this case is what the *jus publicum* is, and that they do not define. Had SIR MATTHEW HALE stated as part of the *jus publicum* that the public might use the shore as they thought fit, that they might use it as a public highway or for the purpose of bathing, then those passages would have been authorities applicable to this case. But SIR MATTHEW HALE, in fact, only states that the *jus publicum* continues to exist, without defining what it is. BRACTON, in lib. 1, c. 12, s. 6, does state what the *jus publicum* is,



and if that passage be good law, it is a strong authority in favour of the defendant. A
The passage is as follows :

"Publica vero sunt omnia flumina et portus. Ideoque jus piscandi omnibus commune est in portu et in fluminibus."

He does not even say navigable rivers, but I will assume that by "fluminibus" is meant navigable rivers, and so far as I have cited the passage, I concur in what B
is there laid down. He goes on :

"Riparum etiam usus publicus est jure gentium sicut ipsius fluminis."

That is, that the public have the same right to use the banks of the river that they have to use the river itself, and that, because the water is common to all mankind, the ripa is also common to all mankind. The passage continues :

"Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in iis reponere, cuivis liberum est, sicut per ipsum fluvium navigare." C

The word "ripa" here applies to rivers and ports, and probably, also, to the land above the high-water mark, and, if it does, is this the law of England? Have all persons a right to fasten a ship to the banks of a river, or have they a right to tie ropes to the trees, or to land goods on the banks of every navigable river? D
Ball v. Herbert (1) is not a distinct authority upon this point, inasmuch as in that case the right of towing was claimed. But the general question as to the right of the public on the ripa of a navigable river was discussed, and the court appear to have been of opinion that the ripa of a navigable river was not publici juris, and they, therefore, virtually overruled the authority of BRACTON.

SIR MATTHEW HALE, in his treatise, *DE PORTIBUS MARIS*, p. 84, after citing this passage, says : E

"As touching ports, and the public right of them, BRACTON saith true; with this allay, that hath been before observed, that the law of England doth thus far abridge that common liberty of ports, that no port can be erected without the licence or charter of the King, or that which presumes and supplies it, viz., custom and prescription." F

But in another passage at p. 73, SIR MATTHEW HALE says :

"Though A. may have the propriety of a creek or harbour, or navigable river, yet the King may grant there the liberty of a port to B., and so the interest of propriety, and the interest of franchise, several and divided. And in this, no injury is at all done to A., for he hath what he had before, viz., the interest of the soil, and consequently the improvement of the shore, and the liberty of fishing; and as the creek was free for any one to pass in it against all but the King (for it was publici juris as to that matter before) so now the King takes off that restraint, and by his licence and charter, makes it free for all to come and unlade. But if A. hath the ripa or bank of the port, the King may not grant a liberty to unlade upon that bank or ripa without his consent, unless custom had made the liberty thereof free to all, as in many places it is; for that would be a prejudice to the private interest of A., which may not be taken from him without such consent." G
H

There may perhaps be a distinction between the ripa of the river where the soil has been long private property and that space between the high and low-water mark where the sea ebbs and flows, but, if there be such a distinction, what becomes of the authority of BRACTON, where he says: "Riparum etiam usus publicus, est jure gentium sicut ipsius fluminis." No man can travel through this kingdom along the banks of rivers without seeing that private rights, exclusive of public rights, exist there, and every one of those rights is at variance with the doctrine of BRACTON, and with the supposed common law right now claimed. I

The practice of bathing may contribute to health, but it ought to be confined within reasonable limits, and it is by no means necessary that the right should

A be co-extensive with the whole shore of the sea or that it should extend to places where the right of fishing with stake nets exists. In the absence of any authority to show that such a right exists, and thinking that the authorities cited do not establish it and that it would be attended with great inconvenience to the public if a general right, free from all regulation by the owner of the soil was to be exercised throughout the whole of the kingdom, I am of opinion that no such right exists,
 B and, consequently, that there ought to be judgment for the plaintiff.

ABBOTT, C.J.—This is an action of trespass, brought against the defendant for passing with carriages from some place above high-water mark across that part of the shore which lies between the high and low-water mark for the conveyance of persons to and from the water for the purpose of bathing. The plaintiff is the
 C undoubtedly owner of the soil of this part of the shore, and has the exclusive right of fishing thereon with stake-nets. The defendant does not rely upon any special custom or prescription for his justification, but insists on a common law right for all the King's subjects to bathe on the seashore, and to pass over it for that purpose on foot, and with horses and carriages, and this right is the only matter which, by the terms of the Special Case, is submitted to the opinion of the court.
 D If such a common law right existed, there would probably be some mention of it in our books, but none is found in any book, ancient or modern. If the right exist now, it must have existed at all times, but we know that sea-bathing was, until a time comparatively modern, a matter of no frequent occurrence, and that the vehicles by which the practice has been facilitated and extended are of comparatively modern invention.

E There being no authority in favour of the affirmative of the question in the terms in which it is proposed, it has been placed in argument at the Bar on a broader ground, and, as the waters of the sea are open to the use of all persons for all lawful purposes, it has been contended, as a general proposition, that there must be an equally universal right of access to them, for all such purposes, over
 F land like the present. If this could be established, the defendant must undoubtedly prevail, because bathing in the waters of the sea is, generally speaking, a lawful purpose. But, in my opinion, there is no sufficient ground, either in authority or in reason, to support this general proposition.

Commerce is a matter greatly favoured in our law by reason of the public and national benefits derived from it, but even as to this favoured matter, I have found no authority in the law of England in support of such a proposition. BRACTON, in
 G the passage so often referred to, speaks not of the waters of the sea generally, but of ports and navigable rivers. It may be admitted that whatever is true of navigable rivers and their banks may be true of the sea and of its shore. But *Ball v. Herbert* (1) shows that the doctrine of BRACTON as to the banks of navigable rivers, however warranted by the civil law, is not conformable to the law of England. SIR MATTHEW
 H HALE said (*DE PORTIBUS MARIS*, p. 84):

—“And as touching ports, and the public right to them, BRACTON saith truth but, with this allay, that the law of England doth thus far abridge that common liberty of ports, that no port can be erected without the licence or charter of the king, or that which presumes and supposes it, viz., custom and prescription.”

I So that even the privilege to be derived from ports cannot be in its nature universal. As to ports, SIR MATTHEW HALE, ch. 6, p. 73, distinguishes between the interest of property and the interest of franchise, and says that

“if A. hath the ripa or bank of the port, the king cannot grant liberty to unlade on the bank or ripa without his consent, unless custom hath made the liberty thereof free to all, as in many places it is.”

Such consent as applied to the natural state of the ripa or bank would be wholly unnecessary, if every man had a right to land his goods on every part of the shore

at his pleasure. If there be no general right to unlade merchandise on the shore, there can be no right to traverse the shore with carriages or otherwise for the purpose of unlading, and, consequently, the general proposition to which I have alluded cannot be maintained as a legitimate conclusion from the general right to navigate the water. I have spoken of merchandise, and not of fish, from the latter I studiously abstain, because no question of that kind is before the court, and it is unnecessary to say anything upon it. It will be remembered also that I speak only of the general right, which is a matter perfectly distinct from those cases of necessity that often arise out of the perils of navigation. Having thus shown that the general proposition cannot, in my opinion, be maintained, I return to the particular right or privilege claimed in the present case.

One of the topics urged at the Bar in favour of this supposed right was that of public convenience. Public convenience, however, is, in all cases, to be viewed with a due regard to private property, the protection whereof is one of the distinguishing characteristics of the law of England. It is true that property of the description of the present is, in general, of little value to its owner, but I do not know how that little is to be protected and much less how it is ever to be increased if such a general right be established. If there be a general right of passage across land of this description in the nature of a highway, by what law are stake-nets or other implements of fishing to be placed there, or sand or stones to be taken away, whereby the exercise of the right which, as claimed, will, in its universality, extend itself over every part of the surface, may be obstructed, or rendered less convenient? By what law can any wharf or quay be made? These, in order to be useful, must be below the high-water mark that vessels or boats may float to them when the tide is in, but when the tide is out no carriage can pass them. In some parts of the coast, where the ground is nearly level, the tide ebbs to a great distance, and leaves dry very considerable tracts of land. In such situations, thousands of acres have, at different times, been gained from the sea and its arms by embankments, and converted to pasture or tillage. But how could such improvements have been made, or how can they be made hereafter, without the destruction or infringement of this supposed right? It is to be observed, that wharfs, quays, and embankments, and intakes from the sea, are matters of public as well as private benefit.

Another topic relied upon by the defendant was usage and practice. The practice of modern times can be considered, at the utmost, in the nature only of evidence, more or less cogent according to its extent and uniformity. I am not aware of any practice in this matter sufficiently extensive or uniform to be the foundation of a judicial decision. It was said at the Bar that in some places a compensation is made to the owner of the shore, but I do not rely on this assertion as a ground of judgment. In many places, doubtless, nothing is paid. In some parts, the King is the owner of the shore, and it is not probable that any obstruction would be interposed on his behalf to such a practice. Of private owners, some may not have thought it worth while to advance any claim or opposition, others may have had too much discretion to put their title to the soil to the hazard of a trial by an unpopular claim to a matter of little value. Others, and probably the greater part, may have derived or expected so much benefit from the increased value given to their own land above by the erection of houses and the resort of company, that their own interest may have induced them to acquiesce in, and even to encourage the practice, as a matter indirectly profitable to themselves. Further, the practice, as far at least as I am acquainted with it, differs in degree only and not in kind or quality from that which prevails as to some inland wastes and commons, and even the difference in degree is, in some instances, not very great. Many of those persons who reside in the vicinity of wastes and commons, walk or ride on horseback, in all directions, over them, for their health and recreation, and sometimes, even in carriages, deviate from the public paths into those parts which may be so traversed with safety. In the neighbourhood of some frequented

A watering-places, this practice prevails to a very great degree, yet no one ever thought that any right existed in favour of this enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil.

The only remaining topic adduced for the defendant was that the right may be considered as confined to those instances only wherein it can be exercised without actual prejudice to the owner of the shore, and subject to all modes of present use or future improvement on his part, but no instance of any public right, so limited and qualified, has been found. Every public right to be exercised over the land of an individual is, pro tanto, a diminution of his private rights and enjoyments, both present and future, so far as they may at any time interfere with or obstruct the public right. But, shall the owner of the soil be allowed to bring an action against any person who may drive his carriage along these parts of the seashore, whereby not the smallest injury is done to the owner? The law has provided suitable checks to frivolous and vexatious suits, and, in general, experience shows that the owners of the shore do not trouble themselves or others for such matters. But where one man endeavours to make his own special profit by conveying persons over the soil of another and claims a public right to do so, as in the present case, it does not seem to me that he has any just reason to complain if the owner of the soil shall insist upon participating in the profit and endeavour to maintain his own private right, and preserve the evidence thereof. For these reasons, I am of opinion that there is not any such common law right as the defendant has claimed.

Judgment for plaintiff.

MILLS v. FARMER

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), November 7, 1815]

[Reported 1 Mer. 55; 19 Ves. 483; 35 E.R. 597]

Charity—Charitable trust—Donor's directions insufficient—Application of gift to charitable objects directed by court.

Where a testator gives to such charitable uses as he shall direct and gives no direction the court will direct the uses to which the gift shall be applied.

A testator, after providing in his will for the payment of his debts and certain legacies, directed that the residue of his estate be applied for religious purposes "and other charitable purposes as I do intend to name hereafter after all my worldly property is disposed of to the best advantage."

Held: a scheme must be laid before the court for the application of the residue to charitable purposes, regard being particularly had to the particular institutions denoted by the testator, but not so as to confine the bequest to those.

Per LORD ELDON, L.C.: For a charitable intention to be effective it is not necessary that the testator should give, or at least indicate the design to give, the property in question to a certain individual for the express purpose of carrying the intention into effect. In all cases it is the intention which the court looks for, and that intention is as clearly expressed by saying: "I give my property to charitable purposes" as by saying: "I give my property to A.B. for charitable purposes."

Notes. Followed: *Pieschel v. Paris* (1825), 2 Sim. & St. 384. Considered: *Re Rymer*, *Rymer v. Stanfield*, [1891-4] All E.R. Rep. 328; *Re Eades*, *Eades v. Eades*, [1920] 2 Ch. 353; *Re Willis*, *Shaw v. Willis* (1920), 37 T.L.R. 43. Referred to: *Cherry v. Mott* (1836), 1 My. & Cr. 123; *A.-G. v. Ironmongers' Co.* (1841), Cr. & Ph.

208; *Lyons Corpn. v. Advocate-General of Bengal* (1876), 1 App. Cas. 91; *Pocock v. A.G.* (1876), 3 Ch.D. 342; *Biscoe v. Jackson* (1887), 35 Ch.D. 460; *Re White, White v. White*, [1893] 2 Ch. 41; *Re Davis, Hannen v. Hillyer*, [1900-3] All E.R. Rep. 336; *Re Gardner's Will Trusts, Boucher v. Horn*, [1936] 3 All E.R. 938; *Re Lawton, Lloyds Bank, Ltd. v. Longfleet St. Mary's Parochial Church Council*, [1940] Ch. 984; *Re Gott, Glazebrook v. Leeds University*, [1944] 1 All E.R. 293.

As to schemes where donor's directions insufficient, see 4 HALSBURY'S LAWS (3rd Edn.) 326-329; and for cases see 8 DIGEST (Repl.) 450 et seq.

Cases referred to :

- (1) *Anon.* (1702), Freem. Ch. 261; 22 E.R. 1197; 8 Digest (Repl.) 466, 1656.
- (2) *A.-G. v. Syderfer* (1683), 1 Vern. 224; cited in 7 Ves. 43, n.; 23 E.R. 430; 8 Digest (Repl.) 465, 1655.
- (3) *Gates v. Jones* (1690), cited in 7 Ves. 496; 2 Vern. 266; 23 E.R. 773; sub nom. *Jones' Case* (1690), [1893] 2 Ch. 49, n., H.L.; 8 Digest (Repl.) 461, 1612.
- (4) *Wheeler v. Sheer* (1730), Mos. 288, 301; 25 E.R. 399, 406, L.C.; 8 Digest (Repl.) 468, 1690.
- (5) *Moggridge v. Thackwell* (1803), 7 Ves. 36; 32 E.R. 15, L.C.; affirmed (1807), 13 Ves. 416, H.L.; 8 Digest (Repl.) 466, 1667.
- (6) *De Costa v. De Pas* (1754), Amb. 228; Dick. 258; 3 Hare, 194, n.; 27 E.R. 150; sub nom. *De Costa v. De Paz*, 2 Swan. 487, n., L.C.; 8 Digest (Repl.) 461, 1615.
- (7) *White v. White* (1778), 1 Bro. C.C. 12; 28 E.R. 955, L.C.; 8 Digest (Repl.) 466, 1663.

Also referred to in argument :

Doyley v. A.-G. (1737), 2 Eq. Cas. Abr. 194; 4 Vin. Abr. 485; 22 E.R. 167; sub nom. *Doyley v. Doyley, A.-G. v. Doyley*, 7 Ves. 58, n.; 20 Digest (Repl.) 259, 73.

Cook v. Duckenfield (1743), 2 Atk. 562; 26 E.R. 737, L.C.; 8 Digest (Repl.) 451, 1467.

A.-G. v. Guise (1692), 2 Vern. 266; 23 E.R. 772; 8 Digest (Repl.) 461, 1613.

A.-G. v. Hickman (1732), Kel. W. 34; 2 Eq. Cas. Abr. 193, pl. 14; 25 E.R. 482, L.C.; 8 Digest (Repl.) 466, 1662.

Bill filed by next of kin praying an account and the distribution of the residue of a testator's estate as being undisposed of by his will and a codicil.

James Mills, by his will, dated June 23, 1806, directed that all his just debts and funeral expenses and all the legacies which he should give by his will, or any codicil should be paid as soon as possible after his decease, and, after giving pecuniary legacies to a considerable amount to certain of his relations and other persons, and appointing the defendant Farmer and another, his executors, with equal legacies, proceeded in the following words :

"The rest and residue of all my effects I direct may be divided for promoting the gospel in foreign parts and in England for bringing up ministers in different seminaries and other charitable purposes as I do intend to name hereafter after all my worldly property is disposed of to the best advantage."

On Aug. 14, 1807, he addressed a letter to his executors as follows :

"Dear gentlemen, In case of illness or death, I have sent to to Messrs. Roberts and Curtis, a box in which is my last will and testament, and several writings."

These writings are specified. He then requests that, in lieu of what he had bequeathed his executors, they would accept £500 each, and divide his wine between them, and that certain persons, named in the letter, might receive some specific and pecuniary legacies. The letter concluded :

"It is needless to have any of my relations attend my funeral, as it is apt to breed ill will among them; and their grief on such occasions, is generally

A attended with hypocrisy; therefore, be pleased to accept of these trifles, with my best wishes; and I pray that God may guide you."

The testator died after writing this letter, which was proved by his executors, together with the will, as a codicil thereto.

The bill was filed by the next of kin, praying an account, and distribution of the residue as being undisposed of by the will and codicil of the testator.

B The Attorney-General, who was a defendant to the suit, claimed the residue as given to charity, and on Jan. 29, 1811, the matter came before SIR WILLIAM GRANT, M.R., who said :

C "So far from its being a case upon which there could be no doubt of its being a bequest substantially to charity, he was clearly of opinion that it must be held void for uncertainty. In the first place, two or three vague objects of charity were mentioned, between which, so named, the other objects of charity which the testator professed a design of naming afterwards, the testator expressed a future intention to divide his property. How is it possible to say, in the absence of all subsequent specification, what portion the testator intended to give to the purposes he had named, and what portions to those which he D intended to name, but did not name? How could it appear whether he intended to give a fortieth, or a fiftieth, or a hundredth part to both or either of the purposes mentioned?"

HIS LORDSHIP declared that :

E "as well on those grounds, as also from the plain meaning of the clause, as altogether referable to a future specification of particulars never afterwards made, the clause must be decreed to be void for uncertainty."

Against this decree the Attorney-General presented a petition of re-hearing, and the cause came on upon re-hearing before LORD ELDON, L.C.

Sir Arthur Pigott for the Attorney-General.

Leach for the next of kin.

F LORD ELDON, L.C.—When this cause first came before me to be re-heard, I cannot help saying that I felt a considerable degree of doubt attaching itself to a subject on which the MASTER OF THE ROLLS does not seem to have entertained any, and, while the great weight of authority which belongs to every decision of that learned judge rendered me more than usually anxious to be certain of fully G comprehending every principle upon which his judgment in this instance could have been founded, I experienced some satisfaction from the information that he had not had the advantage of so full a discussion at the Bar, especially on the part of the Attorney-General, as the great importance of the subject appeared to demand. It was with this view that I desired to be made more particularly H acquainted with the nature of the arguments submitted to His Honour and the precise grounds upon which his judgment was given, and the result of that inquiry was that, finding my mind still assailed by scruples respecting the sufficiency of those grounds to warrant the decision, I directed the second argument which we have heard. After hearing that argument, I cannot by any means bring myself to the conclusion of affirming His Honour's decree. I wish that the cause had I been re-heard before him, at least in the first instance, and I feel that, in differing in case I should find myself bound to differ, from so great a judge, my own decision will not hereafter possess all the authority which might otherwise attach to it. In order to give it more force, I have thought it my duty, in the first place, to hear all that, if the MASTER OF THE ROLLS had heard it, might have induced him to form a different opinion.

I am fully satisfied as to all the principles which have been laid down in the course of this argument and accede to them all. There is no question that the court has not the power to make a will for the testator, but only to carry into execution that which he has made himself and this it can do only by giving to it such a

construction as former precedents have established to be the right construction in every particular instance. Neither is there any doubt that the same words in a will, when applied to the case of individuals, may require a very different rule of construction from that which would govern them if applied to the case of charity. If I give my property to such person as I shall hereafter name to be my executor and afterwards appoint no executors, or if, having appointed an executor, he dies in my lifetime and I appoint no other to supply his place, in either of these cases, as to individuals, the testator must be held intestate and his next of kin will take the estate. But to give effect to a bequest in favour of charity, the court will, in both instances, supply the place of an executor and carry into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly, perhaps, on principles in the Roman law which we do not at this time perfectly comprehend, and partly, no doubt, on the religious notions which formerly obtained in this country, according to which it fell to the ordinary's province to distribute in case of intestacy. A third principle, which it is now too late to call in question, is that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this court, which will then supply the mode which alone was left deficient.

The doctrine laid down in *Freem. Ch., Case 330b. (Anon. (1))** has never, to my recollection, been judicially contradicted. On the decision in *A.-G. v. Syderfen* (2) I can most confidently rely, from the circumstance of my having inspected the original papers which I examined with the most minute attention. It was there held that the will had expressed a complete intention, capable of being executed, notwithstanding the loss of the writing to which it referred as containing the mode by which it was meant to be executed. This case, therefore, establishes in the strongest manner the distinction before laid down, because, in the case of individuals, nobody can doubt that a will, under such circumstances, would have been incapable of being carried into effect. It was said in that case that it must be presumed the writing had been in existence and was lost by accident. But nothing can be more certain than that, in the case of individuals, no such presumption could have been available to establish the will, because in that case, in the absence of the instrument declaring the purposes, there were no purposes in existence to which the will could have any application, and it must, therefore, have failed altogether. Again, in the case of an individual, if I leave my estate to such person as my executor shall name and appoint no executor, or, having appointed one, he dies, and I neglect to supply his place with another, it is admitted that the bequest so given amounts to nothing. Yet it cannot be denied that such a bequest to charity would indicate that general charitable intention which, according to the rules of law, is sufficient to give it effect, and that the court, in such a case, would assume the office of the executor.

It is admitted, indeed, for the next of kin that a charitable intention so expressed is complete because the testator has given, or at least indicated the design to give, the property in question to a certain individual for the express purpose of carrying it into effect, but they say that the case is different where the property is not so disposed of. I cannot allow this distinction. In all these cases it is the intention which the court looks for, and that intention is as clearly expressed by saying: "I

* "In *Cur. Cane. 1702*. It was said, and not denied, that if a man deviseth a sum of money to such charitable uses, as he shall direct by a codicil to be annexed to his will, or by a note in writing; and afterwards leaves no direction, neither by note nor codicil, the Court of Chancery hath power to dispose of it to such charitable uses as the court shall think fit: and so it was held in the case of *Mr. Sidrofen's will [A.-G. v. Syderfen (2)]*, and in the case of one *Jones [Jones' Case (3)]*; but if the will points at any particular charity, as for maintenance of a schoolmaster or poor widows, then the Court of Chancery ought not to direct it to any other purpose but such as is pointed at by the will; as if the devise should be for such school as he should appoint, and appoints none, the court may apply it for what school they please but for no other purpose than a school, although it may be for what school the court thinks fit."

A give my property to charitable purposes," as by saying: "I give my property to A.B. for charitable purposes." Besides, in this case, although the testator does not expressly mention his executors in the clause bequeathing the residue, he has already named executors in the will, and the direction contained in the residuary clause can be understood only as imperative upon his executors so appointed.

I have already expressed my opinion with respect to the ground of decision in B *Wheeler v. Sheer* (4), and it is the same as that which I before gave when discussing the authority of that case in *Moggridge v. Thackwell* (5).^{*} There was in that case a codicil declaring uses more extensive than those declared by the will, and amounting, therefore, in my mind, to something very much like a revocation of the will in respect of those uses. The circumstances of that case, then, are such as to render it of no weight as an authority to govern such a case as the present. C There it was, in effect, "to such charitable and other uses as I shall appoint." How is that applicable to a gift "to certain charitable purposes, and to other charitable purposes which I shall name hereafter?" Either the codicil, in *Wheeler v. Sheer* (4) revoked the will, or it operated to include other objects besides those directed by the will, or it must be taken to have been a declaration in writing by the testator that he did not intend that construction of his own will which a court would put upon it if it were not so guarded. I, therefore, repeat that, in any view of the case, it is no authority to govern the present. D

The question, then, resolves itself into this. When this testator gave the residue of his property to two charities which he specified and to such others as he should thereafter specify, did he mean to say, or must he be taken as having meant to say, that this residue should devolve to charity, or did he mean, or must he be taken as having meant, to say: "Unless I name other charities besides those I have already specified, I do not mean to devote my residue to charity at all"? That is the true question upon the construction of this will; and the only question. E The subsequent words in the clause do not bear upon the point.

Nov. 13, 1815. LORD ELDON, L.C. (after stating the will and codicil and observing on them for the purpose of showing that there were no circumstances in the case affecting the general principle) delivered his opinion upon the residuary clause, as follows: The question reduces itself to that which is in substance this: Whether, regard being had to the rules applied by courts of equity for centuries past to cases of privileged testaments, the residue is effectually disposed of by this testator, privileged testaments being such, according to SWINBURNE (Part 1, F § 13, p. 52, 3), as "have some special freedom or benefit, contrary to the common course of law," and G

^{*} In interlocutory observations in the present case LORD ELDON said: "The reporter of *Wheeler v. Sheer* (4) does not state the grounds upon which LORD KING, L.C., decided it against the charitable intention of the testator. But, from the statement of the circumstances in that case, I should imagine it was considered that the codicil operated as a revocation, and that, by the direction in the codicil that the residue should be applied to 'such uses and purposes' as he should thereafter appoint, the testator had abrogated the 'charitable uses and purposes' expressed by his will. Subsequent cases have proceeded upon this principle, which clearly is law . . . In deciding *Moggridge v. Thackwell*, I took occasion to look into *Wheeler v. Sheer* (4), and examined it with great anxiety, and, after all the attention I have given to it, my notion is this—that, if that case had stood upon the will only, it would have fairly raised the question whether the note in FREEMAN [*Anon.* (1)] is law, but the circumstance of the codicil made afterwards naming purposes in general and not charitable purposes as had been done by the will alters the case in a point so essential as to render it of no authority in deciding the question at issue; and my opinion is that the case must, therefore, have been decided upon the principle that the first intention expressed by the testator was overruled by his second intention, and, consequently, that the rule of law applicable to cases of charity had there no place." In *Wheeler v. Sheer* (4) a testator, after giving several legacies, gave to his executors the residue of his estate upon trust that they should employ it to such charitable uses as by codicil he should appoint. By a codicil to his will he revoked some legacies and gave others, but named no charitable purposes, and he went on to direct that the residue given by his will should be applied to such uses and purposes as by any other codicil or codicils should be directed. He afterwards made a second codicil, still referring to the bequest in his will, but naming no charitable purposes, and finally a third, containing no direction as to his personal estate whatever. He died soon after. LORD KING, L.C., held that "where a man devises to such charitable uses as he had appointed, that supposes he had made an appointment, though it is not to be found: but here it was plain the testator had made no appointment, and only had it in his thoughts to do so." H I

"forasmuch as by a private or special law they are discharged from the usual orders or observations of common or general law, in that respect are called privileged."

In *A.-G. v. Syderfen* (2), which was a devise of an estate charged with payment of a sum of money in favour of a specific charity which the testator stated to have been already mentioned by him in a certain paper or note in writing, and no such paper to be found, the court construed the will in such a way as it is perfectly impossible it ever could have been construed if the case had been that of a gift to an individual, for though no evidence, whether admissible or inadmissible, was attempted to be produced of what was become of the paper, the court held that the will itself was sufficient evidence of the general charitable intention, and decreed accordingly. As is said by SWINBURNE (Part 7, § 16, p. 515, 16), speaking of testaments found cancelled or defaced, that, in general cases,

"the person in whose custody the testament is so found, is to be adjudged to have done the act, whether it be the testator or another. And if it be so that the testament were kept in such a place, as that not only the testator but others might have access unto it, in this case, the arguments and circumstances of the fact being equal and indifferent, the cancelling or defacing of the testament is rather to be ascribed to the testator than to others; who is also presumed to have done the same wittingly and willingly; saving in legacies of freedom, or ad pias causas, which being blotted or put forth by the testator, it is not presumed to have been done willingly."

So, in that case, it was held, in conformity with this doctrine, that, if the note were found to have been cancelled and it could not be known whether the testator had cancelled it wilfully, the court would not presume it to have been so wilfully cancelled. It was quite clear, from the will that the note had once been in existence, and that was enough for the court to decree a devise in favour of charity.

Moggridge v. Thackwell (5) was determined entirely by the force of precedents, much against my inclination, inasmuch as the appointment of an individual in whom alone the testatrix thought proper to repose the confidence which she reposed in Vaston indicated an intention of that peculiar nature which it is impossible to suppose could be in any degree rendered effectual by the court taking upon itself the administration of a trust certainly meant to be personally vested in the individual selected. Nevertheless, in that case I took it to be firmly established, upon the authority of precedents too numerous to be mentioned, that, although, in carrying into execution a bequest to an individual, the mode in which the legacy is to take effect must be of the substance of the legacy, yet, where the testator has sufficiently denoted that charity is his legatee, the court will consider charity as the whole substance of the legacy, and, in such cases only, will provide a mode by which that legatee shall take, but by which no other than charitable legatees can take. In *Moggridge v. Thackwell* (5), the bequest of the residue was, in substance, to such charitable purposes as a certain individual, Vaston, should appoint, and that individual died in the lifetime of the testatrix. The effect of that is precisely the same as if she had bequeathed the residue to such charitable purposes as she herself should appoint, and had died without appointing any. In either case, if the gift had been to "such persons" instead of "such charitable purposes," it is evident that it must have failed altogether, and, by establishing it in favour of charity, the court would not take upon itself to do more in the one case than in the other.

The same principle is applicable to that class of cases in which legacies have been given to superstitious uses. In those also the general charitable intention is held to prevail, and so the benefit designed by the testator for a particular object being taken by the court into its own hands as trustee to carry into effect the general intention is transferred by it to some other object altogether different from the former. Thus a sum of money given to found a Jew's synagogue is taken by the court according to that established principle and transferred to the benefit of the Foundling Hospital:

A *De Costa v. De Pas* (6). It is, therefore, no longer to be contended that a disposition in favour of charity can be construed according to the rules which are applicable to individuals. This is the view to be taken of the case mentioned by FREEMAN [*Anon.* (1)], that where a testator gives to such charitable uses as he shall direct and gives no direction the court will direct the uses to which it shall be applied. The case of "one Jones," [*Jones' Case* (3)] which is there referred to, is not now to be found
B [but see now [1893] 2 Ch. 49, n.], but if there is no express decision which has gone precisely the same length as the note in FREEMAN, it may safely be affirmed that neither is there any decision which has determined that the doctrine there laid down is not law, and it has certainly been cited as an authority in almost every case of a gift to charity that has come into question from those days to the present.

C Admitting all that LORD THURLOW said in *White v. White* (6) with regard to the decision in *Wheeler v. Sherr* (4)*, it is quite impossible to look into the circumstances of that case and say that it is a case which at all touches on the doctrine in FREEMAN. If that doctrine be law, the decision of the MASTER OF THE ROLLS on the present case cannot be right. If the law be that the nomination of the particular objects is only the mode and the gift to charity the substance of the testamentary disposition, and that the declaration of such a gift is substantially sufficient to give
D effect to the disposition, it is surely much less strong to say that, where the testator has himself expressed certain modes by which that effect may be given to it, it shall be carried into execution accordingly than to say that, because he has expressed an intention of naming certain other modes in addition to those which he has named and has not named those others, therefore, his intention must fail altogether than to
E say (in short) that, because he has contemplated a division in certain proportions which he has omitted to render certain, that uncertainty must operate to prevent his general intention, which is ascertained, from taking effect in any manner whatever. Would this be to decide according to the authority of established precedents? How can uncertainty as to the mode operate to defeat the intention, when the impossibility of a certain mode taking effect at all does not so operate?

F In *Moggridge v. Thackwell* (5), the same difficulty occurred as to the proportions. There, the testatrix herself recommended certain purposes, leaving it to her trustee to name others according to his own discretion. It was in the contemplation of that testatrix that other objects should be adopted besides those which she had herself pointed out. Then, how could it be known in what proportions she meant that the
G objects she had so pointed out should be benefited? Can the word "divide" (a word which does not necessarily imply equality of division) constitute such a difference between that case and this as that, because the testator directed his property to be "divided" for the purposes which he had named and those which he intended to name, he must be taken to have meant that his property should not go to those which he has named unless he should thereafter name others also? I doubt, even in the case of individual legatees, whether this would be the right construction. A
H testator says: "I give to A. and B., and such other persons as I shall name hereafter." He has, therefore, designated A. and B. as particular objects of his bounty, and it would be putting a very forced construction upon his meaning to infer that he intended to say, "I do not give to A. and B. unless I shall name certain other persons hereafter." Then, are the next of kin to be substituted in the place of those other charities which the testator intended to name, so as to take, in any, and (if in any)
I in what, proportions, together with the charities, which he has named? It is evident that this latter question does not arise supposing the testator to have effectually devoted the whole of his residue to charity, and my construction of his bequest is this: "I give my residue to charitable purposes. At present, I go the length of

* LORD THURLOW said: "In *Wheeler v. Sherr* (4), in LORD KING's time, there was no appointment, but the testator had procrastinated the legacy; that evidence satisfied LORD KING that the testator had not so fixed his mind as to separate the legacy from the personal fund, and he would not carry the charity into execution."

saying that A. and B. shall be two of those purposes. I mean to name others hereafter." By not naming others, can it be said that he has restricted the generality of his former absolute gift to charity?

I repeat that I am sorry for it, because I am very unwilling to differ from any opinion pronounced by so great an authority as that of the MASTER OF THE ROLLS; but, in the present case, I find myself driven to say that, in my judgment, this is a bequest to charitable purposes. It, therefore, follows, that a scheme must be laid before the Master, regard being particularly had to the charitable institutions denoted by the testator, but not so as to confine the bequest to those only. If the next of kin should think proper to carry the question before the House of Lords, and if, in the further discussion before that tribunal, it shall be found practicable to mark any distinction between this case and those other cases upon the authority of which I have felt it necessary that this be now decided, I shall be glad to assist that decision to the utmost point that it will bear. But I cannot say that I, at present, perceive any such distinction. The decree, as pronounced by the MASTER OF THE ROLLS, must, then, be reversed. The Attorney-General and the executors are to present the scheme before the Master. All parties to have their costs of this appeal, out of the estate, as between attorney and client.

Decree accordingly.

ATTORNEY-GENERAL v. PEARSON AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), July 14-17, 1817]

[Reported 3 Mer. 353; 36 E.R. 135]

Charity—Religion—Trust to maintain "worship of God"—Presumption in favour of established religion—Intention expressed aliunde trust instrument.

If a trust provides for maintaining "the worship of God," without more, the court will execute the trust in favour of the established religion, but, if it be clearly expressed that the purpose is to maintain a congregation of dissenters, so long as the doctrines promoted are not contrary to law, the court will execute the trust according to the express intention. Where the intention appears aliunde, not being expressed in the instrument creating the trust, the court will carry the manifest design of the founder into execution, so far as it is consistent with law.

Charity—Religion—Ascertainment of form of worship—Usage of congregation—Alteration of object of charity—Particular doctrine clearly expressed by founder.

Where a trust is created for religious worship and it cannot be discovered from the deed creating the trust what form of religious worship was intended by it the court must inquire what has been the usage of the congregation, and, if the usage turns out to be such as can be supported, must administer the trust so as best to establish the usage, considering it a matter of implied contract between the members of the congregation. If, however, it appears to have been the founder's intention that a particular doctrine should be preached, it is not in the power of the trustees, or of the congregation, to alter the designed objects of the institution. Where a congregation have become dissentient among themselves the nature of the original institution must alone be looked at as the guide for the decision of the court.

Per LORD ELDON, L.C.: It is incumbent on persons meaning to create a trust for charitable purposes to make their intention clear by the deed creating the trust. If it is not so, the court has no means of ascertaining the intention except

- A** by looking to what has passed, and thereby collecting what may, by fair inference, be presumed to have been the intention of the founders and thence presuming what their object was.

Charity—Administration—Dispute—Proposed alteration—Presumption against change.

- B** Where two parties seeking the benefit of a trust for charitable purposes differ as to the mode of carrying it into effect, one party being in support of the original system and the other for some proposed alteration to be made in it, the leaning of the court must be to support those adhering to the original system and not to sacrifice the original system to any change of sentiment in the persons seeking alteration, however commendable that proposed alteration may be.

- C** *Charity—Religion—Dissenting congregation—Appointment of minister for limited period or subject to removal at pleasure.*

No principle of public policy prevents the court from sanctioning the appointment of a minister to a dissenting congregation for a limited period or on condition that he is removable at pleasure and not for life, if such a practice be according to the general usage of the congregation and the provisions of the original trust.

- D** *Criminal Law—Blasphemy—Offence at common law—Effect of statutory provisions.*

Blasphemy is an offence at common law punishable by fine and imprisonment. The provisions of the Blasphemy Act, 1697, and the Doctrine of the Trinity Act, 1813, did not affect the position at common law, but left the common law as it was before the statute was passed.

- E** **Notes.** Applied: *Shore v. Wilson* (1843), 9 Cl. & Fin. 355. Considered: *A.-G. v. Shore* (1843), 11 Sim. 592; *A.-G. v. Murdoch* (1852), 1 De G.M. & G. 86. Distinguished: *A.-G. v. Etheridge* (1862), 32 L.J.Ch. 161; *A.-G. v. St. John's Hospital, Bath* (1876), 2 Ch. D. 554. Considered: *A.-G. v. Ramsey* (1883), Cab. & El. 126; *A.-G. v. Anderson* (1888), 57 L.J.Ch. 543; *Free Church of Scotland v. Overtoun, Macalister v. Young*, [1904] A.C. 515. Referred to: *West v. Shuttleworth* (1835), 2 My. & K. 684; *Milligan v. Mitchell* (1837), 3 My. & Cr. 72; *Collier v. King* (1861), 11 C.B.N.S. 14; *A.-G. v. Bunce* (1868), L.R. 6 Eq. 563; *Grimond (or Macintyre) v. Grimond*, [1905] A.C. 603; *Bowman v. Secular Society, Ltd.*, [1916-17] All E.R. Rep. 1; *Bourne v. Keane*, [1918-19] All E.R. Rep. 167.

- G** As to religious trusts, see 4 HALSBURY'S LAWS (3rd Edn.) 287-290; and for cases see 8 DIGEST (Repl.) 331 et seq.

Cases referred to in argument:

- A.-G. v. Fowler* (1808), 15 Ves. 85; 33 E.R. 687, L.C.; 8 Digest (Repl.) 339, 206.
R. v. Barker (1762), 3 Burr. 1265; 1 Wm. Bl. 300, 352; 97 E.R. 823; 19 Digest (Repl.) 575, 4149.
H *R. v. Jotham* (1790), 3 Term Rep. 575; 100 E.R. 741; 19 Digest (Repl.) 575, 4150.
R. v. Taylor (1676), 1 Vent. 293; 3 Keb. 607, 621; 86 E.R. 189; 15 Digest (Repl.) 878, 8455.
R. v. Woolston (1729), 1 Barn. K.B. 162; Fitz-G. 64; 2 Stra. 834; 94 E.R. 112; 15 Digest (Repl.) 880, 8481.
De Costa v. De Pas (1754), Amb. 228; Dick. 258; 27 E.R. 150; sub nom. *De Costa v. De Paz*, 2 Swan. 487, n., L.C.; 8 Digest (Repl.) 339, 211.
I

Information and Bill to quiet the possession of the relators and plaintiffs (one claiming as the surviving trustee, the other as minister, of a Protestant Dissenting meeting-house), for an appointment of new trustees, and an injunction to stay proceedings in ejectment by the defendants, who claimed also to be trustees of the meeting-house.

On a motion by the plaintiffs for an injunction it appeared that the meeting-house was erected in the year 1701, under a trust-deed whereby the purpose was declared

to be "for the worship and service of God." The plaintiffs, the Attorney-General at the relation of Benjamin Mander and the Rev. John Steward, Benjamin Mander, and John Steward, contended from the purpose so expressed that the intention was to promote the doctrine of the Holy Trinity and that the trust could not be diverted from the purpose for which it was intended. The defendants insisted that the intention was as general as the purpose expressed, and had no regard to any particular tenets. It was also made a question whether a trust for supporting Unitarian worship was legal and could be supported, and it was further disputed who, according to the true construction of the deed, were entitled, as trustees, to the possession of the meeting-house and whether the minister of a dissenting congregation, elected for a limited period, was afterwards removable at pleasure.

Sir Samuel Romilly, Hart, Shadwell, and Ching in support of the motion.

The Solicitor-General (Sir Robert Gifford), Benyon, and Phillimore for the defendants.

LORD ELDON, L.C.—There are so many considerations in this case of great importance not only to the individuals concerned in the controversy, but to the public at large, that I should not execute my duty in stating any opinion I may at this moment entertain, as final and conclusive, until after I shall have had an opportunity of considering the bill and answer.

The questions that have arisen are many and various. If it were a case that presented nothing more than the title of the parties—a Protestant Dissenting congregation—to have certain trusts established and seeking to have them administered by this court, there would be no difficulty attending it, and, in considering what is to be done, I do not think that we should have occasion to disturb ourselves with any question on the practice of the court as to this being the case of a common or special injunction, and so forth, because, taking it to be a trust in the nature of charity for religious purposes, I conceive that the court is in the constant habit in such cases of saying that, provided it sees any way of deciding the points at issue, it will not allow the parties to go to trial, but will itself find the means of putting the matter into a course which may save all the expense of such a proceeding. If it should turn out to be clear upon the bill and answer that a certain portion of the legal trust estate is vested in a plaintiff and a certain other portion in the defendants, I take it to be quite within the compass of the court's jurisdiction to say that I will put the parties exactly in the same condition as to the point of issue as if there had been a trial, judgment, and execution at law. If, however, this be anything more than a mere suit for the administration of a trust, where it is clear who are the parties having the legal estate, and what are the trusts which are sought to be administered, I must precisely understand the nature and extent of the questions before I attempt the decision of them.

It is represented that this is an institution for the benefit of a Protestant Dissenting congregation consisting in the application of certain trust property to the maintenance of a preacher to that congregation. It may be stated that this court is unquestionably bound to administer such a trust, and to administer it (as it should every other trust) with all the expedition possible. But it must, on the other hand, be admitted that these are not cases in which justice can always be administered with the promptitude which the parties desire, and, if the present be not the case of a simple trust at its first creation, or if it be the case of a trust which has been rendered complex by the parties—by the acts of the trustees having the legal estate, by requiring the accession or consent of subscribers, or of the whole congregation, to their acts—in short, if any of those various questions arise in it which are of such frequent occurrence in cases of this description, although it is very easy to apply to this court for a remedy, it is rather more difficult to find out what is the remedy that ought to be administered.

It is insisted that this was, originally, a Protestant institution for the celebration of divine worship, and, although thus generally expressed, yet it is also further

A insisted that the very instrument creating the trust bears on the face of it evidence that the worship intended to be celebrated was a worship consonant with the acknowledgment of the doctrine of the Trinity—For, say the defendants, the deed contemplates the possibility of the legislature at some future period making it unlawful to celebrate divine worship in the mode thereby intended—which renders it evident that the mode so intended was not at that period unlawful—whereas

B doctrine of those who impugn the Trinity was then an unlawful doctrine, being expressly excepted out of the provisions of the Toleration Act, 1688, and, consequently, could not be in the contemplation of that clause in the deed. On the other hand, it is contended, that the Doctrine of the Trinity Act, 1813, extending the benefit of the Toleration Act to persons impugning the Trinity and repealing another Act of William which inflicted certain penalties on the offence, has removed the

C difficulty.

It is certainly true that the legislature has so done—it is also true that it has by the same Act repealed a Scottish statute which (as I recollect) inflicted the punishment of death on the offence of denying the Trinity, and that it has within the last week passed an Act [the Irish Dissenters Act, 1817] having a similar operation on the laws respecting the same offence as they regarded Ireland, but of this I am satisfied, that in one House of Parliament at least it was never intended by these measures to do anything that should alter or in any manner affect the common law.

D I do not, sitting here as a judge in equity, presume to say what is the doctrine of the common law as to the subject in question, nor what effect, intended or not intended by the legislature, these late Acts may have upon it, but, if the common law remains

E yet unaltered, and if the impugning the doctrine of the Trinity be an offence indictable by the common law it is quite certain that I ought not to execute a trust the object of which is illegal. The business of a judge is not to consider what is the kind or degree of toleration which he would himself be inclined to extend, but what is that which the law has granted—not what he would do if the question were left to his own discretion in the exercise of his judicial authority but that the legislature has

F authorised or forbidden.

But there is another view in which the case should be considered, and it is this, that, where an institution exists for the purpose of religious worship and it cannot be discovered from the deed declaring the trust what form or species of religious worship was intended, the court can find no other means of deciding the question than through the medium of an inquiry into what has been the usage of the congregation in respect to it, and, if the usage turns out upon inquiry to be such as

G can be supported I take it to be the duty of the court to administer the trust in such a manner as best to establish the usage, considering it as a matter of implied contract between the members of that congregation. But if, on the other hand, it turns out (and I think that this point was settled in a case which lately came before the House of Lords by way of appeal out of Scotland) that the

H institution was established for the express purpose of such form of religious worship, or the teaching of such particular doctrines, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members: “We have changed our opinions, and you, who assemble in this place for the purpose of hearing the doctrines and joining in the worship prescribed by the

I founder, shall no longer enjoy the benefit he intended for you unless you conform to the alteration which has taken place in our opinions.” In such a case I apprehend that, where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the court, and that to refer to any other criterion—as to the sense of the existing majority—would be to make a new institution which is altogether beyond the reach, and inconsistent with the duties and character, of this court.

In this view of the case, it is of the first importance to see what the record before the court says upon the subject of the original institution. Without entering into what may be the effect of the late statute repealing several then existing laws on the subject (a question which it is not for me, sitting in a court of equity, to determine, and which would certainly be much better decided by the judges of the courts of common law), without even so much as looking to the point whether it be or be not legal, at this day, to impugn the doctrine of the Trinity (although that is a point upon which indeed I have an opinion, only I do not find myself called upon now to declare it), what I have now to inquire is whether the deed creating the trust does, or does not, upon the face of it (regard being had to that which the Toleration Act at the time of its execution permitted, or forbade, with respect to doctrine) bear a decided manifestation that the doctrines intended by that deed to be inculcated in this chapel were Trinitarian. Because, if that were originally the case, and if any number of the trustees are now seeking to fasten on this institution the promulgation of doctrines contrary to those which, it is thus manifest, were intended by the founders, I apprehend that they are seeking to do that which they have no power to do, and which neither they, nor all the other members of the congregation, can call upon a single remaining trustee to effectuate. In this view of the case, also, supposing even that at the time of the establishment of this institution it had been legal to impugn the doctrine of the Trinity, yet if the institution had been established for Trinitarian purposes, it could not now be converted to uses which are anti-Trinitarian. For (meaning, however, to speak with all due reverence on such a subject) to allow such a conversion would be to allow a trust for the benefit of A. to be diverted to the benefit of B. The question then resolves itself into this—whether such a conversion in the case of a trust can possibly be supported. If, therefore, this appears on the face of the deeds to be the nature of the present case—as I am inclined to believe it does—it disposes of the question, affording a short and direct reason for not refusing the interference of the court.

With respect to the choice of the minister—regard being had to the circumstance that this is the case of a Protestant Dissenting minister—I am not sufficiently acquainted with the principles upon which these congregations usually act to say much upon that subject without more information than has yet been communicated to me. It may be according to general usage among certain classes of persons dissenting from the Establishment to appoint their ministers for limited periods, or to make them removable at pleasure, and, although a court of equity may not be disposed to struggle hard in support of such a plan, yet, were the court to find such a plan established, I know of no principle upon which the court would not be bound, if called upon for the purpose, to carry it into effect. The policy of the established church has been, by giving the minister an estate for life in his office, to render him (in a certain degree) independent of his congregation, but I do not see how this policy can be extended so as to govern the decision of the court in a case of this nature where the trust which the court is called upon to establish is otherwise constituted. So again, with respect to those in whom resides the right of election, I apprehend that here also the court must not be governed altogether by what it finds on inquiry to have been the established usage. On this subject various statements have been made in the present case, but the deeds are silent. At the same time, however, that I am fully aware of the difficulties the court has to encounter in executing a trust of this kind, I also know that it is the duty of the court to struggle with them, and I shall endeavour to execute the trust as well as I can. But, while so many points are unascertained, it is impossible to come to any right decision—it is impossible for the court to execute any trust until it knows who are the persons in whom it is vested and what are its objects.

Of one thing at least I am certain—that there must be no proceeding to trial of the ejectionment which cannot, under these circumstances, be attended with any other than a most fruitless and unnecessary expense to the parties, and because, if I can find out the true state of the case with reference to the subject-matter of these

A inquiries I shall thereby be enabled to make such an order as will embrace all points in dispute between them.

July 17, 1817. **LORD ELDON, L.C.**—The motion before me was made in a cause in which the Attorney-General, at the relation of Benjamin Mander (the surviving trustee under certain instruments which I shall have occasion to mention),
B and the Rev. John Steward (who alleges himself to be minister of the congregation of Protestant Dissenters assembled at Wolverhampton), are plaintiffs, and the defendants are Joseph Pearson and four others representing themselves to be (together with Mander) the trustees of the property in question (which property has been given, as it is expressed in some of these deeds, to the charitable purpose of maintaining this meeting-house) and further contending that Mander ought not to be considered, under the circumstances of this case, (created by his own conduct) as being
C a trustee, or, if he be considered as having vested in him the legal estate in a certain portion of the premises, still that he ought to be held incapable of acting by reason of these circumstances. This information (as I understand it) is filed for the purpose of preventing those who, it alleges, are not to be considered as trustees from acting in the discharge of what does not belong to them, or, on the other hand, if they be
D invested with the character of trustees by reason of having the legal estate in them, then the information is to be considered as insisting that, being invested with the character of trustees for one purpose, they are proceeding to act in that character for a purpose wholly different, and upon this ground contending that the plaintiffs are entitled to certain relief prayed—particularly to that which is the subject of the present application.

E It becomes here necessary (not for the purpose of expressing an opinion on some of the doctrinal points argued at the Bar, but in order to see what may be collected by way of fair inference as to the meaning of the original founders), after observing that the first trust-deed is dated in 1701, to state that in the year 1688 was passed the Act commonly called the Toleration Act which exempted certain persons, coming
F under the description of Protestant Dissenters from the penalties of the laws therein mentioned. The object seems to have been merely as stated in the title of the Act, viz., “to exempt His Majesty’s protestant subjects dissenting from the Church of England from the penalties” of the laws therein mentioned—not appearing, therefore, either upon the terms or substance of it, to have done or to have intended to do any more, but leaving the common law exactly as it was with respect to all common
G law offences against religion or religious establishments. In that Act there is an express provision, s. 17 :

“that no clause or article therein should extend to give any ease, benefit, or advantage to any Papist, or Popish recusant whatever, or any person who should deny the doctrine of the Blessed Trinity declared in the Articles of Religion.”

H Afterwards, in 1697 the Blasphemy Act of that year was passed, intituled “An Act for the “more effectual suppressing of blasphemy and profaneness,” and it recites that, whereas many persons had of late years openly avowed and published many blasphemous and impious opinions, contrary to the doctrines and principles of the Christian religion, greatly tending to the dishonour of Almighty God, which might prove destructive to the peace and welfare of this kingdom, therefore, “for the
I more effectual suppressing of the said detestable crimes,” it was enacted that :

“If any person or persons having been educated in, or at any time having made profession of, the Christian religion within the realm, shall by writing, printing, teaching, or advised speaking [deny any one of the Persons of the Holy Trinity to be God, or shall] assert or maintain that there are more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testaments to be of Divine authority, and shall, upon indictment or information . . . be thereof lawfully convicted by the oath of two or more credible witnesses,”

such person should, for every such offence and for the repetition thereof, incur such several and distinct disabilities and penalties as by the Act were provided. [The words in square brackets were repealed by the Doctrine of the Trinity Act, 1813, itself repealed by the Statute Law Revision Act, 1873.]

It is to be observed that the opinions, the publication of which in any of the modes specified it is the intention of this Act to prevent, are not thereby expressed to be opinions contrary to those of the Church of England, but contrary to the Christian religion. And the Act proceeds to point out more precisely what is the nature of those opinions which it thus declares to be contrary to the Christian religion, viz., the denial of any one of the Persons in the Holy Trinity to be God, etc. It is further to be observed that the information which was to lead to conviction, where the consequences were so extremely penal, is by the statute required (in the case, at least, of words spoken) to be within three months of the time of the words being spoken, and that an opportunity is also given to the offender publicly to renounce his error in the same court where he had been convicted and thereupon to be discharged from all penalties incurred by such conviction. There can be no doubt (at least so I apprehend) that, prior to this statute, blasphemy was an offence punishable at common law, and it is impossible to contend (as it appears to me) that (whether the preamble is or is not to be taken as a ground of ascertaining that the doctrine reprobated in the enacting parts amounts to blasphemy—on which it does not become me to give an opinion) the penalties inflicted by the statute give any foundation for supposing that there could no longer exist a punishment for blasphemy at common law, independent of the statute. On the contrary, the common law is left by the statute exactly as it was before the statute passed. [See 10 HALSBURY'S LAWS (3rd Edn.) 661-663.]

[HIS LORDSHIP referred to certain Scottish statutes repealed by the Doctrine of the Trinity Act, 1813, and continued]: I apprehend that the Doctrine of the Trinity Act, 1813, left the common law exactly where it was. Conceiving the object of this information to be as I have already represented it to be, and, remembering that (whatever may have been stated at the Bar with respect to the question what is or what is not criminal in the conduct of the parties) I (sitting here) can only administer the civil rights of the parties, this court having no office to determine what is or is not an offence or crime except where the question arises as of necessity by its being called upon to administer trusts or regulate civil rights which are involved in its decision, I will, therefore, confine myself entirely to the consideration of the civil question, namely, what, in respect to doctrine was the intent of the founder of this charity.

It must be recollected that by the Toleration Act the benefit of that Act was declared not to extend to persons impugning the doctrine of the Trinity. That Act passed in 1689, and in 1701 (shortly after the opinions in question had been thus expressly declared by the legislature not to be proper subjects for the toleration which the legislature had been granting to every other class of dissenters) the first of those deeds upon which the questions in the present cause arise was executed.

[HIS LORDSHIP read the deed of Oct. 30, 1701, observing the allegation in the answer that the feoffment was followed by livery of seisin, a circumstance which he did not see alleged, or that it could be made out, as to some of the subsequent feoffments. On the purpose for which the meeting-house was declared to be erected, viz., "for the worship and service of God," HIS LORDSHIP remarked that the terms were very general. He continued:] Several passages of this indenture have been particularly taken notice of in the course of the discussion at the Bar. There is quite sufficient of allegation in the information to show that it was a body of Protestant Dissenters who established this meeting-house in order to have preached in it the religious doctrines to which they were attached, and, more especially, if it cannot be said for the express purpose of inculcating the doctrines of the

A Trinity, yet that they were dissenters entertaining such a class of opinions as that the doctrine of Unitarianism would be directly at variance with their purpose in founding this meeting-house. I observe upon this particularly because I take it that, if land or money were given (in such a way as would be legal notwithstanding the statutes concerning dispositions to charitable uses) for the purpose of building a church or a house or otherwise for the maintaining and propagating
B the worship of God, and if there were nothing more precise in the case, this court would execute such a trust by making it a provision for maintaining and propagating the established religion of the country. It is also clearly settled that, if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of Protestant Dissenters—promoting no doctrines contrary to law, although such as may be at variance with the doctrines of the
C established religion—it is then the duty of this court to carry such a trust as that into execution, and to administer it according to the intent of the founders.

In the present case it is impossible to doubt that the trust was originally created for the purpose of maintaining a Protestant dissenting institution, and it would be doing violence to the intention of the parties to these deeds to say that the worship and service of God being the object expressed by them, the trust must be
D administered in such a way as to maintain the religion of the established church. Nevertheless, I take it from the experience of many years in this court that, if any body of persons mean to create a trust of land or money in such a manner as to render the gift effectual and to call upon this court to administer it according to the intent of the foundation, whether that trust has religion for its object or not,
E it is incumbent on them, in the instrument by which they endeavour to create that trust, to let the court know enough of the nature of the trust to enable the court to execute it, and, therefore, where a body of Protestant Dissenters have established a trust without any precise definition of the object or mode of worship, I know no means the court has of ascertaining it except by looking to what has passed, and thereby collecting what may, by fair inference, be presumed to have
F been the intention of the founders. From this deed, I can collect that the founders were Protestant Dissenters and thence presume that their object was the maintenance of Protestant dissenting worship, but I have nothing to inform me what species of doctrine this institution was intended to maintain, except as I may be able to infer from some of the clauses of the deed, and particularly from that clause which alludes to the possibility of the future prohibition by law of the worship
G thereby intended to be established, and also from that which relates to the binding effect of orders to be made by a majority of the trustees, upon matters relating to the meeting-house only; from which it should appear, both that the founder meant to establish an institution which was not then contrary to law, and that they did not mean to invest in the trustees, or the major part of them, any right to vary the system or plan of doctrinal teaching which was to be maintained
H in this meeting-house according to their own discretion.

When I look to the date of the deed of 1701 and to the dates of the Toleration Act [1688] and of the Blasphemy Act [1697] and also to the deed executed in 1742, which contains the same clause as that of 1701, it is impossible to say that, while the founders contemplated the eventual abrogation of the existing system of toleration, they were in fact intending to create by that very deed a system
I which was at that time illegal and which had been excepted out of the Toleration Act as a system unfit to be included in the toleration which was extended by it to all other modes of Protestant dissent, the legislature at that time intending to embrace all the doctrines that could be safely included in that toleration. This clause, therefore, seems to afford extremely strong countenance to the allegation that the institution was not intended to be for the maintenance of those opinions which impugn the doctrine of the Trinity. With respect to the clause which invests the trustees, or the major part of them, with the power of making orders from time to time upon matters relating to the meeting-house, I think it would

be doing violence to all the principles of construction upon which we act to understand it as meaning that those trustees, or the major part of them, should have power to convert that meeting-house, whenever they thought proper, into a meeting-house of a different description, and for teaching different doctrines from those of the persons who founded it, and by whom it was to be attended. I say, that appears to me to be as inconsistent with the probable meaning of the original founders, as it would be to hold that they meant it should be converted, at the discretion of the trustees, into a place of worship according to the form and doctrines of the Church of England. A
B

With regard to the clause which is supposed to affect Mander's character as a trustee from his having withdrawn himself from the congregation, it is to be observed, first, that he could not be discharged under it without a regular proceeding on the part of the remaining trustees to replace him by a successor, and, next, if the meaning of these parties has been to divert the institution from its original purpose by causing it to maintain doctrines such as these that are charged by the information, this court would never permit that he should be discharged from the office of trustee for endeavouring to preserve the object and ends of the institution for the protection of which the very clause now insisted upon as depriving him of his character of trustee was introduced into the instrument. C
D

Another part of the trust is settled by a deed of Feb. 1 and 2, 1720. Upon the provisions of this deed there arises a question (upon which usage will have great effect) whether, according to the original constitution of this society, the minister, preacher, or pastor could be appointed for three years only, or whether according to the general principles of this body of dissenters, the congregation and minister might agree that the one will give, and the other accept, a nomination for three years only. It appears highly probable that the person who gave this part of the fund contemplated a provision for the minister for his life since he has expressly given it to him for life even when he could no longer officiate as minister, but, on the other hand, it may turn out to be established by usage that he was only a temporary minister, elected with the concurrence of the congregation and liable to be removed in the same manner as he was called upon to officiate. E
F

Upon the clause respecting the desertion or removal of any of the trustees, which occurs in this deed also, and contemplates the event that the trustees

“should change, or become of any other religion or persuasion whatsoever, contrary to, and different from, the said congregation,”

I must observe that, if the question comes before this court in the execution of a trust whether a trustee has been properly removed, and that point depends upon the question whether the trustee has changed his religion and become of another (as in this instance) different from the religion of the rest of the society, it must then be ex necessitate for the court to inquire what was the religion and worship of the society from which he is said to have seceded, not for the purpose of animadverting upon it, but in order to ascertain whether or not the charge is substantiated. It must then be necessary that this court should inquire what religion the congregation is of and also what is the religion of the man who is, or is sought to be, removed from the trusteeship because he is of a different religious persuasion from that of the congregation. G
H

Then follow the words of the clause relating to the appointment of new trustees. I in any of the events before contemplated. This trust, being created in 1720, became, in 1792, vested in Mander and eleven others, including a person, who (it is insisted by the defendants) never acted, and the object of the information is to allege, first, that Mander is the only trustee, and that the defendants have no right to interfere at all, and, next, that, if the defendants can be considered as being invested with the character of trustees as well as Mander, they have no right to act as they are now doing by reason of their not having observed due forms in their proceedings, and being engaged in introducing a doctrine and mode I

A of worship into the meeting-house directly contrary to that which it was the original founder's intention should be preached and maintained in it. If the defendants have not been duly elected trustees, then Mander must be admitted to be certainly the surviving and only trustee, as all the other trustees named in the deed of 1772 are dead, and the defendants admit that the legal estate, in a fifth of a part of the property and in a sixth of another part, is still vested in B Mander, but they nevertheless contend that, Mander not having done any act in the execution of the trust since 1792 or 1793, this legal estate must be in him only subject to the trusts being administered by them (the defendants) according to their own discretion. . . .

C I have nothing to do here in the way of pronouncing any opinion as to any religious doctrine whatever. This case must be discussed exactly as if it were the case of a charity properly created, having no relation whatever to any religious purpose, but a case in which one party contends that the trust was originally for purposes of a particular description (and has a right so to contend) against another party who insists that it was originally for other purposes. The court is bound to determine this question if it arises. It would not, perhaps, be difficult D to decide where the legal estate is, but, after that has been disposed of, there still remains the other question—for what purpose that legal estate was vested in the persons in whom it now resides? For the court will not permit that purpose to be altered, unless it be obvious, from the original nature of the institution that it was meant to be capable of such alteration.

E Where a clergyman is presented to a living in the Church of England we know the duties committed to him and the grounds upon which he is bound to execute those duties, but, as the justice of this country has for the ease of men's consciences permitted them to secede from the established church and to form religious institutions for themselves to a certain extent, it has become the duty of this court, and others of a like nature, to enforce the execution of trusts for such institutions, and to give the parties who are trustees that relief which the legislature meant F they should have. It is necessary, therefore, to look to the instruments, to know what are the trusts which the court is called upon to enforce the execution of, and, if the parties themselves do not give the information which is requisite, it is in vain to look for a prompt decision with reference to the point in controversy, because, till inquiry has been made as to the nature of the trusts, a judge must remain in ignorance of the duty he has to perform. Where, then, a charitable G institution of this kind is founded—or let us say it were for a civil purpose that we may the more temperately discuss the subject—I apprehend that where a man gives his money to such an institution for a civil purpose one of the duties of this court is to take care that those who have the management of it shall apply it to no other purpose so long as it is capable of being applied according to the original intention. If, upon inquiry, it shall be found that in this case the land H was originally given, and the money originally subscribed for the purpose of forming an institution such as the Attorney-General in his information has alleged that this institution should be, then those who object to any change in the institution from its original purposes are not guilty of departing from the institution, but are only doing their duty in endeavouring to prevent such a departure from the purposes of the institution in others, and, if the allegation is that there has been such an I alteration of sentiments on the part of the congregation, they certainly do throw great difficulties in the way of the court's carrying the trusts into execution in any manner whatever.

I must here again advert to the principle which was, I think, settled in the case to which I referred the other day as having come before the House of Lords on an appeal from Scotland, viz., that, if any persons seeking the benefit of a trust for charitable purposes should incline to the adoption of a different system from that which was intended by the original donors and founders and others of those who are interested think proper to adhere to the original system, the leaning

of the court must be to support those adhering to the original system and not to sacrifice the original system to any change of sentiment in the persons seeking alteration, however commendable that proposed alteration may be. Upon these grounds, I have nothing at all to do with the merits of the original system, as it is the right of those who founded this meeting-house and gave their money and land for its establishment to have the trusts continued as was at first intended. It is necessary, therefore, to make inquiries as to what was the nature of that original system and in the meantime, it is perfectly absurd that any ejectment should be going on.

For these reasons, I shall now grant an injunction, not till the hearing of the cause, but till the further order of this court, the parties undertaking to account for the immediate rents and profits (except so far as is necessary to maintain the minister) and to obey such order as the court shall make. If the parties will submit to give that undertaking, I do not know how to go more promptly to a decision than by allowing the matter of inquiry to go to the Master immediately.

[The parties having acquiesced in regard to the proposed undertaking, His LORDSHIP proceeded to direct the inquiries, which were afterwards drawn up according to the form of the following minutes: "The relators and defendants undertaking to obey such order as this court may hereafter think fit to make with respect to the possession and intermediate rents of the meeting-house, etc., let the defendants be restrained by the injunction of this court from further proceeding at law in the ejectment, etc., and from all other proceedings at law to recover possession, etc., until the further order of this court" and refer certain matters for inquiry by the Master.]

R. v. HEREFORDSHIRE JUSTICES

[COURT OF KING'S BENCH, May 9, 1820]

[Reported 3 B. & Ald. 581; 106 E.R. 773]

Time—Computation—Notice—"Clear days."

When a period is expressed in a legal document as being so many "clear days" it means the specified number of perfect intervening days between the beginning of the period and its end. Where, by the Bastardy Act, 1809, s. 5, ten clear days' notice before the quarter sessions of intention to appeal to the sessions against an affiliation order was needed,

Held: the ten clear days meant ten perfect intervening days between the day of the giving of the notice and the first day of the sessions.

Notes. As to computation of time, see 37 HALSBURY'S LAWS (3rd Edn.) 92 et seq.; and for cases see 45 DIGEST (Repl.) 252 et seq.

Case referred to:

(1) *Roberts v. Stacey* (1810), 13 East, 21; 104 E.R. 274; 45 Digest (Repl.) 256. 232.

Rule Nisi for mandamus.

Joseph Stinton, having had an order of filiation made on him as the father of a bastard child, served a notice of appeal to the quarter sessions for the county of Hereford, on the morning of Oct. 9. The sessions were holden on the 19th of the same month and the court refused to enter on the appeal, being of opinion that the notice was insufficient, the Bastardy Act, 1809 s. 5 [repealed], requiring that the person aggrieved by such an order should give notice ten clear days before the quarter sessions of his intention to appeal, and the cause and matter thereof.

A Abraham showed cause against the rule.

W. E. Taunton supported the rule.

Per Curiam: Ten clear days means ten perfect intervening days between the act done and the first day of the sessions, and, therefore, the notice was defective: see *Roberts v. Stacey* (1).

Rule discharged.

B

C

WALKER AND OTHERS *v.* SYMONDS AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), April 2, 8, 11, 16, 18, 21, 25, May 26, June 2, 10, 13, July 6, 1818]

[Reported 3 Swan. 1; 36 E.R. 751]

D

Trustee—Duty of trustee—Disposition of trust fund—Duty to inform cestui que trust—Need to give complete information.

It is the duty of trustees to afford to their cestui que trust accurate information of the disposition of the trust fund—all the information of which they are, or ought to be, in possession. A trustee may involve himself in serious difficulty by want of the information which it was his duty to obtain.

E

Per LORD ELDON, L.C.: He who, undertaking to give information, gives but half information, in the doctrine of this court conceals.

Trustee—Several trustees—Decision—Need for unanimity—Discharges of debt.

In the case of a private trust where there is more than one trustee the concurrence of all the trustees is necessary to effect any transaction affecting the trust property. Accordingly, a discharge for a debt due to the trustees cannot be given by one of them.

F

Trust—Cestui que trust—Acquiescence in breach—Release of trustees—Inquiry by court.

Trustee—Breach of trust—Action by cestui que trust—Proceeding against one or all of several trustees.

G

If a cestui que trust [seemle of full age and under no incapacity], knowing all the circumstances, joins with the trustees in a breach of trust, he cannot complain of the breach and obtain relief for it. Concurrence in the act, or acquiescence without original concurrence, will release the trustees, but that is only a general rule, and the court must inquire into the circumstances which induced the breach or acquiescence, recollecting in the conduct of that inquiry how important it is, on the one hand, to secure the property of the cestui que trust, and, on the other, not to deter persons from undertaking trusts.

H

On the other hand, when several trustees are involved in a breach of trust a cestui que trust suffering from that breach and proving that the transaction was neither authorised nor adopted by him may proceed against any one or all of the trustees.

I

Trust—Investment—Personal security—Trust money left for unduly long period.

In the absence of express authority in the trust instrument the investment of trust money on personal security is a breach of trust.

Although the court in directing an inquiry will proceed as favourably as it can to trustees who have laid out trust money on security from which they cannot with activity recover it, yet no judge can say that they are not guilty of a breach of trust if they suffer it to lie out on such a security for an unduly long time.

Trustee—Breach of trust—Liability—Trustee unaware of commission of breach. A

Per LORD ELDON, L.C.: It is very unfortunate that trustees acting without a supposition of liability are afterwards made liable [for a breach of trust], but it would be impossible to maintain the proposition that, because trustees are not aware that they have committed a breach of trust, they are not responsible.

Notes. Considered: *Burrows v. Walls* (1855), 5 De G.M. & G. 233. Applied: *Chillingworth v. Chambers*, [1896] 1 Ch. 685; *Fletcher v. Collis*, [1905] 2 Ch. 24. Considered: *Re Pauling's Settlement Trusts*, [1961 3 All E.R. 713. Referred to: *Tarleton v. Hornby* (1835), 1 Y. & C. Ex. 333; *Munch v. Cockerell* (1836), 8 Sim. 219; *Perry v. Knott* (1841), 4 Beav. 179; *Shipton v. Rawlins* (1845), 4 Hare, 619; *Re Tratt, Ex parte James* (1853), 3 De G.M. & G. 493; *Thompson v. Finch* (1856), 22 Beav. 316; *Lloyd v. Attwood, Attwood v. Lloyd* (1859), 3 De G. & J. 614; *Farrant v. Blanchford* (1863), 1 De G.J. & Sm. 107; *Re Brogden, Billing v. Brogden* (1888), 38 Ch.D. 546. B

As to the duties and powers of trustees, see 38 HALSBURY'S LAWS (3rd Edn.) 966 et seq.; and for cases see 47 DIGEST (Repl.) 346 et seq. C

Cases referred to: D

- (1) *Harden v. Parsons* (1758), 1 Eden, 145; 28 E.R. 639; 47 Digest (Repl.) 447, 3975.
- (2) *Ryder v. Bickerton* (1743), 3 Swan. 80, n.; 1 Eden, 149, n.; 36 E.R. 782, L.C.; 47 Digest (Repl.) 447, 3979.
- (3) *Brice v. Stokes* (1805), 11 Ves. 319; 32 E.R. 1111, L.C.; 47 Digest (Repl.) 497, 4502. E

Also referred to in argument:

Joy v. Campbell (1804), 1 Sch. & Lef. 328; 3 Bli. N.S. 110, n.; 5 Digest (Repl.) 857, *3368.

Doyle v. Blake (1804), 2 Sch. & Lef. 231; 24 Digest (Repl.) 729, *1784.

Bacon v. Bacon (1800), 5 Ves. 331; 31 E.R. 614, L.C.; 24 Digest (Repl.) 723, 7086. F

Balchen v. Scott (1795), 2 Ves. 678; 30 E.R. 838, L.C.; 23 Digest (Repl.) 44, 312. *Trafford v. Boehm* (1746), 3 Atk. 440; 26 E.R. 1054, L.C.; 47 Digest (Repl.) 527, 4771.

Smith v. French (1741), 2 Atk. 243; 26 E.R. 550, L.C.; 47 Digest (Repl.) 477, 4283. G

Bill for compensation for breach of trust.

The bill was filed in July, 1802, by the Rev. Adam John Walker, Loveday Walker, his wife (née Loveday Whitmore), William Roberts, and John Sanderson, the defendants being William Symonds, John Lilly, Isaac Harris, and Johanna Whitmore. By amendment made in 1804 Thomas Cooke was made a defendant. H

The bill stated that by indenture, dated Jan. 17, 1780, made between Isaac Donnithorne, of the first part, Nicholas Donnithorne, Thomas Griffith, and William Symonds, one of the defendants, of the second part, and John Whitmore, and Johanna his wife, another of the defendants, of the third part, it was recited that John Whitmore by his bond, dated June 26, 1772, became bound to Isaac Donnithorne in the penal sum of £12,000, conditioned for payment of £6,000 at a day then long past; that there was then due for principal and interest thereon £7,912 12s.; and that Isaac Donnithorne, being desirous of making some provision for his daughter, Johanna Whitmore, had agreed to assign the bond, with the sum of £7,900, principal and interest due thereon, to Nicholas Donnithorne, Thomas Griffith, and William Symonds, upon the trusts therein mentioned. It was witnessed that Isaac Donnithorne, the grandfather of the plaintiff Loveday Walker, in consideration of natural love and affection towards his daughter, and in order to make some provision for her and her children, and for other considerations therein I

A mentioned, assigned unto Nicholas Donnithorne (Loveday Walker's uncle), Thomas Griffith, and William Symonds, and the survivors, their executors, administrators, or assigns, the bond, and the sum of £7,900 thereon due, upon trust, with all convenient expedition to call in the sum due upon the bond, and as soon as it could be received, to lay out the same upon mortgage of freehold lands or government or other securities in the names of the trustees, and during the lives of John B Whitmore and Johanna his wife and the life of the survivor upon trust to pay the yearly interest, dividends, and produce thereof, or such part thereof as the trustees should in their discretion think fit, to or for the use of John Whitmore and Johanna his wife, and the survivor, and to the use of their child or children, in such shares, and at such times, as they should think fit, and after the death of John Whitmore and Johanna his wife, to pay the said £7,900 to and among all and every the child C or children of John Whitmore and Johanna his wife, share and share alike, if more than one, and if but one, to such only child, at his or her attaining the age of twenty-one years, or day of marriage.

Isaac Donnithorne died soon after the date of the indenture. The trustees accepted the trusts, and in execution thereof, in the year 1783, called in, and received from John Whitmore the sum of £7,900, which was secured, not only on D the bond of John Whitmore, but also on some mortgage or other real security, and John Whitmore, in order to increase the trust moneys to an even sum of £8,000, when he paid the £7,900 to the trustees advanced to them a further sum of £100 upon the same trusts as the £7,900. John Whitmore and Johanna his wife had but one child, the plaintiff, Loveday Walker, who, at the date of the indenture, was E an infant of very tender years, and resided with Johanna Whitmore, her mother, who lived apart from her husband, and to whom the trustees paid three-fourths of the interest of the trust sum, paying the other one-fourth to John Whitmore.

Loveday Walker attained the age of twenty years in December, 1795, and having separated herself from her mother and not having any separate provision, and having understood that she would become entitled at the death of her father F and mother to a considerable sum of money, and that she was entitled to some provision for her maintenance in the meantime, but being ignorant of the amount and particulars thereof, she, on or about Dec. 23, 1795, wrote a separate letter to each of the trustees to inform them of her situation, and to request that some provision should be made for her support, whereupon the trustees allowed her £100 a year out of the income of the trust property. In June, 1799, the plaintiffs Adam G John Walker and Loveday Walker married, and previous to their marriage an indenture of settlement was executed between Loveday, of the first part, Walker, of the second part, and the plaintiffs William Roberts and John Sanderson (as trustees), of the third part, whereby, after reciting that Loveday, after her father and mother's decease, would become entitled to a legacy or portion of £8,000, given by the will of her late grandfather to Nicholas Donnithorne, William Symonds, and Thomas H Griffith, in trust for her benefit, it was witnessed, that in consideration of the intended marriage, Loveday covenanted with William Roberts and John Sanderson that the sum of £2,000, part of the sum of £8,000, should, from and after the decease of her father and mother, be paid to Walker, and that the sum of £6,000, the residue thereof, should be paid to William Roberts and John Sanderson or otherwise settled upon the trusts therein mentioned.

I Nicholas Donnithorne died on Sept. 26, 1796, and by his will appointed his son, Isaac, who had assumed the name of Harris, his executor. Isaac proved the will, possessed himself of the personal estate of his father, and became his legal personal representative. John Whitmore died in December, 1799, upon which event Loveday Walker applied to William Symonds and Thomas Griffith, as the surviving trustees, named in the indenture of January, 1780, and they consented to make an additional allowance of £50 per annum, part of the interest of the trust money, which had, in the lifetime of John Whitmore, been paid to him. Thomas Griffith died in October, 1800, having appointed the defendant John Lilly his executor, who proved

his will, and had possessed assets to pay the debts of the testator. Walker, and Loveday his wife, being desirous that the sum of £8,000 should be invested in the public funds, or on real security, or otherwise properly secured for their benefit according to the trusts of the indenture of January, 1780, called on the plaintiffs Roberts and Sanderson, as trustees under their marriage settlement, to concur with them in having the same so invested or secured. A

The bill charged that after the trust money had been paid by John Whitmore to the trustees it was by them invested in a mortgage security, but in 1790 the mortgagee, or the purchaser of the mortgaged estates, gave six months' notice to the trustees of his intention to pay off the mortgage money, and it was in or about that year paid to them, or to one of them, by the direction, or with the consent and concurrence, of the rest. They all joined in the receipt for the same, but, although they had six months' notice that the money was to be paid, they took no steps to procure any other real or effectual security on which to invest it. After the money was so received by the trustees, it was alleged, they ought to have invested it in the public funds or on some real security, but, instead of doing so, they preferred the interest of John Whitmore and his wife to that of the plaintiff Loveday Walker, and for the sake of procuring some small addition of interest beyond what the public funds would have yielded, or for some other improper cause, took upon themselves to invest the money in bills or notes of the East India Co. The trust money was afterwards, by agreement between the trustees, called in and received by Nicholas Donnithorne, Thomas Griffith, and William Symonds, but they did not provide any security or mortgage, or endeavour to procure any such, on which to invest it, but received, or authorised Nicholas Donnithorne to receive it and joined in the receipt or acquittance for it to John Whitmore. After the trust money was received, it never was laid out or invested according to the directions of the trust deed, but Thomas Griffith and William Symonds, instead of investing it on real or government security, as they ought to have done, consented and agreed to lend, or to permit Nicholas Donnithorne to retain it in his hands, by way of a loan or otherwise, until the time of his death, for the payment of which with interest he, several months after he had been so permitted to receive it, gave to Thomas Griffith and William Symonds, who consented to accept the same, a bond, or other personal security. The bill charged that Thomas Griffith, William Symonds, and Nicholas Donnithorne, by having so neglected to lay out and invest the trust money in a proper manner, and William Symonds and Thomas Griffith, by having so consented to lend or permit Nicholas Donnithorne to hold and retain it, were all guilty of a breach of trust, by reason of which they and their estates were answerable for the trust money or such part thereof as had been, or might be lost, by such breach of trust. B C D E F G

The bill also charged, that Loveday Walker, at the time she attained twenty-one, was, and long after remained, ignorant of the trust deed and the contents thereof, the exact nature of her interest therein and in what manner such interest was derived to her and in what manner the money ought to have been invested. None of the trustees ever distinctly explained to her the same as they ought to have done, but, on the contrary, for a long time deliberately concealed the same from her or kept her in ignorance thereof, and it was not until many applications had been made to them and a considerable time had elapsed that she was able at different times to obtain some information of the trust deed. For a long time after she attained twenty-one, she supposed that her interest in the trust money was devised to her by some will of her grandfather, Isaac Donnithorne, and she was wholly ignorant of the existence of the trust deed. H I

The plaintiffs alleged that in February, 1797, when Loveday Walker was on a visit at the house at Fetcham, in Surrey, of a Mr. Sherson whose wife was the daughter of Nicholas Donnithorne, a Mr. Hardy, who was a solicitor acting for creditors of Nicholas Donnithorne, came to the house, and, having assured Loveday

A Walker that the trust property was perfectly safe, made some statements or representations to her of the embarrassed state of the affairs of her uncle Nicholas Donnithorne and of her cousin Isaac Harris and the distress of the family, and of some arrangement for adjusting their affairs and represented and assured her that all the creditors would be ultimately paid, and that the purpose of a proposed arrangement was to enable Isaac Harris to provide the money for satisfying the claims of the

B creditors, by means the best adapted to effect that end with least inconvenience and loss to him and the family of Nicholas Donnithorne. Mr. Hardy then produced to her a written paper which he represented to contain the joint concurrence of William Symonds, Thomas Griffith, John Whitmore and Johanna his wife (Loveday's father and mother), in the arrangement and their entire approbation thereof.

C Of the expediency and propriety of the measure recommended, Loveday Walker was not sufficiently informed to have a proper judgment, but, having no proper person to consult with and advise her what to do, gave credit to the representations made to her respecting the ultimate security of the property, and under the influence of the advice and opinion of her friends William Symonds and Thomas Griffith, who, as it appeared to her, recommended a compliance with the proposed arrangement, she

D was induced to express her willingness to concur in what was so approved and to sign the paper. The bill insisted that her consent, or concurrence and authority, were fraudulently obtained and not binding, or at least that they ought not to have the effect of discharging the trustees and their respective estates from liability in respect of the trust moneys, but that the trustees, and particularly Symonds and Griffith, having been guilty in the first instance of a breach of trust, ought to be held

E answerable for the consequences and bound to make good the trust moneys. The bill prayed that the consent of Loveday Walker and her signature to the writing expressive of such consent might be declared to have been improperly obtained and to be fraudulent and void, and that William Symonds (deceased) and the estates of Thomas Griffith and Nicholas Donnithorne might be charged with the amount of such trust money and that William Symonds, and John Lilly, and Isaac Harris, out of the

F estates of their respective testators, or some, or one of them, might be decreed to pay the said £8,000 into the Bank of England.

In May, 1807, the case came before SIR WILLIAM GRANT, M.R., who found that it was not proved that Loveday Walker's consent had been fraudulently obtained, and dismissed the bill.

The cause was heard before LORD ELDON, L.C., in June, 1811, when Isaac Harris and Johanna Whitmore did not appear. His LORDSHIP directed that it should be referred to the Master to inquire and report in whose hands the trust money mentioned in the pleadings had been since the year 1782 and as to other matters. The defendants William Symonds and John Lilly took certain exceptions to the report. In January, 1816, William Symonds died, and the suit was revived against his executors, William Symonds and Thomas Cook. In April, 1818, the cause was heard

G on the exceptions.

Sir Samuel Romilly, Bell, Treslove and Merivale for the defendants, in support of the exceptions: The object of the bill is to rescind a transaction to which the plaintiff, Mrs. Loveday Walker, was a party with full knowledge of all the circumstances, and, consequently, to charge the trustees with a breach of trust when, by the effect of that transaction at this distant period, the parties can never be restored to the

H rights and remedies which they previously possessed. The facts were all known to Mrs. Walker. The legal consequence, that the trustees were responsible to her for a breach of trust, could not be communicated to her by them, for they knew it not themselves. Whatever loss occurs is the effect of an arrangement which Mrs. Walker expressly sanctioned.

Hart, Agar, Roupel and Collinson for the plaintiffs, supported the report.

During the argument, the following remarks were made by

LORD ELDON, L.C.—It is the duty of trustees to afford to their cestui que trust

accurate information of the disposition of the trust fund—all the information of which they are, or ought to be, in possession. A trustee may involve himself in serious difficulty by want of the information which it was his duty to obtain . . . I never saw a case in which there was a plainer breach of trust by the act of the trustees, in placing the money under the control of their co-trustee.

April 21, 1818. **LORD ELDON, L.C.**—This case comes before me on exceptions to the Master's report. I do not see how it is possible to support the exceptions. The bill is filed to charge the representatives of certain trustees with the consequences of a breach of trust, and to render them responsible for a sum of about £8,000. I take notice at the earliest moment, that whether the trust money was £7,900 or £8,000, a circumstance immaterial in many respects, may be material in this respect, that the person who was cestui que trust of the money seems not very accurately informed whether it was one sum or the other, or whether it was derived under a settlement or a will.

I have been furnished with a copy of the judgment of the Master of the Rolls, and I have also read the decree embodying that judgment in the form and language of the court. The Master of the Rolls observes that the foundation of the plaintiffs' case is that the consent of the plaintiff Loveday Walker was improperly obtained, and that the objection is that it would be impossible to replace the parties in the situation in which they were when the deed was executed, but that it would not, therefore, follow, if the deed had been improperly obtained, that the plaintiffs were precluded from relief. This observation applies to the effect of the transaction of the trustees in signing the deed of arrangement with the representatives of Nicholas Donnithorne under the authority, if they had the authority, of the plaintiff Loveday. I agree with the Master of the Rolls that there is no pretence for a charge of fraud, because, whatever ground there may be in any case, I say not that in the present case there is any ground to suspect imposition, and it ought not to be imputed unless clearly proved. But whether there was communication from the trustees to the plaintiff Loveday, whether any personal influence was attempted to be used for inducing her to accede to the proposed arrangements, are questions that cannot be determined without adverting to the transactions in which Hardy was engaged, and I take the liberty of observing that it was impossible for the Master of the Rolls to attain a satisfactory conclusion on so little evidence as was before him.

The next proposition adopted by the Master of the Rolls is that there was no concealment. Concealment is of different natures—an intentional concealment and an actual concealment where there may be an obligation not to conceal, even if disclosure is not required. But the view in which it appears to me that this case must be examined is this, and the questions which it raises are, first, whether a trustee is not bound to communicate facts which he knows relative to the disposition of the trust-money; next, whether, supposing he is not bound, yet in the circumstances of this case, Hardy and Fallows [Hardy's client] are not to be considered as agents of the trustees, and, as their agents, taking on themselves to make representations and give information—whether they have not said to the cestui que trust: "We state to you certain circumstances. You know nothing of many other circumstances which we might have communicated. You act on that information, and we are now entitled to say, you shall require no further information from us."

The principles on which the liability of trustees must be decided cannot be mistaken, though it appears from a book, for which the profession is indebted to Mr. EDEN, that LORD NORTHINGTON held doctrines different from those on which we have been accustomed to proceed. The judgment in *Harden v. Parsons* (1) is, in more respects than one, a curious document in the history of trusts as administered by this court. LORD NORTHINGTON says (1 Eden, at pp. 148-150):

"The lending trust money on a note is not a breach of trust, without other circumstances crassæ negligentiae. That is plain from the case of *Ryder v. Bickerton* (2), where a sum of money was left to be placed out on security, with

A the best interest that could be got. The executor had lent it on a note without interest. Did the court say that it was a clear breach of trust to lend it on a personal security? No."

The fact is, that the court said, "Yes," declaring that the trustee, having placed out the money neither at interest nor on security, had committed a direct breach of trust in both respects. LORD NORTHINGTON proceeds to state a most material circumstance in the case; a "deliberate, uniform, and steady confirmation." The editor of this valuable work has taken the trouble to subjoin a great variety of cases, all of which contradict the doctrine that investing trust money on personal security is not a breach of trust.

B Without going through all the cases, it is obvious, that *prima facie* there is this distinction between executors and trustees—that one executor can, and one trustee cannot, give a discharge, and it may frequently happen, as in *Brice v. Stokes* (3) it actually happened, not only that one trustee cannot give a discharge, but that the instrument of trust provides that there shall be no discharge without an act in which all the trustees join. Executors seem formerly to have been charged on much stricter principles, if they joined unnecessarily, though without taking the control of the money. That rule is now altered: whether the alteration is wholesome may be a question. It may be laid down now, as in *Brice v. Stokes* (3), that, though one executor has joined in a receipt, yet whether he is liable shall depend on his acting. The former was a simple rule, that joining shall be considered as acting, but in the cases since the rule that joining alone does not impose responsibility scarcely two judges agree.

E It is established by all the cases that, if the cestui que trust joins with the trustees in that which is a breach of trust, knowing the circumstances, such a cestui que trust can never complain of such a breach of trust. I go further, and agree that either concurrence in the act, or acquiescence without original concurrence, will release the trustees, but that is only a general rule, and the court must inquire into the circumstances which induced concurrence or acquiescence, recollecting in the conduct of that inquiry how important it is, on the one hand, to secure the property of the cestui que trust, and, on the other, not to deter men from undertaking trusts from the performance of which they seldom obtain either satisfaction or gratitude.

F In the present case the effect of the whole correspondence is very different from the effect of that part of it which was read to the Master of the Rolls, and it becomes necessary, therefore, minutely to consider the whole. [His LORDSHIP referred to the correspondence.] When this case was re-heard, following what the Master of the Rolls intimated he should have thought right if he had given a different judgment, I directed an inquiry relative to the period between 1791 and 1795. The case comes back with a report stating a clear breach of trust in leaving the trust fund in the situation represented from 1791 to 1793 and from 1793 to 1795. The report states that the money was laid out, with the consent of the trustees, in India bills, payable to Nicholas Donnithorne, a palpable breach of trust by placing the fund under his control, secured by little more than a promissory note payable to himself. It was probable that in 1793 he would receive the money, and it would be lodged in his hands, and I repeat, that, although the court in directing an inquiry will proceed as favourably as it can to trustees who have laid out the money on security from which they cannot with activity recover it, yet no judge can say that they are not guilty of a breach of trust if they suffer it to lie out on such a security during so long a time. Here is a distinct breach of trust, and I lay the more stress on it because it has been represented in argument that the chief breach was the laying out the money on bond.

I The plaintiff Loveday, who appears to have had nothing beyond her expectations under this settlement and was living separate from her father and mother, themselves separated, was so little informed of her rights that she knew not whether she was entitled under a will or under a settlement. Whether the letters which passed

between Nicholas Donnithorne and his co-trustees relative to the investment of the fund were communicated to the cestui que trust, appears not. I, therefore, take it for granted that they were not communicated. Between July, 1795, and June, 1796, I do not find any transaction, though the bond was payable at Christmas, 1795, except three letters. Receipt after receipt by the plaintiff Loveday of her annual allowance is in evidence, but will anyone contend that this sort of receipt, while she yet knew nothing of the breach of trust, can amount to acquiescence?

It appears that in November, 1796, his co-trustees were pressing for security from Nicholas Donnithorne, and giving the strongest evidence that, from regard either to the situation of their cestui que trust or to their own, they thought themselves bound to use exertions in obtaining this money from him. In November, 1796, the matter stood thus. The trustees had been guilty of a breach of trust in permitting the money to remain on bills payable to Nicholas Donnithorne alone, and in leaving the state of the funds unascertained for five years. They had the bond of Nicholas Donnithorne, who was dead, which affected his assets as a specialty debt. Whether they had a judgment no one knows. They had also a claim on Isaac Donnithorne in his own right and as his father's executor. I knew enough of Mr. Hardy to be satisfied that he must have been aware that without the signature of the plaintiff Loveday no deed executed by the trustees could have discharged Isaac Donnithorne from a demand on behalf of the Whitmore family; that her consent was necessary to discharge the trustees; and that without it, Isaac Donnithorne, as the representative of a deceased trustee, could never be discharged. It appears that in December, 1796, the plaintiff Loveday knew that the money was in the hands of Nicholas Donnithorne, but whether she knew that it was there by breach of trust is a different question.

[His LORDSHIP referred to certain of the facts, and continued :] It is, I admit, very unfortunate that trustees acting without a supposition of liability are afterwards made liable, but it would be impossible to maintain the proposition that, because trustees are not aware that they have committed a breach of trust, they are not responsible.

This young lady, who had sought information from her trustees, what were her interests under her grandfather's will, was so little acquainted with her rights as to suppose that she claimed as legatee under a will, while her real title was as a purchaser under a settlement. Where the trustee and cestui que trust are equally informed, or the cestui que trust requires no information, desiring to speak most guardedly, I think that the doctrine of this court would not protect the trustee, but supposing that it would, as in *Brice v. Stokes* (3), that case is not applicable to this. I cannot allow to these trustees the benefit of the observation that information was not required. They volunteered to give information, and gave it in a way which was calculated to induce the cestui que trust to believe that it was all that was to be given. He who, undertaking to give information gives but half information, in the doctrine of this court, conceals. The receipt of interest by the plaintiff Loveday is not binding, unless it can be shown that she was previously apprised of all the circumstances. The trustees have had the opportunity of explaining the case before the Master, and have proved nothing; on the contrary, the report brings forward a case of breach of trust, such as was not thought before and such as authorises me to say that she knew not how the money was disposed of after it was received in 1793. Payments were made to her at the time, for the purpose of procuring her to execute what would be useful to Isaac Donnithorne, under the pretence that it would be useful to her, placing before her eyes money which she was to receive in case she signed the instrument; she at that time having nothing for her support except what she could acquire through all the difficulties which encumber a cestui que trust to whom the trustees have not done their duty.

This is a case of great importance to trustees in general, and illustrates the necessity of attending to every word in transactions of this nature. It is one of

A the cases which convince me at a mature period of my judicial life that it is impossible to comprehend such questions without minute examination of every fact and reference to all the documents. The plaintiff Loveday Walker is entitled to relief, and the trustees must stand in her place under the deed.

B April 25, 1818. *Hart* proposed that the decree should declare the trustees personally liable for the trust-money, leaving them to proceed for their indemnity against the estate of Nicholas Donnithorne. *Sir Samuel Romilly* objected that it was unprecedented to allow a cestui que trust seeking compensation for a breach of trust to select two of the trustees and prosecute no claim against the third, and that the defendants could effectuate their equity only by means of the plaintiff.

C June 10, 1818. **LORD ELDON, L.C.**—When three trustees are involved in one common breach of trust, a cestui que trust suffering from that breach and proving that the transaction was neither authorised nor adopted by him may proceed against either or all of the trustees. The present case comprises this peculiarity, that Isaac Harris, being the son and representative of a deceased trustee, by deed dedicates all his own fortune and the assets of his father to the payment of debts including the trust fund, and by the form of the arrangement he becomes the debtor of the co-trustees and they become his creditors, if with the approbation properly obtained of the plaintiff Loveday Walker, she has no reason to complain. Her demand against the assets of the deceased, it appears to me, might be enforced under the trust deed, but then all persons interested in it must be parties to the suit. The real question is whether on this record in its present state, supposing the court right in declaring the two surviving trustees guilty of a breach of trust with the deceased trustee, the plaintiff is not entitled to abandon all benefit of the trust deed and charge the survivors with breach of trust and also the representative of the deceased, to say that the assets have, without her concurrence, been placed in such a state that she is not bound to pursue them, but may leave the survivors to indemnify themselves thence? If she abides by the trust deed, she must abandon her claim against the survivors.

G June 13, 1818. **LORD ELDON, L.C.**—I have again read the papers, and the view which I take of the case is this. The first question is, with reference to the exceptions, whether there was a breach of trust? It clearly appears to me that there was, and the result is that Nicholas Donnithorne and the other two trustees were responsible for the consequences of that breach of trust. The defence of those who represent the co-trustees was founded in this, that the plaintiff Mrs. Walker had given to them authority, by the power of attorney, to conclude the compromise with Isaac Harris, the representative of Nicholas Donnithorne, and that she must be considered in their persons as a creditor, not on the assets of Nicholas Donnithorne, but on the funds provided by the trust deed, to which, as it was insisted, she was a party. On the former occasion I reviewed the whole evidence and correspondence for the purpose of stating the grounds of my opinion that she could not be considered as a party to that instrument so as to exclude her from a demand against the trustees, and I particularly adverted to the circumstance, that the other parties to that deed saved their rights against third persons.

H I The principal difficulty was to do justice among the trustees and their representatives. Nicholas Donnithorne, if the trust deed had not been executed, was first liable, but the consequence of that was no more than that Mrs. Walker would be bound to place the other trustees in her situation that they might have every remedy which she might have had against him. The difficulty arises from this, that the trust deed has made all the property of Donnithorne a trust fund for the creditors executing that deed, and has, therefore, taken the property out of the situation in which it would otherwise have stood as his real or personal assets. But if Mrs. Walker is compelled, in consequence of the execution of that deed, to pursue his assets under all the difficulties which that deed has interposed, by

which, in the circumstances of the case, she is not bound to abide, the question is whether she is not entitled to an equity of this kind, to say to the surviving trustees that the bond of Nicholas Donnithorne is discharged as a bond, not by her act but by theirs, and to require them to replace the trust fund, leaving them to seek justice through the means provided by this deed. The court is justified in holding that they would have no reason to complain, having constantly stated that, holding the bond for Mrs. Walker, they were consulting her interests and doing the best that could be done for her in executing the trust deed.

A declaration must be inserted in the decree, that all demands which the plaintiff Mrs. Walker may possess under the trust deed, or against the assets of Nicholas Donnithorne, as assets, the surviving trustees will be entitled to enforce for their own benefit. The assets of Nicholas Donnithorne must be considered as assets and as subjects of the trust deed. In this suit, they cannot be treated as subjects of the trust deed because the trustees are not before the court, nor as assets, because under the trust deed, they are the subjects of that deed. It appears to me that the remedy to which the plaintiff Mrs. Walker is entitled is to charge the two defendants personally, leaving them to proceed over for their indemnity, but that they cannot do in this suit.

R. v. BURDETT

[COURT OF KING'S BENCH (Abbott, C.J., Best, Holroyd and Bayley, JJ.), November 27, 1820]

[Reported 4 B. & Ald. 95; 1 State Tr. N.S. 1; 106 E.R. 873]

Criminal Law—Evidence—Presumption of fact—Inference from proved facts—Probability of fact presumed.

Libel—Malicious intention—Presumption—Contents of libel.

When one or more things are proved from which experience enables one to ascertain that another thing, not proved, must have happened, it will be presumed that that other thing did happen as well in criminal as in civil cases. The fact not proved need not be established by irrefragable inference, but to warrant a presumption a *prima facie* case must be made out. It is enough if the existence of the fact to be presumed is highly probable, particularly if the opposite party has it in his power to rebut it by evidence and yet offers none, for then there is something like an admission that the presumption is just. In the case of a libel which is charged to be written with a particular intent, if the libel is calculated to produce the effect charged to be intended, the intent is presumed.

Per HOLROYD, J.: Crimes of the highest nature, more especially in cases of murder, are established and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved by presumptive evidence only, and the well-being and security of society much depend on the receiving and giving due effect to such proofs.

Per ABBOTT, C.J.: A fact must not be inferred without premises which will warrant the inference, but if no fact could thus be ascertained by inference in a court of law very few offenders could be brought to punishment.

Criminal Law—Libel—Seditious libel—Defence—Truth of libel.

Evidence of the truth of statements in a seditious libel held to be inadmissible at the trial of the author for criminal libel.

A *Criminal Law—Libel—Trial—Venue—Libel written in one county and published in another.*

In a case of criminal libel, if the libel is written in one county and published in another the author of the libel may be prosecuted in either county.

B Per ABBOTT, C.J.: Where a misdemeanour consists of such distinct parts, I say, without doubt or hesitation, that the whole may be tried in that county wherein any part can be proved to have done.

Newspaper—Improper conduct—Imputation of criminal conduct to public men.

C Per BEST, J.: My opinion of the liberty of the Press is that every man ought to be permitted to instruct his fellow subjects; that every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country; and that he may point out errors in the measures of public men, but he must not impute criminal conduct to them. The liberty of the Press cannot be carried to this extent without violating another equally sacred right—namely, the right of character.

D **Notes.** The remarks of the judges in this case with regard to publication of a libel must be read in the light of *Pullman v. Hill & Co.*, [1891] 1 Q.B. 524, and other cases which make it quite clear that for there to be publication there must be communication of the libel to a third person. See also 24 HALSBURY'S LAWS (3rd Edn.) 35, 36. With regard to venue for the trial of criminal cases some changes have been made by statute in the common law rules mentioned in this case, e.g., s. 2 (3) of the Magistrates' Courts Act, 1952, and s. 11 of the Criminal Justice Act, 1925: see 32 HALSBURY'S STATUTES (2nd Edn.) 416, and *ibid.*, vol. 14, p. 934 respectively.

E Considered: *Stikeman v. Dawson*, [1843–60] All E.R. Rep. 1076; *Joyce v. D.P.P.*, [1946] 1 All E.R. 186. Referred to: *R. v. Grant, Ranken and Hamilton* (1848), 7 State Tr. N.S. 507.

F As to venue for trial of and evidence in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 325–335, 436 et seq.; and for cases see 14 DIGEST (Repl.) 156 et seq., 401 et seq. As to criminal libel, see 24 HALSBURY'S LAWS (3rd Edn.) 133–139; and for cases see 32 DIGEST (Repl.) 226 et seq.

Cases referred to:

- (1) *R. v. Watson* (1808), 1 Camp. 215; 22 Digest (Repl.) 362, 3898.
- (2) *R. v. Williams* (1810), 2 Camp. 506; 15 Digest (Repl.) 785, 7366.
- G** (3) *R. v. Beare (or Bear or Beere)* (1698), 1 Ld. Raym. 414; Carth. 407; Holt, K.B. 422; 2 Salk. 417; 12 Mod. Rep. 218; 91 E.R. 1175; 32 Digest (Repl.) 98, 1196.
- (4) *R. v. Knell* (1729), 1 Barn. K.B. 305.
- (5) *R. v. Carter*, cited in Holt on Libel, 108, n.
- (6) *Seven Bishops' Trial* (1688), 12 State Tr. 183; 22 Digest (Repl.) 187, 1711.
- H** (7) *R. v. Lopez* (1819), March 18 (Exeter Assizes); Annual Register, p. 210.
- (8) *Baldwin v. Elphinston* (1775), 2 Wm. Bl. 1037; 96 E.R. 610, Ex. Ch.; 32 Digest (Repl.) 99, 1210.
- (9) *R. v. Carlile* (1819), 3 B. & Ald. 161; 1 State Tr. N.S. 1387; 106 E.R. 621; 15 Digest (Repl.) 878, 8457.
- I** (10) *R. v. Horne* (1778), 2 Cowp. 672; 20 State Tr. 651; 98 E.R. 1300; sub nom. *Horne v. R.*, 4 Bro. Parl. Cas. 368, H.L.; 15 Digest (Repl.) 780, 7326.
- (11) *Cole's Case* (1570), 1 Plowd. 401.
- (12) *Anon.* (1504), Keil. 67; 72 E.R. 227; 14 Digest (Repl.) 161, 1250.
- (13) *Gawen v. Hussee and Gibbes* (1537), 1 Dyer, 38 a.
- (14) *Bulwer's Case* (1584), 7 Co. Rep. 1 a.
- (15) *Danby's Case* (1484–5), Y.B. 2 Richard 3, fo. 10; cited in 1 Hale, P.C. 652.
- (16) *R. v. Brisac* (1803), 4 East, 164; 102 E.R. 792; 14 Digest (Repl.) 149, 1122.
- (17) *R. v. Bowes* (1787), cited 4 East, 171; 102 E.R. 795; 14 Digest (Repl.) 161, 1248.

(18) *R. v. Buttery* (prior to 1820), cited 4 B. & Ald. 179; 106 E.R. 904; 14 Digest (Repl.) 160, 1239. A

Rule Nisi for the new trial of an information against the defendant by which he was charged with writing, composing, and publishing a libel in the county of Leicester.

On August 22, 1819, the defendant, Sir Francis Burdett, M.P., while in the county of Leicester, wrote an address to the electors of Westminster in which he stated that English troops had been called in to quell riots at Manchester and had killed unarmed men and women, expressing himself "in contempt of our lord the King and his laws" and calling for the organisation of protest meetings. This document was handed to a Mr. Bickersteth [afterwards Lord Langdale] who delivered it to a Mr. Brookes at his home in Middlesex on August 24. The defendant having been convicted of publishing a seditious libel, a rule was obtained for a new trial. B
C

The Attorney-General (Sir Robert Gifford), the Solicitor-General (Sir John Copley), Serjeant Vaughan, Clarke, Reader, and Balguy, for the Crown, showed cause against the rule.

Scarlett, Denman, Philipps, Blackburne, and Evans, for the defendant, supported the rule. D

Cur. adv. vult.

BEST, J.—This case came on for trial before me at the Spring Assizes for the county of Leicester. On the part of the prosecution it was proved by Mr. Brookes that the libel in question was delivered to him by Mr. Bickersteth, on Aug. 24, 1819. He did not state where, but I think it fair to presume that it was delivered at the place of his abode in Middlesex. Mr. Brookes's memory did not enable him to state distinctly the manner in which the paper came to his possession. He said that the envelope which had covered it was destroyed. He could not say whether it had an address on it or not, but, to the best of his recollection, it was addressed to Mr. Bickersteth. Where Mr. Bickersteth lived did not appear, nor who he was, further than that he was the professional friend of Sir Francis Burdett. E
F

There was not any seal or trace of a seal on the envelope, nor was there any post-mark either on the envelope or paper. The paper was dated Kirby Park, Aug. 22, and it appeared in evidence that Kirby Park was in Leicestershire. It also appeared, from the evidence of a tollgate keeper near Kirby Park, that Sir Francis Burdett was seen in Leicestershire on Aug. 22, and again on the following day. There was no evidence of his having left the county of Leicester till after the publication of the paper which took place on Aug. 25. The paper, to be ready for publication on the 25th, must have been sent from the defendant's seat in Leicestershire (which is nearly 100 miles from London) on the evening of Aug. 23 or the morning of the 24th. The only words that, according to Mr. Brookes's memory, were within the envelope or any other part of the papers besides the libel were: "Forward this to Brookes." There was no express direction to him to publish it, and his only reason for thinking the defendant intended that it should be published was that it was addressed to the electors of Westminster. It further appeared that Sir Francis Burdett, on Mr. Brookes being called upon by Lord Sidmouth to deliver up the author, wrote this letter: G
H

"Cottisbrook, August 28. My Lord, hearing your Lordship had applied to the gentleman through whose hands my address to the electors of Westminster was transmitted to the newspapers to give up the author, and had, at the same time, intimated that a refusal would subject him, as well as the editors of the papers, to a Ministerial prosecution, I take the liberty, in order to save your Lordship further trouble, and also the gentleman above mentioned an unjust prosecution, to inform your Lordship that I am the author of the address in question, and, moreover, to assure your Lordship that although penned in a hurry, and under the influence of strongly excited feelings, I can discover I

A nothing in it, on a re-perusal, unbecoming the character of an honest man and an Englishman."

B At the close of the evidence on the part of the prosecution it was contended that there was no evidence that the libel in question had been published in Leicestershire. After hearing the argument I thought that there was not only such evidence of a publication in Leicestershire as I was bound to leave to the jury, but it appeared to me then, and appears to me now, that, unless it received an answer, it was cogent evidence for the jury to find the verdict which they have found. I stated shortly to the learned counsel that my opinion was that there was evidence to be laid before the jury, by which I meant them to understand that, if they thought proper, they might offer evidence on the part of the defendant, to rebut the inference which the evidence on the part of the prosecution had raised of a publication in Leicestershire. No evidence was offered on the part of the defendant. The case was defended by the defendant himself most ably. He said but little on the question of venue, but he contended that it was impossible to impute to him the intent charged in the information.

C I told the jury that there were two questions for their consideration. The first was whether there was a publication of the libel in Leicestershire; and secondly, if they should be of opinion that the paper was published in Leicestershire, whether the paper under the circumstances in which it was published was a libel. I stated to them the evidence that had been given. I pointed out to them the opportunity the defendant had of answering the evidence for the prosecution by evidence which I thought he might have been prepared to offer. With respect to whether this was a libel, I told the jury that the question whether it was published with the intention alleged in the information was peculiarly for their consideration, but I added that the intention was to be collected from the paper itself unless the import of the paper were explained by the mode of publication, or any other circumstances. I added that, if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to produce. I told them, further, that, if they should be of opinion that such was the intention of the defendant, then it was my duty to declare that, in my opinion, such a paper, published with such an intent, was a libel, leaving it, however, to them to find whether it was a libel or not. The jury found the defendant guilty. A motion has been since made for a new trial, and I am extremely glad that this case has been fully discussed and that the defendant has had the advantage of the ablest counsel whom the Bar of this or any country could afford. All that talent, industry, and learning could bring forward, has been urged by the gentlemen on each side. I hope, therefore, that we are enabled, by the assistance of the Bar, to form an accurate judgment on this case.

H Three objections were taken when the rule was moved. The first objection is that there was no evidence that the libel was published in the county of Leicester. I have to observe on that point, that if there was any evidence, it was my duty to leave it to the jury, who alone could judge of its weight. The rule that governs a judge as to evidence, applies equally to the case offered on the part of the defendant, and that in support of the prosecution. It will hardly be contended, that, if there was evidence offered on the part of the defendant, a judge would have a right to take on himself to decide on the effect of the evidence, and to withdraw it from the jury. Were a judge so to act, he might, with great justice, be charged with usurping the privileges of the jury, and making a criminal trial, not what it is by our law, a trial by jury, but a trial by the judge. It must be borne in mind that the question is not whether the evidence was such as ought to have satisfied a jury of the fact of publication in Leicestershire, but whether any facts were proved which raised a presumption of publication in that county. If there were any such facts, I could not deal with them otherwise than I did. I

am of opinion that there was evidence in this case, given on the part of the prosecution, which raised a strong presumption that the libel was published in Leicestershire, and no attempt having been made to rebut such presumption, it became, in my mind, conclusive proof of that fact. A

It has been said that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence and yet offers none, for then we have something like an admission that the presumption is just. It has been solemnly decided, that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilised countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle. B C D

LORD MANSFIELD, in the *Douglas* case, gives the reason for this :

“As it seldom happens that absolute certainty can be obtained in human affairs, therefore, reason and public utility require that judges and all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side and on the other.”* E

In the highest crime known to the law, treason, you act upon presumption. On proof of rebellion, or the endeavour to excite rebellion, you presume an intent to kill the King. In homicide, upon proof of the fact of killing, you presume the malice necessary to constitute murder, and put it on the prisoner, by extracting facts in cross-examination or by direct testimony to lower his offence to manslaughter or justifiable homicide. In burglary and highway robbery, if a person is found in possession of the goods recently after the crime, you presume the possessor guilty, unless he can account for the possession. In the case of a libel which is charged to be written with a particular intent if the libel is calculated to produce the effect charged to be intended, you presume the intent. It, therefore, appears to me quite absurd, to state that we are not to act upon presumption. Until it pleases Providence to give us means beyond those our present faculties afford of knowing things done in secret we must act on presumptive proof or leave the worst crimes unpunished. I admit, where presumption is attempted to be raised as to the *corpus delicti*, that it ought to be strong and cogent, but in a part of the case relating merely to the question of venue and leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me in the most trifling cause that can be tried in Westminster Hall. F G H

[His LORDSHIP referred to the evidence, and continued:] Supposing this libel to have been sent by the post, my opinion is that such a sending of it amounted to a publication. It is assumed that publication means a manifestation of the contents. I deny that such is the meaning of the word publication. In no part of the law do I find that it is used in that sense. A man publishes an award, but he does not read it. Again, he publishes a will, but he does not manifest its contents to those to whom he makes the publication; he merely desires the witnesses to take notice that the paper to which they affix their different attestations is his will. So in the case of a libel, publication is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands his control over it is gone; he has shot his I

* See ANDREW STUART'S THIRD LETTER TO LORD MANSFIELD, p. 127, where this sentence is cited.

A arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the locus pœnitentiæ, his offence is complete, all that depends upon him is consummated, and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act. Suppose a man wraps up a newspaper and sends it into another county by a boy, who is the publisher? The boy who, perhaps, cannot read or is ignorant of its contents, or the man who has put it up in the envelope? The boy who carries it is merely an innocent instrument. There can be no other publisher, but the person who sent it, and who publishes it when he delivers it to the boy. If the sending of a letter by the post be not a publication in the county whence it is sent, how is a libeller to be punished who sends his libel by the post to some foreign country for circulation? The libeller will not go to the foreign country that he may be punished there. If the sending it from England be not a publication (as it is contended at the Bar), can it be insisted, when the libel is completed by publication, that such a libeller can nowhere be punished? A British subject might libel with impunity in a foreign land his sovereign, his government, or any distinguished individual whose fame extended beyond the limits of his own country, and the foreign disseminator would have this strong appeal to the mercy of his own laws, that, it being sent to him from a person in England, he believed the libel to be true.

D There is authority for saying that this is a publication. In *R. v. Watson* (1) it was contended that the postmark was proof of the letter having been put into the post at Islington, and that such putting into the post amounted to a publication. LORD ELLENBOROUGH held the proof of the publication of the letter insufficient. Why? Because there was no proof that there was the postmark, and that what appeared to be the postmark might have been a forgery. He would not have said so if he had thought that putting the letter into the Post Office at Islington did not amount to a publication. If he had said the putting the letter into the post was not a publication, he would have been inconsistent with himself, a circumstance which the soundness of his judgment would have prevented. For in *R. v. Williams* (2), which was for sending a challenge in a letter, LORD ELLENBOROUGH said there was a publication in Middlesex by putting it into the Post Office there, with intent that it should be delivered at Windsor. LORD ELLENBOROUGH does not say that this is a sufficient sending of a challenge, but a sufficient publication; nor can there be any difference between that case and any other libel. Why are libels against individuals prosecuted? Because they have a tendency to provoke the party, to whom they are sent, to a breach of the peace. There can be no distinction between a libel sent with an express intent to provoke a breach of the peace, and any other libel on an individual. This case is directly in point to prove that the putting of a letter into the post is a sufficient publication.

G Had not the Civil Law been quoted by the counsel for the defendant, I should not have referred to it, although I think it strongly confirmatory of my opinion. H The description of a libeller in our indictments seems to me to have been borrowed from the Civil Law, and I agree that their word "edo" is represented by our word "publish," but I deny that "edere" means to manifest the contents of a paper. Both in the Roman classics and law books it means the act of delivery, which precedes the manifestation of the contents, and the subsequent manifestation is expressed by some other term, as "exponere" or "manifestare." Thus, in I CICERO, DE LEGIBUS, lib. 3, art. 20, he says:

"apud eosdem qui magistratu abierint edant et exponant quid in magistratu gesserint."

Here, the word "edant" means "they uttered," and the word "exponant," "they exposed to public view what was so uttered." So in the Civil Law, in the CODEX, lib. 9, tit. 36, we have this passage:

"Si quis famosum libellum ignarus repererit, aut corrumpat priusquam alter inveniatur aut nulli confiteatur inventum. Si vero non statim easdem chartulas

corruperit vel igne consumpserit, sed earum vim manifestaverit sciat se ut auctorem hujusmodi delicti capitali sententiæ subjugandum."

Here, the word "ediderit" is not used, but "manifestaverit." Why? Because it constituted no crime for a person who found a paper, and, being ignorant of its contents, delivered it to another. To punish him with death would have been a species of cruelty of which the worst of the Romans were incapable, but if, instead of destroying it, he manifested it, then he was to be considered as the author. The reason I quote this passage is to show that where "ediderit" is used it means a delivery only, but when they intend to express a disclosure of the contents of a paper they use the word manifestaverit; and thus, both according to the Civil and the English law, whether this paper were delivered open or wrapped up in a hundred envelopes, the delivery was a publication.

I come now to another point, viz., the rejection of the evidence of that which was done at Manchester, which it was contended ought to have been received for the purpose of explaining the libel. In the first place there was no ambiguity to explain. There was no part of the libel that was not intelligible without the aid of evidence. In the next place, it was clear that notwithstanding anything which might have passed at Manchester, many parts of this letter were libellous.

Another point on which the motion for a new trial was made was, that I took upon myself to lay down the law to the jury as to the libel, and that since the Libel Act, 1792, I was not warranted in so doing. I told the jury that they were to consider whether the paper was published with the intent charged in the information, and that, if they thought it was published with that intent, I was of opinion that it was a libel. I, however, added, that they were to decide whether they would adopt my opinion. In forming their opinion on the question of libel, I told the jury that they were to consider whether the paper contained a sober address to the reason of mankind, or whether it was an appeal to their passions, calculated to incite them to acts of violence and outrage. If it was of the former description, it was not a libel; if of the latter description, it was. It must not be supposed that the Act of 1792 made the question of libel a question of fact. If it had, instead of removing an anomaly, it would have created one. Libel is a question of law, and the judge is the judge of the law in libel as in all other cases, the jury having the power of acting agreeably to his statement of the law or not. All that the statute does is to prevent the question from being left to the jury in the narrow way in which it was left before that time. The jury were then only to find the fact of the publication and the truth of the innuendoes, for the judges used to tell them that the intent was an inference of law, to be drawn from the paper, with which the jury had nothing to do. The legislature has said that that is not so, but that the whole case is to be left to the jury. But judges are in express terms directed to lay down the law as in other cases. In all cases the jury may find a general verdict. They do so in cases of murder and treason, but there the judge tells them what is the law, though they may find against him, unless they are satisfied with his opinion. This is plain from the words of the statute, which, after reciting that doubts had arisen whether on the trial of a libel the jury may give their verdict on the whole matter in issue, directs [s. 1] that they

"shall not be required or directed [by the judge] to find the defendant . . . guilty, merely on the proof of the publication by such defendant of the paper charged to be a libel, and of the sense ascribed to it by the indictment."

The statute proceeds expressly to say [s. 2] that

"On every such trial [the judge] shall, according to . . . his discretion, give . . . his opinion and directions to the jury on the matter in issue . . . in like manner as in other criminal cases."

That was all that was done on this occasion, and, therefore, I am of opinion that this objection also fails. As to the libel itself, considering it as the production of

A a man of large fortune, high rank, and extensive influence, where is the person that can make an observation in favour of any part of it? My opinion of the liberty of the Press is that every man ought to be permitted to instruct his fellow subjects; that every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country; and that he may point out errors in the measures of public men, but he must not impute criminal conduct to them. The liberty of the Press cannot be carried to this extent without violating another equally sacred right—namely, the right of character. This right can only be attacked in a court of justice where the party attacked has a fair opportunity of defending himself. Where vituperation begins, the liberty of the Press ends. This maxim was acted upon by the greatest States of antiquity. In our country, the liberty of the Press allows us to persuade men to use their constitutional influence over their representatives to obtain in the regular Parliamentary manner a redress of real or supposed grievances. But this must be done with temper and moderation, otherwise instead of setting the government in motion for the people, the people may be set in motion against the government.

D **HOLROYD, J.**—This is a motion for a new trial which has been made and supported in argument on various grounds with the greatest ability, but after hearing and most attentively considering everything that has been suggested by the learning and ingenuity which on this occasion we have heard displayed, and the authorities that have been relied upon or discussed, I am of opinion, that the rule for a new trial ought not to be made absolute.

E His LORDSHIP said that it had been proved at the trial that the defendant was the author of the alleged libel and had published it with the intent that it should be acted on, and he continued: Writing a libel with the intent and for the purpose of its being published (under circumstances not sufficient in law to justify or excuse the writer for so doing), followed by a publication by the act or under the authority of the writer, is in my opinion, by the law of England, a misdemeanor, and triable in the county where such writing took place, though the publication be in some other county. I do not say whether all those qualities are or are not necessary to be attached to or connected with the act of writing in order to make it a misdemeanor. It is not necessary at present to consider or give any opinion upon any such case, and still less upon a case where the writing remains confined by the author to his own closet or privacy, or has been obtained thence and published without his privity or consent. How far *R. v. Beare* (3) may be borne out, or supported in law to that extent, I have not in the present case considered, nor do I mean now to give my opinion upon it. The present case, I think, does not require it, being quite distinguishable, and everything said by me in this case will, as I conceive, leave my judgment, as well as that of others, quite unfettered in any such cases as I have last supposed if unfortunately any such should arise.

H Where a misdemeanor has been committed by a defendant by writing and publishing a libel, the writing of such a libel so published, is, in my opinion, criminal, and liable to be punished by the law of England as a misdemeanor as well as the publishing of it. The crime in such a case is not confined to the publishing of it alone. The constant form in which the charge is alleged in indictments and information, shows this. Where the facts of the case are expected to support it the indictment or information does not confine the offence charged to publishing the libel merely, but alleges the composing or the writing of it as part of the crime, and where the party prosecuted has been acquitted of publishing it and found guilty of writing it judgment has passed against the defendants, not merely in *R. v. Beare* (3), but in the subsequent cases of *R. v. Knell* (4), and *R. v. Carter* (5), for the preceding parts which the several defendants had taken with respect to the libel, whether it were in printing, composing, or writing them. The charge against this defendant is an aggregate offence, a misdemeanor consisting of different parts, viz., the composing, writing, and publishing, and if so much of that charge be proved to

have been committed in the county of Leicester, as is in law a misdemeanor, it is perfectly clear that he might be found guilty of that part alone, and that judgment thereupon must pass against him pro tanto. The composing and writing, with the intent and for the purpose above stated, of a libel proved to have been published by the defendant is, in my opinion, of itself a misdemeanor, in whatever county the publishing of it took place, and is, I think, triable in the county where the libel was composed and written. The jury of that county, I take it to be clear, may inquire into any fact, though in another county, so far at least as tends to prove that to be an offence which has been done in their own county. So far, therefore, at least as the defendant's publishing the libel elsewhere tends to prove his composing and writing of it to be criminal, the jury of the county where it was composed and written, clearly, I think, may inquire of, and take cognisance of it. This is constantly done in the case of overt acts of high treason, and of acts of conspiracy, committed out of the county, in order to establish or confirm the charge of treason or conspiracy within the county.

It is urged that, if the defendant were found guilty of the composing and writing and not of the publishing, this information does not contain a sufficient charge of composing and writing, so as to make composing and writing in that case criminal, inasmuch as it does not allege that the defendant wrote it with intent to publish it. Without considering how far an information in such a case would or would not be sufficient to convict the writer upon it unless such an allegation, either directly or to that effect, were contained in it, the information does in this case, I think, contain an allegation, not only to that extent and effect, but even further, for it alleges that the defendant, intending to excite discontent and sedition among the King's subjects, and particularly among the soldiers, etc., composed, wrote, and published the libel. This allegation of the intent is applicable to each of the acts charged upon the defendant, to the composing and writing as well as the publishing. Therefore, as such discontent and sedition could not be excited among the soldiers of the King without publishing the libel, the information in effect alleges that the defendant composed and wrote it for the purpose of its being published, in order to effect those further purposes of mischief which could not be accomplished by it, unless by its publication.

But, further, I think the jury may inquire into and take cognisance of those facts which are done out of their county for the purpose of finding a defendant guilty, not only of so much of the crime as was committed within the county, but also of the remainder of the aggregate charge, in those cases where so much of the misdemeanor charged as is proved to have been done within their county is of itself a misdemeanor. If that be so, it would warrant this verdict in its full extent, whether the publication of this libel is deemed to have been in the county of Leicester or not. This is established to be the law in cases of conspiracies and nuisances, in both of which the juries do not confine their verdicts of guilty to such criminal acts or consequences as occur in the county where the conspiracy or erection of the nuisance is laid and proved, but extend them to such further acts and consequences of conspiracy and nuisance, as may occur or arise in another county and judgment and punishment are in such cases given and awarded to the full extent of the aggregate offence. The cases of felony have been urged as bearing on the present case, but those are, I think, distinguished from and do not apply to the present question.

It has, however, been further urged that there ought to be a new trial because the verdict was found upon the learned judge's telling the jury that there was evidence before them to show that the libel was published by the defendant in Leicestershire, and that it might be presumed to have been delivered by the defendant to Mr. Bickersteth there, and even in the state in which it was afterwards delivered to Mr. Brookes, namely, open. From what I have stated above it appears that my opinion must be that by law the learned judge need not have gone so far in favour of the defendant as to put it to the jury to consider whether, from the evidence given, they

A would presume and find that the defendant had published the libel in Leicestershire, which would have given him the benefit of an acquittal in case they had thought the evidence not sufficient for them to make that presumption. For the reasons I have above stated I think the verdict ought to have been the same whether the defendant had published the libel in that or any other county.

B It is certainly true, and I most ardently hope that it will ever continue to be the case, that by the law of England, as it was urged and admitted in the *Seven Bishops' Trial* (6), no man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably, or reasonably, from the facts proved, cannot avail in law. That is the presumption spoken of in the *Seven Bishops' Trial* (6), which is no more than mere loose conjecture, without sufficient premises really to warrant the conclusion. But crimes of the highest nature, more especially cases of murder, are established and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved by presumptive evidence only of the guilt of the party accused, and the well-being and security of society much depend upon the receiving and giving due effect to such proofs. The presumptions arising from these proofs should, no doubt, and most especially in crimes of great magnitude, be duly and carefully weighed. They stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger according as the party has, or is reasonably to be supposed to have, it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true, and according as he does or does not produce such contrary evidence. It is established as a general rule of evidence that in every case the onus probandi lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognisant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged, but when such proof has been given it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, un rebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true. Bearing these considerations in remembrance, there was, I think, evidence sufficient to be left to the jury from which they might reasonably presume a publication by the defendant in Leicestershire.

G In the case of Sir Manasseh Lopez for bribing a voter of a borough in Cornwall [*R. v. Lopez* (7)] evidence was given that when he was at his seat in Devonshire he said: "Such a one" (the person whom he was charged to have bribed, and whom he was proved to have bribed, though it did not appear whether the bribery was committed in the county of Devon) "has been with me." It was objected at the trial that there was not evidence to show that the offence was committed in Devonshire. Upon that occasion I left it to the jury to consider whether his being there at the time, and that being the county in which the voter was to vote, were not sufficient, and upon that evidence the jury presumed the offence to have been committed in Devonshire, it being in the defendant's power, by means of the voter, who was, however, not called by him, to have shown that the crime was committed out of Devonshire, if the fact had been so. I mentioned this circumstance to the court afterwards in order that it might be ascertained whether he was rightly convicted or not, and the court thought it was *prima facie* evidence, and he received judgment.

I The presumptions in the present case are stronger, and arise as well from the contents of the libel and the extrinsic facts proved as from the want of contrary evidence within the knowledge and power of the defendant as to facts peculiarly within his own knowledge of which he must be supposed to be cognisant in order to rebut or weaken those presumptions against him. The contents of the libel show that it was written in haste and in Leicestershire, for the purpose of being speedily

acted upon by public meetings elsewhere, from which it is reasonably to be presumed to have been, as soon as effectually it might be, sent off for its destination as it must have been delivered by Mr. Bickersteth to Mr. Brookes, in Middlesex, on Aug. 24, or otherwise it could not have been published in the newspaper called the "British Press" on Aug. 25. The writer was living in Leicestershire, and was proved to be there on Aug. 22 and the day following, within which period of time it was, probably, sent away, and it is but a reasonable presumption that it was sent away by him from the place where he was then living—at least it is so in default of proof on his part of his being out of the county or of any other evidence to rebut that presumption. The evidence for the Crown established both the time and person to whom the prosecutor had traced the libel. How it came to Mr. Brookes unsealed and whether it was originally sealed or not were matters peculiarly in the knowledge of the defendant, and not of the prosecutor. He knew how and in what state, whether open or sealed, and when he had sent or delivered it to Mr. Bickersteth and might have proved it, or at least he might have shown, by Mr. Bickersteth, in what state it was when he received it. Of these facts the prosecutor could not be supposed to be cognisant, nor can it be supposed, if the letter had not been parted with by the defendant in Leicestershire, and even in an unsealed state (for it does not appear—that is, there is no proof—that it went by the post, and, if it did, it would, no doubt, go sealed), that Mr. Bickersteth would not have been called by the defendant to prove the state in which it was received by him. In default of all proof, under such circumstances, to weaken or rebut these presumptions, I think the jury were warranted in concluding and finding that it was parted with by the defendant in Leicestershire and that it was then in the same state in which it was delivered to Mr. Brookes, there being no proof, either direct or presumptive, of its ever having been in any other state. Indeed, my belief, from the evidence, would be that it was not sent by the post to Mr. Bickersteth and that he was not in London when he received it, but that probably it was delivered to him by the defendant in Leicestershire, for I cannot suggest to myself any reason for his sending the libel, either by the post or otherwise, to Mr. Bickersteth, merely to give him the trouble of passing it to Mr. Brookes in the Strand instead of sending it at once to Mr. Brookes himself.

But whether it was sent away or parted with by the defendant in Leicestershire, open or sealed, makes, in my opinion, no difference with respect to the question, whether it was, in point of law, published by him in that county or not, so far as to give the jury of that county jurisdiction over that fact. In 5 Co. Rep. 126 a, it is laid down that a scandalous libel may be published traditione, when the libel, or any copy of it, is delivered over to scandalise the party. So that the mere delivering over or parting with the libel with that intent is deemed a publishing. It is an uttering of the libel, and that I take to be the sense in which the word publishing is used in law. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only is, indisputably, in law, a publishing. DE GREY, C.J., in *Baldwin v. Elphinston* (8), states that a written libel may be published in a letter to a third person, and states two instances from RASTELL'S ENTRIES (Action on case, 13, a.) of charges of constructive publications by delivering letters to A. and B., and by fixing them on the door of St. Paul's Church. The mere delivery or fixing them, with the intent to scandalise, is itself considered to be a publishing, and in prosecutions for libels it is never made a matter of inquiry whether either the witness who purchased the libel at a defendant's shop or any other person read it in the county where it was bought, or even at all, in order to prove the publication of it complete in that county. In such cases the fact of delivering it to the purchaser is alone relied upon as proof of the publication in the county without any proof of its being read there or elsewhere. In the prosecutions for libels in London, when proof was given of their being purchased at Carlile's shop, in Fleet Street [see *R. v.*

- A *Carlile* (9)], no inquiry, I believe, ever followed whether the purchaser had read them within the city of London or not, though there is all probability he took them out of the city of London and delivered them unread to the Solicitor of the Treasury or someone else in Lincoln's Inn. The mere parting with a libel with such an intent by which a defendant loses his power of control over it is an uttering, and when the contents of it have thereby become known, if not before, it has become, I think, so far a criminal act in the county where it is parted with as to give the jury there a jurisdiction to try the crime of publishing it. So far as depends on the defendant, his crime is there complete; and the act of another person in reading the composition elsewhere does not alter his criminality, or the nature of his act, in the county where he parted with it with the criminal intent. In the cases of wills and awards, they are constantly made and published without the contents being made known, even to the witnesses in whose presence they are published. So that the making known the contents is not, in some cases at least, *ex vi termini* essential to the constitution of an act of publishing.

- With respect to the objection of the learned judge's refusing to receive evidence of the truth of the facts alleged, or rather assumed in the libel, there is, I think, not the least doubt upon the point. Although the objection was made, it was not even attempted to be supported by argument at the trial. Whatever might be the result of a due inquiry into those facts elsewhere, it is clear that that was not the proper place or occasion for inquiring into them, nor would the writing be otherwise than, in law, a libel. It assumes, as true, a statement most highly calumnious on individuals and on the government merely from a statement in a public newspaper and without the knowledge, whether it were true or not, to any or to what extent, and indulges in the highest strain of invective for the purpose of inflaming the public, and raising in their minds the greatest discontent, disaffection, and alarm. That is, in itself, a seditious libel, and the question for the jury was whether what the defendant had written and published, with the intent stated in the information, was a libel or not, and not to what extent it was so, even supposing that the result of that inquiry would have been any palliation of the libel.

- With respect to the objections taken to the learned judge's having given his opinion and directions to the jury, upon the question, whether the writing was a libel or not, it seems to me that he left it to them to consider, whether they would adopt his opinion in that respect or not, and he is expressly directed, by the Libel Act, 1792, according to his discretion to give his opinion and directions to the jury on the matter in issue in like manner as in other criminal cases. I think the rule for a new trial ought to be discharged.

- BAYLEY, J.,** who disagreed, saying that he thought there should be a new trial on the ground, on the question of venue, that the whole offence must be committed in one and the same, said in the course of his judgment: I take it to be clear law that if a libel contain matters imputing to another a crime capable of being tried, you are not at liberty at the time of the trial of the libel to give evidence of the truth of those imputations. This is founded on a wise, wholesome, and merciful rule of law, for if a party has committed such an offence he ought to be brought to trial fairly and without any prejudice previously raised in the minds of the public and the jury. The proper course, therefore, is to institute direct proceedings against him, and not to try the truth of his guilt or innocence behind his back, in a collateral issue to which he is no party. The present libel contains imputations of very high crimes, capable of being tried. It contains a statement that certain persons at Manchester had been guilty of murder, and the truth, therefore, of the libel could not be tried without inquiring whether at Manchester certain persons had or had not committed murder. It appears, therefore, to me, that evidence upon this point was not admissible, and that *R. v. Horne*

(10) is distinguishable on the ground that there was not in that case an imputation of any crime capable of being tried. In some cases, indeed, it is possible that the falsehood may be of the very essence of the libel. As for instance; suppose a paper were to state that A. was on a given day tried at a given place and convicted of perjury: if that be true, it may be no libel, but if false, it is from beginning to end calumnious, and may, no doubt, be the subject of a criminal prosecution. Possibly, therefore, in such a case, evidence of the truth of such a statement by the production of the record, might afford an answer to a prosecution for libel. [Now, by s. 6 of the Libel Act, 1843, "the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published."]

No one can doubt that presumptions may be made in criminal as well as in civil cases. It is constantly the practice to act upon them, and I apprehend that more than one half of the persons convicted of crimes, are convicted on presumptive evidence. If a theft has been committed, and shortly afterwards the property is found in the possession of a person who can give no account of it, it is presumed that he is the thief, and so, in other criminal cases, but the question always is whether there are sufficient premises to warrant the presumption. Those premises seem to me, in this case, to be wanting. In order to warrant a presumption a *prima facie* case must, at least, be made out. Was such a *prima facie* case made out here? . . . I agree, that where a matter is peculiarly within the knowledge of one party, the *onus probandi* may be shifted, and his neglect to give the evidence may furnish ground for a presumption against him. But here the matter does not lie peculiarly within the knowledge of the defendant. Mr. Bickersteth knew as well as the defendant the circumstances of the case, and the case on the part of the prosecution shows it. Then the question is whether it was sufficient to leave the case without calling him as a witness.

ABBOTT, C.J.—I am of opinion, that the rule for a new trial in this cause ought to be discharged. The case has been argued at very great length on the part of the defendant, and many topics have been addressed to the court, some of a general nature, and others more particularly applicable to the case itself. It has been contended that the whole crime of libel consists in the publication alone, and that the author or writer is in no degree criminal if his composition be not published. I intimated more than once in the progress of the argument that the decision of this point was, in my opinion, immaterial to the present case, because this is the case of a libel actually published by the authority and procurement of its author. I shall, therefore, abstain from giving any decided opinion upon this point, but I cannot forbear observing, that many of the passages quoted in support of the proposition, from the text of the Civil Law being expressed in the disjunctive, appear to me to be authorities rather against than in favour of the point for which they were adduced. The composition of a treasonable paper intended for publication has, on more than one occasion, been held an overt act of high treason, although the actual publication had been intercepted or prevented, and I have heard nothing upon the present occasion to convince my mind that one who composes or writes a libel with intent to defame, may not, under any circumstances, be punished, if the libel be not published. In any case in which this question may arise, the particular circumstances of the case will become fit matter for consideration at the trial.

R. v. Beare (3) came before the court after verdict. There is no very clear and satisfactory report of it, and I will only say of it at present that I have no doubt that HOLT, C.J., considered the criminal intention charged in the indictment as not negatived by the verdict, and understood the word "only" to be confined to the acts done. It is true that in cases of libel a publication has been generally proved, and the trial has been had in the county where publication took place. The place of publication is rarely a matter of doubt, the place of the writing or

A composition is often unknown, and, as most of the cases of libel have been cases of publication, judges and other persons, speaking of the crime of libel, generally, and without anything requiring a distinction between the writing and publishing, may not unreasonably use expressions applicable to published slander.

It was further contended, that the word publication denotes an actual communication of the contents of the writing by the publisher to some other person, and we were referred to dictionaries for the sense of the word publication. But in the law, as indeed in other sciences and arts, some words are used in a peculiar sense, differing in a certain degree from their popular meaning. Thus, in the language of the law, we speak of the publication of a will, and the publication of an award, without meaning to denote by that word any communication of the contents of those instruments, and meaning only a declaration by the testator or arbitrator, in the presence of witnesses, that the instrument is his testament or award. In like manner the publication of a libel does not, in my opinion, mean an actual communication of the contents of the paper. SIR EDWARD COKE says, a libel may be published traditione, by delivery; and this is adopted by COMYNS, C.B., in his DIGEST, and is conformable to the Civil Law, wherein we find the word "edidit" used as applicable to this subject. Actual communication of the contents, as by singing or reading, is indeed one mode of publication, but it is not the only mode, nor the usual mode. The usual mode is by delivery of the paper, either by way of sale or otherwise, and upon proof of the purchase of a newspaper or pamphlet in Fleet Street, no one ever thought of asking whether the purchaser or other person read the paper or pamphlet in London or elsewhere.

I shall now proceed to advert to the topics more particularly applicable to the present case. In the first place it was contended that there was not in this case, as it was said there ought to have been, any evidence of publication in the county of Leicester, and the manner in which this point was put to the jury by my learned brother at the trial was made the ground of much objection. It was said that the jury were directed to presume a publication in Leicestershire without any sufficient ground, but upon an attentive consideration I am of opinion that all that was done upon this subject was well warranted by the evidence adduced at the trial. A presumption of any fact is, properly, an inferring of that fact from other facts that are known. It is an act of reasoning, and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference, but if no fact could thus be ascertained by inference in a court of law very few offenders could be brought to punishment.

In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime is or can be given. The man who is charged with theft is rarely seen to break the house or take the goods, and in cases of murder it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved regard must always be had to the nature of the particular case and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction, but, when such proof has been given and the nature of the case is such as to admit of explanation or contradiction if the conclusion to which the proof tends be untrue and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily, but in matters that regard the conduct of men the certainty of mathematical demonstration cannot be required or expected, and it is one of the peculiar advantages of our jurisprudence that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men conversant with the affairs and

business of life, who know that, where reasonable doubt is entertained, it is their duty to acquit, and not of one or more lawyers whose habits might be suspected of leading them to the indulgence of too much subtlety and refinement.

I have thought it right to premise these general observations before I consider the particulars of the evidence in the present case, and I must also first take notice of a topic that was urged on this head by one or more of the learned gentlemen who have argued for the defendant. It was said, and truly said, that guilt and crime are never to be presumed, and the cases of supposed murder mentioned by SIR MATTHEW HALE, which have since operated as a caution to all judges, were quoted on this occasion. But the cases are wholly different. In those cases there was no actual proof of the death of the person supposed to have been slain, and, consequently, no proof that the crime of murder had been committed. The *corpus delecti* was not established. In this case the crime, so far as it consists in the composing and publishing the paper, was proved beyond all contradiction. The paper was written by the defendant, and came to the hands of Mr. Brookes by the defendant's authority and procurement, not as a private and confidential communication, but for insertion in the public newspapers, and the question is not whether there was any publication, but in what county the publication shall be deemed to have taken place—a question arising entirely out of the locality of the jurisprudence of this country. If the prosecutor has mistaken the county in which the offence is charged, the defendant is entitled to avail himself of that mistake, and I have as little inclination as authority to deprive him of his privilege; and this brings me to the particulars of the evidence.

[HIS LORDSHIP examined the evidence and asked why, in the absence of proof of a delivery out of the county, might not the jury conclude that the defendant had delivered the paper to Mr. Bickersteth in that county in which he (the defendant) had been proved to be. Matters of fact were for the determination of the jury. If they drew a conclusion not warranted by the premises before them, it was the duty of the court to correct their error and to send the case to another trial, but, if the conclusion were a reasonable inference from the premises, the court ought not to disturb their verdict. Their conclusion in the present case was the most reasonable inference from the premises, and the judge was perfectly justified in presenting the matter to the jury for their consideration with a strong expression of his own opinion in favour of this conclusion. HIS LORDSHIP continued:] Upon the facts, can any man hesitate to infer that the defendant, in some way delivered the paper out of his custody in Leicestershire that it might pass to London? And if he did there deliver it for that purpose, such a delivery was at the least a commencement in Leicestershire of the *traditio* or act of publication. The fact of such a delivery in Leicestershire can scarcely be called an inference, for it is nothing more than saying that the defendant did the act in the county in which he is proved to have been on the day on which he did it, he not appearing to have been out of the county on that day, and the act being such, as regard being had to his rank and situation in life, would in the ordinary course of things take place at his own house.

To write and publish a libel is a misdemeanor compounded of distinct parts, each of which parts (for I am speaking of a published libel) being an act done in prosecution of one and the same criminal intention, is a misdemeanor. Where a misdemeanor consists of such distinct parts, I say, without doubt or hesitation, that the whole may be tried in that county wherein any part can be proved to have been done. All that I have heard from the learned gentlemen who have argued the case on the part of the defendant, and have presented this matter to the court in every various view that ingenuity could devise, has not for one instant raised a particle of doubt in my mind, and having no doubt, I should abandon the duty of my office if I did not declare my own conviction and act judicially upon it. If the law should be otherwise, I know not very well what consequence is to follow. At one time it was argued that the trial could be in that

A county alone wherein the paper was received and read, which was called the place of the publication. If this be true, one of two consequences must follow—either the party must be convicted of the whole offence in the latter county, and then the jury of that county will inquire into and find criminal matter committed in another, which would be contrary to other parts of the argument addressed to us, or the party must be acquitted of the writing, and if the latter alternative be correct, then an author can never be punished as such if he happen to write at one side of Temple Bar and publish at the other. At another time it was contended that in the case supposed the party could not be tried in either county, or, in other words, that he could not be tried at all, and, if it be true that a misdemeanor can be tried in that county alone wherein every part of it has been committed, the impossibility of any trial in the supposed case would be a conclusion fairly deducible from the premises. But the conclusion would be an absurdity in the law, and the absurdity of the conclusion proves the falsehood of the premises.

Felony stands on a very different ground from misdemeanor, and the assertion that a misdemeanor can be tried in that county alone wherein every part of it was committed appears to me to have been built upon a mistake of the true ground and reason of the doctrine in felony. This mistake, however, is not new, and, therefore, in no degree surprising, for we find in many of our books, and even in the preamble of the Criminal Law Act, 1548 [repealed by the Criminal Law Act, 1826] there are expressions importing that a jury of one county cannot inquire into or take cognisance of any fact that happened in another. It was admitted on the present argument that the generality of these expressions must be so far restrained as to confine their import to criminal matter or rather to a part of the crime, because daily experience shows that the proof of introductory or explanatory matter occurring in either county is received without objection even in cases of felony. There was a time, however, when it was supposed that a jury could not even in a civil action inquire into a matter that did not take place in their own county. In the time of Henry VII an action of debt was brought upon a bond. The condition of the bond, according to the report in one part of the YEAR BOOK (Y.B. 10 Hen. 7, fo. 22, pl. 21), was that, if a certain ship should sail to Lynn and thence go to Norway and return from Norway to London, the bond should be void; otherwise, that it should stand good. On this it was said that as Norway was a place *ultra mare* no jury in England could try or know whether the ship had been in Norway, that the fact upon which the condition depended was, therefore, a matter not triable, and a condition containing matter not triable was the same as a void condition, and that where the condition of a bond was void, it was the same thing as if the bond was made without any condition and so the bond must stand good and be available as a single bond. There was much learned and subtle reasoning upon those points, on one side and on the other, and the case was adjourned. So easy is it for men to perplex themselves, and even to deduce absurd conclusions, if once a false proposition be admitted as true. The case occurs afterwards in another part of the book in the following year (Y.B. 11 Hen. 7, fo. 16, pl. 13) and there the condition is differently stated, but still in such a way to make the return from Norway material. It appears not to have been decided at that time, and I have not traced the final result.

The true ground of the doctrine in felony is this. If a felony be compounded of two distinct acts one of which takes place in one county and the other in another county, the concurrence of both being necessary to constitute the felony, the party may not be triable in either, because, *ex hypothesi*, there is no felony committed in either. The case of a stroke in one county and death in another, was considered by some as of this kind. The stroke was not a felonious act at the time, and the death, though consequential to the act of the striker, seems not to have been considered by them as properly his act. To remedy this inconvenience, the Criminal Law Act, 1548, was passed. It seems somewhat extraordinary that

the preamble of this part of the statute should be expressed in the terms in which we find it, because SIR MATTHEW HALE (1 Hale, P.C. at p. 426) mentions this point as being doubtful at the common law and says the more common opinion was that the party might be indicted where the stroke was given. On the same page there is a reference to *Coles's Case* (11), to show that a general pardon, whereby all misdemeanors are pardoned intervening between the mortal stroke and the death of the party stricken doth pardon the felony consequentially, because the act that is the offence is pardoned though it be not a felony until the party die.

Observations of the same kind may be made upon the case of accessories in one county, whether before or after the fact, to a felony committed in another county. The act done, whether of prior advice or procurement, or of subsequent receipt and harbouring, is not a felonious act, if taken singly and by itself, but requires the concurrence of some other act to give the felonious character. Both descriptions are provided for by the same statute, though the preamble speaks only of accessories after the fact, and the case of accessories before the fact does not seem to have been very clearly settled at the common law, for according to a case in KEILWEY, p. 67 [*Anon.* (12)], it appears that accessories before the fact in one county to a murder committed in another, might be arraigned and tried in the county where the murder was committed. In the YEAR BOOK, 9 Edw. 4, fo. 48, pl. 1, there is a case of a person indicted in Middlesex for there procuring one I.S. to commit a murder, who committed it in Berks. Because the accessory could not be arraigned until the principal was attainted or acquitted, the court wrote to the justices and coroners of Berks to certify whether I.S. was indicted for the murder, and upon a return that he was not, the accessory was discharged. It was wholly unnecessary to obtain such a certificate and the party ought to have been discharged immediately if the indictment against him in Middlesex could not be sustained in case the principal had been convicted in Berkshire.

In the case of the appeal of robbery reported in DYER, 38 a [*Gawen v. Hussee and Gibbes* (13)] it appears to have been the opinion of one, if not both, of the judges present that the procurer of a felony might be indicted in the county where his procurement was. But in that case an appeal of robbery brought in Wiltshire, where the robbery was committed, against the procurers thereof in London, was quashed, for, says SIR EDWARD COKE, in *Bulwer's Case* (7 Co. Rep. at p. 2 b), who there cites *Gawen v. Hussee and Gibbes* (13):

“in case of felony, which concerns the life of a man, every act shall be tried in the proper county where the act was in truth done.”

This case of life, though, perhaps, not a good logical reason for distinction, is undoubtedly a ground for the utmost caution, and is well known to have operated strongly upon the minds of judges in all times. It has, indeed, led in some cases to such subtlety and refinement of construction and to the giving way to such nice and formal objections as were in the opinion of SIR MATTHEW HALE a reproach to the law. But as the reasons which may be assigned in cases of felony do not apply to other cases, so neither has any instance been found wherein a misdemeanor composed of acts in different counties, each act being in itself a misdemeanor, has not been held wholly triable in that county wherein any criminal part was committed. The *Seven Bishops' Trial* (6) which was referred to in the motion, does not establish anything of this kind, for in that case, which was an indictment in Middlesex, there was not at any period of the trial any proof of the writing in Middlesex, nor, for a very long period, any proof of a publication in Middlesex. The difficulty as to the locality of trial was in the end so far removed as to become a question for the jury, under circumstances to which I need not now advert, by the testimony of the Lord President of the Council. Even after his testimony the identity of the paper was to be collected by inference, which was not objected

A to. The doctrine of COKE in 3 Co. INST., p. 80, in his commentary on the statute 4 Ja. c. 1, c. 8, was applied to the case of felony.

B I will now refer to *Bulwer's Case* (14), and the authorities there cited, premising only that I am not aware of any authority pointing to a distinction between local actions and indictments for misdemeanors. The power of the jury appears, upon principle, to be not less limited in the one case than in the other. *Bulwer's Case* (14) was an action brought in the county of Norfolk for maliciously causing the plaintiff to be outlawed in London upon process sued out of a court at Westminster, and causing him to be imprisoned in Norfolk upon a capias utlagatum directed to the sheriff of that county, but issued at Westminster. It was objected that the action was not maintainable in the county of Norfolk, but the contrary was decided, because where matter in one county is depending upon matter in another county, C the plaintiff may choose in which county he will bring his action unless the defendant should be prejudiced in his trial. Of this proposition numerous instances are there cited relating to actions, some of which were then considered as local, though, perhaps, they might not be so now, and others which would still be so considered. Among the instances are conspiracy in one county to indict a man falsely, followed up by an indictment preferred by the same parties in another D county; neglect to repair a wall in Essex, whereby the plaintiff's land in Middlesex is overflowed; and the forgery of a deed in one county and publication of it in another. This last instance exactly resembles the writing of a libel in one county and publication of it in another, and is less strong than the writing in one county and sending or carrying from thence into another in order that it may be received E and read. For the sending or carrying in the latter case is the commencement of the publication; the receipt and reading are its consummation; the sending is the act of the party, and so also is the carrying of it, if it be carried by the writer; and the melior notitia that has been alluded to, seems to be, as it regards such a party, in the county in which his own acts are done.

A very early instance of misdemeanor, wherein the whole matter was inquired F into in one county, is *Danby's Case* (15) in Y.B. 2 Richard 3, fo. 10, cited in 1 HALE'S PLEAS OF THE CROWN, 652. The proceedings, to an outlawry, consisting of an original writ, three writs of capias, and a writ of exigent, had been altered by the erasure of the christian name of the defendant who was therein called John and the substitution of William in its place. This alteration in the original writ was made by one person in London, and in the several other writs, by three other G persons in Middlesex. The whole matter, taken together, was considered as a felony, under the statute of 8 Hen. 6, c. 12. It seems that the several writs were considered as constituting but one record, and this offence, thus committed in parts, was held not to be triable as a felony, but it was held that the one offender might be tried in London and the others in Middlesex for the misprision, which was accordingly done and they were punished; and, though it may be true, as H was said by one of the learned counsel, that the whole act of the person tried in London was committed there, yet it seems to have been thought necessary to prove all that had occurred in Middlesex. A part, viz., the issuing of the writ, was certainly necessary, but this was no criminal part, and the case is not so material in itself, as for the observations made upon it by SIR MATTHEW HALE. He said (1 Hale, P.C. at pp. 652, 653):

I "And yet observe, the felony was one entire felony, committed in two counties, and so neither inquirable nor determinable in one county; for the jury of that county cannot take notice of part of the fact committed in another; and yet the misprision of that felony was inquirable and punishable in either county, where but part of the felony was committed; and yet the jury, in that case, must take notice of the entire felony, part whereof was committed in another county."

The expression misprision of felony, does not seem to be very correctly used in

this case, for misprision of felony is the concealment of a felony, knowing it to have been committed by another. This was the case of acts done by the parties themselves. A

In *R. v. Williams* (2), which is reported to have been an indictment in Middlesex for sending, but was, in fact (as appears by the record), an indictment for composing and writing, causing to be composed and written, sending and delivering, and causing to be sent and delivered, a libellous letter, with intent to provoke a challenge, the letter, being sealed up, was put into the Post Office by the defendant in Westminster addressed to the prosecutor in London, who received it there. Objection being taken that there was not any evidence of an offence committed in Middlesex, LORD ELLENBOROUGH said there was a sufficient publication in Middlesex by putting the letter into the Post Office there, with intent that it should be delivered to the prosecutor elsewhere. In *R. v. Watson* (1), the prosecutor failed in proving that the first letter was put into the Post Office in Middlesex, and it was received in another county. GROSE, J., in delivering the judgment of the court in *R. v. Brisac* (16), says (4 East, at p. 171): B C

"There seems no reason why the crime of conspiracy, amounting only to a misdemeanor, may not be tried wherever one distinct overt act of conspiracy is, in fact, committed, as well as the crime of treason. In *R. v. Bowes* (17) the trial proceeded upon this principle; where no proof of actual conspiracy embracing all the several conspirators was attempted to be given in Middlesex where the trial took place and where the individual actings of some of the conspirators were wholly confined to other counties than Middlesex, but still the conspiracy, as against all, having been proved from the community of criminal purpose and by their joint co-operation in forwarding the objects of it in different places and counties, the locality required for the purpose of trial was holden to be satisfied by overt acts done by some of them, in prosecution of the conspiracy in the county where the trial was had." D E

Another instance of this kind is the decision of the judges in *R. v. Buttery* (18), who was indicted on the statute 30 Geo. 2, c. 24, s. 1, for obtaining money by false pretences. The language of the statute makes the offence to consist in obtaining the money, and not in using any false pretence whereby money shall be obtained. The indictment was in Herefordshire; the false pretence was in Herefordshire, but the money was received in Monmouthshire. The judges thought the indictment was laid in the wrong county. They did not think the party not indictable at all, which they ought to have done if the proposition addressed to us be true, because the pretence which was necessary to constitute the crime was in one county and the receipt in another, and so there was no entire crime in either. The instances of treason which were alluded to by GROSE, J., are well known; see 1 EAST'S PLEAS OF THE CROWN, 180; and they go this length, viz., that one witness to an overt act in the county wherein the indictment is preferred is sufficient, if another overt act in another county be proved by another witness, and so, as there can be no conviction but by the testimony of two witnesses, the jury must take cognisance of criminal matter committed out of their county as the foundation of a conviction. Treason and misdemeanor are alike distinguishable from felony on the ground that I have already mentioned, viz., that each act is an offence of the same species with every other and with the whole, whereas an act requiring the concurrence of some other act or matter to constitute a felony may not be in itself a felony, and may either be an offence of a different nature, punishable as such, or lose its character by merger in the other act or matter so as to become dispensable for want of the locality necessary to a trial. F G H I

In cases of felony, the legislature has, on more than one occasion, intervened to prevent the failure of justice, occasioned by the rule to which I have adverted. I am not aware that the legislature has interposed in any case of misdemeanor, and

A I cannot help thinking that the absence of any such enactment furnishes an argument to show that nothing of this kind has been thought necessary, and that it has been generally understood that a conviction for a misdemeanor might take place in the county wherein any such part thereof as I have mentioned should have been committed, for otherwise there would, in many cases, be a great failure of justice. I cannot, therefore, do otherwise than say I am clearly of opinion
B in the way I have expressed myself and for the reasons I have given, that, if any such part of an entire misdemeanor be proved to have been done in the county in which the indictment is preferred, there is enough to satisfy the locality of trial. Here there is not only the fact of composing the paper in the county of Leicester, but some act must have been done by the defendant by delivering the paper or carrying it himself out of that county. Some act must have been done
C in that county as the commencement of sending it for publication.

The next ground taken in support of the motion for a new trial was, that the learned judge had rejected evidence offered at the trial to prove that some of the King's subjects had been killed and wounded by the dragoons on Aug. 16, or, in other words, that evidence of the truth of the fact alleged in the libel as the foundation and cause of the remarks therein contained was tendered and refused.
D I am of opinion that this evidence was properly refused. The whole history of the law of libel shows that such evidence has been almost invariably refused on all occasions of criminal prosecution for slanderous observations and remarks upon the administration of the government, or upon the conduct of public or private men. The reason of this part of the law has been so often explained that it is altogether unnecessary to enter into it at present. I will only quote the opinion
E of one of the most eloquent writers of antiquity who united the characters of philosopher and statesman. CICERO having cited the law of the Twelve Tables, made for the punishment of anyone, "qui carmen condidisset quod infamiam afferret flagitiumve alteri," immediately subjoins:

F "Præclare judiciis enim ac magistratuum disceptationibus legitimis propositam viam non poetarum ingeniis habere debemus, nec probum audire nisi ea lege ut respondere liceat et iudicio defendere."

The *Seven Bishops' Trial* (6) has been mentioned as an instance of evidence received on the part of a defendant, but in that case the evidence was not offered to prove any matter of fact mentioned in the supposed libel, which was a petition to the King, but to show that the King had not the power of dispensing with an Act of Parliament, which was matter of law, and the evidence consisted of the records of proceedings in Parliament, and was addressed to the court rather than to the jury.
G

R. v. Horne (10), tried before LORD MANSFIELD, was also quoted, as an instance for receiving evidence of facts. Upon looking into that case it appears that Mr. Horne, who conducted his own defence, did not open his evidence to the jury, but sat down without proposing to call any witnesses, and when he afterwards proposed to call some, and the Attorney-General objected, LORD MANSFIELD said: "You had better not object; you had better hear his witnesses." They were accordingly examined. Such an instance can, in my opinion, be of no avail against the current of prior and subsequent practice. It certainly can be of no avail
H against the opinion of the judges, delivered in the House of Lords, in answer to a question on this particular point propounded to them by the House on the occasion of the passing of the Libel Act, 1792, and the still more important fact that the legislature, having its attention directed to this subject at that time, left the law in this respect in the situation wherein the judges reported it to stand.
I

Another case, that occurred before me, was also referred to. In that case, however, the truth was not offered in evidence by way of defence, but the evidence of the falsehood was adduced by the prosecutor as necessary to support the charge. No objection was made on the part of the defendant, and, although I was not free

from doubts in my own mind, yet, adverting to the particular nature of the supposed libel, which contained little more than a narrative of certain facts, supposed to have taken place in one of the West India islands, I did not think myself warranted in interposing under the very peculiar circumstances of that case, and, having received evidence of the falsehood, I should, most undoubtedly, have received evidence of the truth, if any such had been offered, on the part of the defendant.

Another ground of the motion was, that the learned judge gave his own opinion to the jury upon the character of the publication in question, expressing himself at the same time somewhat to this effect: "You are to say whether you will adopt this opinion or not; and unless you are satisfied that I am wrong, you will take the law from me." This was supposed to be contrary to, or at least beyond, the duty of the judge as prescribed by the statute to which I have just alluded; it was, however, in my opinion, not only contrary to or beyond the duty of the judge as prescribed by that statute, but in strict conformity to it. If the judge is to give his opinion to the jury, as in other criminal cases, it must be not only competent but proper for him to tell the jury, if the case will so warrant, that, in his opinion, the publication before them is of the character and tendency attributed to it by the indictment, and that, if it be so in their opinion, the publication is an offence against the law. This has been repeatedly done by different judges within my experience, and I am not aware of any instance in which it has been omitted. The contrary has sometimes occurred in cases where the judge has thought that the matter of the publication was innocent, but those cases also are instances of an opinion given and not of silence on the part of the judge as to the law of the case. The statute was not intended to confine the matter in issue exclusively to the jury without hearing the opinion of the judge, but to declare that they should be at liberty to exercise their own judgment upon the whole matter in issue after receiving thereupon the opinion and directions of the judge. For these reasons I am of opinion that the rule ought to be discharged.

BEST, J.—I entirely agree with my Lord Chief Justice and HOLROYD, J., in the opinion that, if a libel be written in one county and published in another, the libeller may be prosecuted in either.

** Rule discharged.*

BURDETT v. ABBOT AND ANOTHER

[HOUSE OF LORDS (Lord Eldon, L.C., and Lord Erskine), July 2, 7, 1817]

[Reported 5 Dow, 165; 3 E.R. 1289]

Parliament—House of Commons—Power to commit for contempt—Protection from obstruction and insult—Maintenance of dignity and character.

The House of Commons has power to commit for contempt of the House and to order the imprisonment of the offender. This privilege is necessary for the protection of the House and is part of the law of the land. The House of Commons, whether a court or not, must, like every other tribunal, have the power to protect itself from obstruction and insult, and to maintain its dignity and character.

Notes. Applied: *Beaumont v. Barrett* (1836), 1 Moo. P.C.C. 59. Followed: *Stockdale v. Hansard* (1839), 9 Ad. & El. 1. Applied: *Middlesex Sheriff's Case* (1840), 11 Ad. & El. 273; *R. v. Evans and Wheeton* (1840), 8 Dowl. 451. Considered: *R. v. Gossett* (1840), 3 Per. & Dav. 349. Distinguished: *Kielley v. Carson* (1841–2), 4 Moo. P.C.C. 63. Applied: *Diel v. Murphy* (1864), 1 Moo. P.C.C. N.S. 487; *Harvey v. Harvey*, [1881–5] All E.R. Rep. 1129; *Fielding v. Thomas*, [1896] A.C. 600. Considered: *In the matter of Parliamentary Privilege Act, 1770*, [1958] 2 All E.R. 329. Referred to: *R. v. Hobhouse* (1820), 2 Chit. 207; *Wellesley v. Duke of Beaufort, Long Wellesley's Application*, [1824–34] All E.R. Rep. 198; *Howard v. Gosset* (1845), 10 Q.B. 359; *Re Martin, Ex parte Van Sanday* (1845), 4 L.T.O.S. 369; *Fenton v. Hampton* (1858), 11 Moo. P.C.C. 347; *Ex parte Fernandez* (1861), 10 C.B.N.S. 3; *A.-G. of New South Wales v. Macpherson* (1870), L.R. 3 P.C. 268; *Bradlaugh v. Erskine* (1883), 47 L.T. 618; *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271; *Barton v. Taylor* (1886), 2 T.L.R. 382; *R. v. Sir Graham Campbell, Ex parte Herbert*, [1935] 1 K.B. 594; *Southam v. Smout*, [1963] 3 All E.R. 104.

As to breaches of privilege and contempts of the House of Commons, see 28 HALSBURY'S LAWS (3rd Edn.) 464–467; and for cases see 36 DIGEST (Repl.) 392 et seq.

Case referred to:

(1) *Ex parte Jones* (1806), 13 Ves. 237; 33 E.R. 283, L.C.; 16 Digest (Repl.) 30, 236.

Also referred to in argument:

Donne v. Walsh, 4 Prynne's Register of Parliamentary Writs, 743.

Rivers v. Cossins (circa 1473), 4 Prynne's Register of Parliamentary Writ, 755.

Atwell's Case (circa 1477), 1 Hatsell's Precedents, 48.

Roo v. Sadcliffe (circa 1485), 1 Hatsell's Precedents, 51.

Duchess of Somerset v. Earl of Manchester (1663), 4 Prynne's Register of Parliamentary Writs, 1214; 36 Digest (Repl.) 393, 394.

Binion v. Eveling (1662), cited in 2 Salk. 512; cited in Carth. 137; 91 E.R. 436; 36 Digest (Repl.) 393, 393.

R. v. Knowles (or Knollys) (alias Earl of Banbury) (1693), 12 State Tr. 1167; 1 Ld. Raym. 10; Comb. 273; 12 Mod. Rep. 55; 2 Salk. 509; 3 Salk. 242; Skin. 517; 91 E.R. 904; sub nom. *Lord Banbury's Case*, Carth. 297, H.L.; 36 Digest (Repl.) 394, 414.

Murray's Case (1751), 1 Wils. 299; 95 E.R. 629; 36 Digest (Repl.) 398, 465.

Hall's Case (1580), D'Ewes Journals of Parliament, 291; Hatsell's Cases of Privilege of Parliament, 93; 36 Digest (Repl.) 391, 454.

Privilege of Parliament Case, Shirley v. Fagg (1675), 6 State Tr. 1121; 36 Digest (Repl.) 395, 421.

Admiral Griffin's Fishery Case (1759), 28 Commons Journals 545; 36 Digest (Repl.) 399, 465.

Crosby's (Brass) Case (1771), 3 Wils. 188; 2 Wm. Bl. 754; 19 State Tr. 1137; **A**
95 E.R. 1005; 16 Digest (Repl.) 279, 489.

R. v. Paty (1705), 2 Salk. 503; 2 Ld. Raym. 1105; Holt, K.B. 526; 91 E.R. 431;
36 Digest (Repl.) 398, 464.

R. v. Flower (1799), 8 Term Rep. 314; 101 E.R. 1408; 36 Digest (Repl.) 398, 467.

Bushell's Case (1670), Vaugh. 135; Freem. K.B. 1; 1 Mod. Rep. 119; T. Jo. 13;
124 E.R. 1006; sub nom. *R. v. Bushell*, 6 State Tr. 999; 16 Digest (Repl.) **B**
298, 704.

Astwick's Case (1566), Moore, K.B. 839; 72 E.R. 939.

Apsley's Case (1615), Moore, K.B. 840; 72 E.R. 940.

R. v. Suddis (1801), 1 East, 306; 102 E.R. 119; 16 Digest (Repl.) 300, 741.

R. v. Oates (1685), 10 State Tr. 1079; 22 Digest (Repl.) 318, 3320.

Jones v. Randall (1774), 1 Cowp. 17; 98 E.R. 944; 22 Digest (Repl.) 289, 2942. **C**

Walker v. Earl of Grosvenor (1797), 7 Term Rep. 171; 101 E.R. 915; 36 Digest
(Repl.) 395, 432.

Catmur v. Knatchbull (1797), 7 Term Rep. 448; 101 E.R. 1069; 36 Digest (Repl.)
395, 433.

Jay and Topham's Case (1689), 12 State Tr. 822.

Semayne's Case (1604), 5 Co. Rep. 91 a; 77 E.R. 194; sub nom. *Seyman v.*
Gresham, Cro. Eliz. 908; sub nom. *Semayne v. Gresham*, Moore, K.B.
668; Yelv. 29; 21 Digest (Repl.) 566, 614. **D**

R. v. Horne (1778), 2 Cowp. 672; 20 State Tr. 651; 98 E.R. 1300; sub nom. *Horne*
v. R., Bro. Parl. Cas. 368, H.L.; 15 Digest (Repl.) 780, 7326.

Fitzherbert's Case (1592), D'Ewes Journals of Parliament, 482. **E**

Richard Coke's Case (1584), 1 Hatsell's Precedents, 96.

R. v. Airey (1801), 2 East, 30; 102 E.R. 279; 15 Digest (Repl.) 1187, 12,015.

Appeals from decisions of the Court of Exchequer Chamber in actions of trespass brought by Sir Francis Burdett against the Rt. Hon. Charles Abbot, the Speaker of the House of Commons, and the Serjeant at Arms.

The plaintiff alleged that on April 6, 1810, and divers other days the defendant Abbot broke and entered a certain messuage of the plaintiff situate in the parish of St. George, Hanover Square, London, and on one of those days, to wit, on April 9, 1810 (the outer door of the messuage being then shut and fastened), with divers soldiers, and men armed with offensive weapons, forcibly, and with strong hands, broke open a certain window and two window shutters belonging to the messuage, and through the same broke into and entered the messuage, assaulted the plaintiff, and compelled him to go into the public street there where they forced him to go into a coach which took him to the Tower of London where he was imprisoned without, as the plaintiff alleged, any reasonable or probable cause, contrary to the laws of this realm. **F**

The defendant, Abbot, denied liability for the trespasses charged. Further, he justified the breaking and entering of the plaintiff's house for the purpose of arresting and imprisoning the plaintiff under the Speaker's warrant of commitment for a breach of the privileges of the House of Commons, after audible notification of the purpose and demand of admission, without effect, and the subsequent arrest and imprisonment of the plaintiff in execution of the warrant. He stated that a Parliament was sitting at the time of the trespasses complained of, and that he, the defendant, and the plaintiff, were members of the House of Commons, that the House resolved : **G**

"that a letter signed, 'Francis Burdett,' and a further part of a paper entitled, 'Argument,' in COBBETT'S WEEKLY REGISTER, of March 24, 1810, was a libellous and scandalous paper, reflecting on the just rights and privileges of that House; and that Sir Francis Burdett, who had admitted the letter and argument to have been printed by his authority, had been thereby guilty of a breach of the privileges of that House;" **H**

A and that it was thereupon ordered by the House

“that the plaintiff be for his said offence committed to the Tower; and that Mr. Speaker do issue his warrants accordingly.”

B The defendant, being the Speaker, in pursuance of the resolutions and order afore-said issued his warrant, reciting the resolution and order of the House, to the Serjeant at Arms to arrest the plaintiff, and deliver him to the custody of the Lieutenant of the Tower. He also issued another warrant, reciting the resolutions and order of the House to the Lieutenant of the Tower, requiring

C “that the said Lieutenant of his Majesty’s said Tower, or his deputy, should receive into his custody the body of the said Sir Francis Burdett, and him safely keep during the pleasure of the said House.”

This warrant was delivered to the Lieutenant to be executed in due form of law.

D The defendant said that the Serjeant at Arms went to the plaintiff’s house, where he then was, to execute the warrant, and with an audible voice notified his purpose and demanded admittance to execute his warrant. Because the outer door was kept shut and fastened against him, and was refused by the plaintiff to be opened, he, with the assistance of soldiers and armed men, broke into the house, arrested the plaintiff, and conveyed him to the Tower in execution of the first mentioned warrant. The Lieutenant of the Tower received and detained the plaintiff there, by virtue of the latter warrant.

E The second action was against one Colman, the Serjeant at Arms. The declaration was in trespass for an assault and false imprisonment of the plaintiff, by the defendant, acting in execution of the Speaker’s warrant, and the form of the counts was the same as in the action against the Speaker. The pleas in defence also were, like those in the former action, the general issue of not guilty and two special pleas of justification, the one justifying the arrest and imprisonment of the plaintiff under the Speaker’s warrant and the breaking of the house, the outer door being shut and fastened against the officer, for the purpose of executing the warrant, and the execution of it by the assistance of soldiers and armed men.

F The cause was tried at Bar before the Court of King’s Bench in 1811, when a verdict was found for the plaintiff on the general issue and for the defendant on the two other issues. Judgment was accordingly given for the defendant.

G The plaintiff appealed to the Exchequer Chamber, contending in both cases that the justificatory pleas were not sufficient in law to bar the action, and that judgment ought to have been given for the plaintiff, or a venire de novo awarded to try the first issue. The judgments having been affirmed in the Exchequer Chamber in 1812, the plaintiff appealed to the House of Lords.

H *Brougham and Courtnay* for the appellant, contended that courts of law had jurisdiction to consider whether a publication which the House of Commons had resolved was a libel on the House and a breach of privilege was in fact so. The resolution of the House was not in all cases conclusive that a certain act was a breach of privilege. Privilege was not so delicate a subject that it must not be mentioned outside the House. The defendants contended that the House of Commons had the privilege of determining whether a particular act amounted to a libel, and such a libel as entitled the House to punish by imprisonment. It was said that the right I so to punish was necessary for self-protection, to enable the House to perform their functions, and that that purpose could not be effected in any other way. On that argument of convenience the inconvenience was not all on one side. The House was not a court of record; there was no redress against a wrong done by them as in courts of law whose judgments were liable to be reversed. A member of Parliament could not be questioned in any court for what he had done in Parliament; if judges abused their power they could be impeached or removed. Claims of privilege made by the House had not been regularly admitted. Even if the House had the powers they claimed, the plaintiff’s privilege as a member ought to exempt him from

liability. The courts had jurisdiction to inquire whether there had been any excess or impropriety in the execution of the order of the House, and here there had been. There was no authority for breaking into a person's house for a contempt, and in any case the House had no right to enforce their orders by means of the King's troops. A

LORD ELDON, L.C.—Counsel for the plaintiff having been now heard, I propose to your Lordships that counsel for the defendants should not be heard until we have received the advice of the judges on the following question : B

“Whether, if the Court of Common Pleas, having adjudged an act to be a contempt of court, had committed for the contempt under a warrant, stating such adjudication generally without the particular circumstances, and the matter were brought before the Court of King's Bench by return to a writ of habeas corpus, the return setting forth the warrant, stating such adjudication of contempt generally—whether in that case the Court of King's Bench would discharge the prisoner, because the particular facts and circumstances out of which the contempt arose were not set forth in the warrant.” C

The question being handed to the judges, and they having consulted among themselves for a few minutes, **RICHARDS, C.B.**, delivered their unanimous opinion that in such a case the Court of King's Bench would not liberate. D

LORD ELDON, L.C.—That this is a case of very great importance none will dispute, but at the same time I do not think it a case of difficulty. If I did, I should be anxious to hear the counsel for the defendants before proceeding to judgment. But in my view of the case, considering it as clear in law that the House of Commons have the power of committing for contempt, that this was a commitment for contempt, and that the general nature of the contempt, if that was necessary, was sufficiently set forth in the warrant, and being of opinion that the objections in point of form have not been sustained, I shall now move that the judgment of the court below be affirmed. E

LORD ERSKINE.—When this matter was first agitated, I understood that the House of Commons intended to pursue a very different course. I was, therefore, alarmed. I expressed myself, because I felt, with warmth. I have changed none of the opinions which I then entertained. I then said that the House of Commons ought to be jealous of such privileges as were necessary for its protection. My opinion is that these privileges are part of the law of the land, and upon this record there is nothing more than the ordinary proceeding. The Speaker of the House of Commons, like any other subject, put himself on the country as to the fact and pleaded a justification in law, for this was not a plea to the jurisdiction, but a plea in bar. This course of proceeding gave me the most heart-felt satisfaction, for, if the judgment had been adverse to the defendants, the House would no doubt have submitted. It would be a libel on the House of Commons to suppose that it would not. Therefore, by this judgment, it appears that it is the law which protects the just privileges of the House of Commons as well as the rights of the subject. F

It was contended that it was not alleged in the warrant that the libel was published by the plaintiff. But it is alleged that the paper was printed by his authority. If I send a manuscript to the printer of a periodical publication and do not restrain the printing and publishing of it, and he does print and publish it in that publication, then I am the publisher. The word reflecting, standing separately, would not be sufficiently distinct, but the warrant recites that the letter had been adjudged to be a libellous and scandalous paper, reflecting on the just rights and privileges of the House of Commons, and the meaning there must be arraigning the just rights and privileges of the House. G

I myself, while I presided in the Court of Chancery, committed for contempt in a case [*Ex parte Jones* (1)] in which a pamphlet was sent to me the object of which H

I

A was, by partial representation and by flattering the judge, to procure a different species of judgment from that which would be administered in the ordinary course of justice. I might be wrong, but I do not think I was. The House of Commons, whether a court or not, must, like every other tribunal, have the power to protect itself from obstruction and insult, and to maintain its dignity and character. If the dignity of the law is not sustained, its sun is set, never to be lighted up again.

B So much I thought it necessary to say, feeling strongly for the dignity of the law, and, have only to add that I fully concur in the opinion delivered by the judges.

Counsel were called in, and informed that the House did not think it necessary to hear counsel for the defendants.

Appeals dismissed.

BLORE v. SUTTON AND OTHERS

[ROLLS COURT (Sir William Grant, M.R.), June 18, 20, 1816, August 25, 1817]

[Reported 3 Mer. 237; 36 E.R. 91]

Landlord and Tenant—Lease—Memorandum in writing—Signature by clerk of agent—All material terms not contained in memorandum.

E *Landlord and Tenant—Lease—Agreement for lease—Parol agreement—Part performance—Terms not communicated to remainderman.*

A., the tenant for life of lands under a will, was empowered to grant leases by deed duly executed under her hand and seal and securing the best yearly rent. The plaintiff, under an agreement for a lease evidenced only by a memorandum in the book of A.'s agent and signed by the clerk, entered into possession of land forming part of the estates and expended considerable sums on building thereon. The evidence of the agent was that he had approved the transaction which was according to the usual course of business. The memorandum did not state all the material terms of the lease, and in particular when it was to commence. On the death of A., the plaintiff had not finished the buildings on the land, and sought specific performance of the agreement.

G **Held:** (i) there was no sufficient agreement in writing to satisfy the Statute of Frauds [now s. 40 of the Law of Property Act, 1925], since the memorandum was not signed by an agent properly authorised in that behalf, and, even if it were so signed, it was insufficient since it did not contain all the material terms; (ii) the agreement could not be established as a parol agreement; it was not the agreement of the principal nor of the authorised agent, and the remainderman had been guilty of no fraud since he was unaware of the agreement or its terms," (iii) the plaintiff was not entitled to compensation out of the estate of A., for it would be in the nature of damages and the loss arose from the plaintiff's own negligence in failing to obtain a lease from A.

I **Notes.** Considered: *Potter v. Peters* (1895), 64 L.J.Ch. 357. Referred to: *Bird v. Boulter* (1833), 4 B. & Ad. 443; *Jaques v. Millar* (1877), 6 Ch.D. 153; *Marshall v. Berridge*, [1881-5] All E.R. Rep. 908.

As to the matters to be included in a written memorandum for a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 446; and for cases see 30 DIGEST (Repl.) 397, 398. As to the doctrine of part performance, see 23 HALSBURY'S LAWS (3rd Edn.) 465, 466; and for cases see 30 DIGEST (Repl.) 403 et seq. For s. 40 of the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 500.

Cases referred to:

(1) *Shannon v. Bradstreet* (1803), 1 Sch. & Lef. 52; 44 Digest (Repl.) 45, *146.

- (2) *Denton v. Stewart* (1786), 1 Cox, Eq. Cas. 258; 17 Ves. 276, n.; 29 E.R. A 1156; 40 Digest (Repl.) 217, 1770.

Also referred to in argument :

Todd v. Gee (1810), 17 Ves. 273; 34 E.R. 106, L.C.; 40 Digest (Repl.) 217, 1771.

Kemey's v. Proctor (1820), 3 Ves. & B. 57; affirmed, 1 Jac. & W. 350; 37 E.R. 409; 3 Digest (Repl.) 10, 80.

White v. Proctor (1811), 4 Taunt. 209; 128 E.R. 309; 3 Digest (Repl.) 10, 79.

Campbell v. Leach, *Leach v. Campbell* (1775), Amb. 740; 27 E.R. 478; 31 Digest (Repl.) 574, 6952.

Greenway v. Adams (1806), 12 Ves. 395.

Bill for specific performance of an agreement to grant a lease.

The bill stated that Henrietta Laura, late Countess of Bath, was tenant for life, under the will of her mother, of certain lands in the parishes of St. James, Westminster, and elsewhere, with a power (contained in the will)

"from time to time, and at all times after she should have attained twenty-one, during her life, whether covert or sole, by deed duly executed under her hand and seal, to demise or lease unto any person or persons, etc., for any term of years not exceeding ninety-nine years from the time of executing such lease, so as to take effect, either in possession, or immediately after the determination of the leases then subsisting, and so as upon every such lease there should be reserved, to be due and payable during the continuance of the estates to be thereby granted, the best and most beneficial yearly rent or rents, to be incident to the immediate reversion, that, considering the nature of the case, could be reasonably had or gotten for the same at the time of making such lease, without fine, premium, or foregift, and half yearly payable, and so as in all such leases there should be contained a covenant obliging the respective lessees to insure the premises, and conditions of re-entry in case the rent should be in arrear, and so as the respective lessees should severally seal and deliver counterparts of their respective leases, and enter into covenants to repair, and other usual covenants."

On Oct. 26, 1807, the plaintiff entered into a contract with one, S. P. Cockerell, "as the agent for and on behalf of the said Lady Bath," whereby, in consideration of the money to be expended by the plaintiff in building, Cockerell, "as such agent as aforesaid," agreed to let to him certain premises in Piccadilly (part of the estate comprised in the will); and a memorandum of such contract, and of the terms thereof, was then made in writing, and entered in a book kept by Cockerell, as follows :

"Plans of the ground and buildings agreed to be built by Mr. Robert Blore in Piccadilly, where Mr. Arnold's house now stands—the term to be ninety-nine years, and the rent for the first two years £60 per annum : and for the remainder of the term £120 per annum :—Covenants as usual in the Bath estate."

The memorandum so made and entered was signed by the plaintiff.

Lady Bath died in July, 1808, having by her will appointed the defendant Codrington (together with others, of whom Codrington survived) her executor. The defendant Sir Richard Sutton (an infant) on the death of Lady Bath, became entitled to the estates of which Lady Bath had been tenant for life, as tenant in tail by virtue of the will of his grandfather Sir Richard Sutton, the remainderman and the other defendants were the representatives of Sir Elijah Impey, the surviving trustee under that will.

The bill stated further that, in part performance of the agreement with Lady Bath's agent, the plaintiff had taken possession of the premises, and laid out £6,000 in buildings upon the same, and it prayed a declaration that Sir Richard Sutton was bound by the agreement, and that he, and all other necessary parties, might be

A directed to grant to the plaintiff a lease of the premises upon the terms and conditions of the agreement; the plaintiff offering to execute a counterpart of such lease; or, if the court should be of opinion that Sir Richard Sutton was not bound by the agreement, then an account of moneys expended in repairs or otherwise, and that the plaintiff might be declared entitled to be reimbursed the amount thereof out of the personal estate of Lady Bath.

B Cockerell, the agent employed by Lady Bath for receiving the rents and for the management and letting of her estates in London, stated in evidence that the business of so managing and letting the estates in question was conducted in his office, and either personally by himself, or by the occasional assistance of Noble (his chief clerk), or some other clerk, under his immediate direction. That, about the time stated in the bill, Noble, with the privity and under the immediate direction of the witness, as such agent, for and on behalf of Lady Bath, verbally agreed with the plaintiff to make to him a building lease of the premises in question for ninety-nine years on the terms above specified. That the particulars of the agreement were not reduced into writing, otherwise than by a memorandum (as had been stated in the bill) being made thereof by Noble, by the witness's order, upon a plan drawn and signed and affixed by the plaintiff as a description of the buildings which the plaintiff proposed to erect upon the site of the premises. That Noble affixed his initials to such entry or memorandum; and that the lease so agreed to be granted was to commence at the expiration of a then existing lease, which expired at Christmas following the date of the memorandum.

E He deposed further that, at the time of the agreement being entered into, the premises in question stood in need of very heavy and substantial repairs, and that it appeared to the witness that it was better they should be pulled down and other buildings erected on their site than that any repairs should be attempted. That the plaintiff had, since the date of the agreement, laid out very considerable sums in re-building the same pursuant to the agreement; but that the same were only in part re-built at Lady Bath's death, and only one fourth part of the whole cost at that time expended therein; and the witness believed that, if the plaintiff had then stopped proceeding with the buildings, the same could not, in their then unfinished state, have been let for much more than the yearly rents of £60 and £120 reserved by the agreement, and that all the benefit of the improvements had accrued since Sir Richard Sutton succeeded to the inheritance.

G The evidence of Noble was substantially to the same effect; that of other witnesses examined on the part of the plaintiff went to the condition and value of the premises, and the money expended by him under the agreement.

Hart and Courtenay for the plaintiff.

Sir Samuel Romilly and Richards for the defendant, Sir Richard Sutton.

Bell and Dowdeswell for the defendant, Codrington.

H **SIR WILLIAM GRANT, M.R.**—This is a bill for the specific performance of an agreement to grant a lease. The agreement is alleged to have been entered into with the agent of the late Countess of Bath, who was tenant for life, with a power of granting leases in the manner and on the terms specified in the power; and the question is whether there be any such agreement in this case as is binding upon the remainderman, the defendant Sir Richard Sutton.

I It appears to me that there is no sufficient agreement in writing, first, because Charles Noble, who signs his initials to the memorandum written on the plan, is neither alleged by the bill, nor proved by the evidence, to have been the authorised agent of Lady Bath; secondly, because the memorandum does not contain some of the material terms of a building lease, which this was. It merely specifies the rent, and the number of years. It does not even specify the commencement of the lease. By the parol evidence, indeed, it is said, that it was to be from the expiration of a subsisting lease. But then the while agreement is not in writing.

It was insisted, however, that there is a parol agreement, in part executed; for

the plaintiff has expended large sums in building upon the premises, partly in Lady Bath's lifetime, but principally since her death. The agreement, it is said, is, therefore, binding on the remainderman. It is rather difficult to say that there is even a parol agreement by an authorised agent of Lady Bath. For the evidence is that Noble, by the direction and with the privity of Mr. Cockerell, who was Lady Bath's agent, did make a verbal agreement with the plaintiff. This seems rather a delegation of Cockerell's authority, than the personal exercise of it. He does not appear to have had any communication with the plaintiff. He does not say: I ratify the terms agreed upon by Noble, but: I authorise Noble to make the agreement. Supposing, however, that, by the effect of Cockerell's direction to Noble this can be construed to be the parol agreement of Cockerell himself, and that, subsequently to such agreement, and on the faith of it, an expenditure has been made by the plaintiff, there is no authority for holding that the remainderman is bound by such an agreement.

It is considered as a fraud in a party permitting an expenditure on the faith of his parol agreement to attempt to take advantage of its not being in writing. But of what fraud is a remainderman guilty who has entered into no agreement, written or parol, and has done no act, on the faith of which the other party could have relied? The only way in which he could be affected with fraud, would be by showing that an expenditure had been permitted by him with a knowledge that the party had only a parol agreement from the tenant for life. Without that knowledge, there is nothing in the mere circumstance of expenditure. For the prima facie presumption is, that he who is making it has a valid lease under the power, or at least a binding agreement for a lease. That the remainderman in this case, or those acting on his behalf, had any such knowledge, is neither alleged, nor proved. The reason, therefore, fails, on which the case of a parol agreement, in part performed, is taken out of the Statute of Frauds.

On the strict construction of the power, the remainderman would only be bound by a lease executed conformably to it. But LORD REDESDALE has, I think, in *Shannon v. Bradstreet* (1), given satisfactory reasons why a clear explicit written agreement ought, in equity, to be held equivalent to a lease, and as binding on the remainderman as a formal lease conceived in the same terms would have been. But, to go further, and say that a man shall be bound not by his own parol agreement, but by the uncommunicated and unknown parol agreement of another person, would be to break in upon the Statute of Frauds, without the existence of any of the pretexts on which it has been already too much infringed.

On the supposition that the plaintiff cannot obtain specific performance, he prays that he may be reimbursed for his expenditure out of Lady Bath's assets. This would be, as against her representatives, a decree merely for damages, and not a compensation for the benefit her estate has received. It is the estate of the remainderman that is benefited by the houses built upon it.

The competency of a court of equity to give damages for the non-performance of an agreement, has, notwithstanding *Denton v. Stewart* (2), been questioned by very high authorities. In that case, however, the party was guilty of a fraud, in voluntarily disabling himself to perform his agreement, and had an immediate benefit from the breach of it. But Lady Bath never refused to perform the agreement. On the contrary, the plaintiff alleges, that, if she had lived, she would have granted him a lease. Then the case is only that he himself has been so improvident as not to get from Lady Bath that which, he says, she would have given him; namely, a lease that would have been binding on the remainderman. That, surely, is not a case in which a court of equity will exercise a doubtful jurisdiction, by awarding damages for a loss, which, if it shall ever be sustained, will have been occasioned, more by the plaintiff's negligence, than by Lady Bath's fault. I say, if it shall be ever sustained; for it does not appear that the plaintiff has been yet evicted; and I cannot believe that Sir Richard Sutton, when able to judge and act for himself,

A will think of taking the benefit of the plaintiff's improvements, without making him a compensation for them. But, be that as it may, I should not be warranted in straining general principles in order to obviate the hardship of a particular case.

The bill must be dismissed, but without costs.

Bill dismissed.

GIDLEY v. LORD PALMERSTON

C [COURT OF COMMON PLEAS (Dallas, C.J., Park, Burrough and Richardson, JJ.), May 17, 1822]

[Reported 3 Brod. & Bing. 275; 1 State Tr. N.S. 1263; 7 Moore, C.P. 91; 129 E.R. 1290]

Crown—Crown servant—Liability on contract made in official capacity—Payment of pension to retired Civil servant.

D At common law, a servant of the Crown could not be made personally liable on contracts entered into by him in his official capacity, for he was presumed to contract as a servant of the Crown.

E **Notes.** The Crown Proceedings Act, 1947, amends the law relating to the civil liabilities and rights of the Crown and to civil proceedings by and against the Crown. The Act leaves the law as regards contracts with the Crown substantially as it was before, but the procedure is changed. Its chief substantive effect is to end the immunity of the Crown in tort with certain exceptions: see 6 HALSBURY'S STATUTES (2nd Edn.) 46 et seq.

F Considered, Followed and Applied: *The Athol* (1842), 1 Wm. Rob. 374. Distinguished: *Auty v. Hutchinson* (1848), 6 C.B. 266. Considered and Applied: *Re Tufnell* (1876), 3 Ch.D. 164; *Grant v. Secretary of State for India* (1877), 2 C.P.D. 445; *Palmer v. Hutchinson* (1881), 6 App. Cas. 619; *R. v. Secretary of State for War*, [1891] 2 Q.B. 326. Considered and Followed: *Dunn v. Macdonald*, [1897] 1 Q.B. 401. Considered and Distinguished: *Graham v. Public Works Comrs.*, [1901] 2 K.B. 781. Followed: *Hosier v. Earl of Derby*, [1918] 2 K.B. 671. Considered: *China Navigation Co. v. A.-G.*, [1932] All E.R. Rep. 626. Considered and Followed: *Lucas v. Lucas and High Comr. for India*, [1943] 2 All E.R. 110.

G As to legal proceedings against the Crown and its servants, see 7 HALSBURY'S LAWS (3rd Edn.) 249 et seq.; and for cases see 1 DIGEST (Repl.) 754 et seq.

Cases referred to:

(1) *Macbeth v. Haldimand* (1786), 1 Term Rep. 172; 99 E.R. 1036; 1 Digest (Repl.) 754, 2923.

H (2) *Unwin v. Wolseley* (1787), 1 Term Rep. 674; 99 E.R. 1314; 1 Digest (Repl.) 741, 2828.

Also referred to in argument:

Lane v. Cotton (1701), 12 Mod. Rep. 472, 488; 1 Com. 100; 1 Ld. Raym. 646; Carth. 487; Holt, K.B. 582; 1 Salk. 17; 88 E.R. 1458; 1 Digest (Repl.) 784, 3132.

I *Whitfield v. Le Despencer* (1778), 2 Cowp. 754; 98 E.R. 1344; 1 Digest (Repl.) 784, 3133.

Action of assumpsit brought by the plaintiff, as executor of Christopher Holland deceased, against the defendant, claiming the sum of £600, being the amount of three years' retirement allowance alleged to be due to Holland as a retired established clerk at the War Office. The defendant, Lord Palmerston, was the Secretary for War and head of the War Office at the time when the allowances were alleged to have been due to Holland. The defendant pleaded the general issue.

On Mar. 9, 1815, the testator, Christopher Holland, who had been for many years one of the established clerks in the War Office, obtained leave to retire from his situation and, on the recommendation of the Secretary at War and by the authority of the lords commissioners of H.M. Treasury, was placed on the list of retired established clerks of the War Office, with an allowance of £200 a year, commencing Mar. 3, 1815 inclusive, the allowance being granted to him with the due observance of the statute 50 Geo. 3, c. 117. Holland continued on such list of retired established clerks from Mar. 3 until Aug. 25, 1818, when he died, having first made his will and appointed the plaintiff his executor, who, after his death, duly proved the will.

The defendant, during the whole of the material period and at the time of the commencement of this action, was His Majesty's Secretary at War. The mode in which the compensations or retired allowances granted to the retired clerks were provided for, was as follows. Estimates were drawn up every year, entitled: "Estimates of army services," containing separate estimates of all the allowances, compensations and emoluments in the nature of any superannuation or retired allowances, to any persons in respect of their having held any public offices or employments of a civil nature, and prepared agreeably to the Act 50 Geo. 3, c. 117. The estimates were laid before the House of Commons and, after having been voted by Parliament, the payment of the several sums so voted, were provided for by an Act of Parliament passed for that purpose. One of the heads of such estimates so laid before and voted by Parliament during 1815, 1816, 1817 and 1818, was entitled: "Great Britain, for an allowance to the Secretary at War, to enable him to defray the charge of compensations or retired allowances to the following persons formerly employed in his office." One of the items contained under that head was entitled: "To one retired established clerk £200," and the person to whom that description applied, was Christopher Holland.

In this manner, the sum of £200 had been regularly included in the sum voted in each of the said years, and the appropriation thereof provided for by an Act of Parliament, as the compensation or retired allowance of one retired established clerk during each of those years respectively.

The mode in which the money so voted was placed at the disposal of the Secretary at War, was as follows: The entire amount of the estimates of army services for the current year was, in the first instance, imprested from the Exchequer into the hands of the Paymaster-General. There was a warrant issued by the lords of the Treasury to the Paymaster-General in the following form:

"By his Royal Highness, the Prince Regent of the United Kingdom of Great Britain and Ireland. G.P.R., Whereas the Parliament of the United Kingdom of Great Britain and Ireland hath made provision for various services connected with the expenditure of His Majesty's land forces for the year 18 , our will and pleasure, therefore, is, that the accompanying establishments of the said services do accordingly commence and take place from Dec. 25, 18 , and continue in force until Dec. 24, 18 , both days inclusive, and that the amount of each of the said establishments be issued and applied by the Paymaster-General of His Majesty's forces, at such periods, and in such proportions, as shall from time to time be directed by His Majesty's Secretary at War, or in case of His Majesty's forces serving abroad, by the officer commanding such forces, or by one of the comptrollers of army accounts, in pursuance of the regulations in this behalf established by us His Majesty's high treasurer, or the commissioners of His Majesty's Treasury for the time being, or by any Act of the legislature: but that no new charge be added thereto, nor any greater sum be issued on account of the said establishments than is herein authorised in each particular case, without being first communicated to us His Majesty's high treasurer, or the commissioners of His Majesty's Treasury for the time. [The warrant here enumerated the various sums authorised to be paid,

A including an item for the superannuation and retired allowances and also various deductions not affecting the present case:] and for so doing, this shall be as well to the Paymaster-General of the land forces, as to the commissioners for auditing public accounts, the commissary-general of musters, and all other persons whom it doth or may concern, a sufficient warrant, authority and direction. Given at our court at Carlton House, this day of 18 in the year of his Majesty's reign. By command of his Royal Highness the Prince Regent, in the name and on behalf of His Majesty."

This warrant was under the royal sign-manual, and countersigned by the lords of the Treasury. The Secretary at War granted, from time to time, warrants on the Paymaster-General for the payment of the sums placed by Act of Parliament at his disposal. The warrants were in the following form:

"Allowances, compensations and emoluments, in the nature of superannuation or retired allowances, etc., to persons belonging to the several public departments in Great Britain. Warrant. N. No. To the Right Honourable the Paymaster-General of His Majesty's land forces for the time being. You are hereby authorised and directed, out of such moneys as are in, or shall come to your hands applicable to army services, to issue to Robert Lukin, Esq., or his assign, the sum of £ being towards defraying the retired allowances of persons formerly employed in the corresponding department of the war office, for the quarter ending on the 24th the same to be issued without deduction, and without other accompt than such as is liable to be rendered under the authority and direction of the Secretary at War.

Signed Palmerston.

Given at the War Office this day of 18."

"Received the day of 18 of the Right Honourable the Paymaster-General, the above sum.

Signed Robert Lukin."

F The Paymaster-General, after the receipt of these warrants, drew on the Bank of England for the amount and such amount was thereupon, by Robert Lukin, first clerk to the Secretary at War, paid into the bank of Biddulph & Cox, the bankers of Lukin, and was entered by them in account with the first clerk of the War Office. The money, when so paid, was at the discretion of the Secretary at War, no minute of the Treasury being necessary to take it out. The first clerk acted as his cashier in the distribution of it and the first clerk or his deputy signed cheques on Biddulph & Cox for the quarterly payments of the compensations and retired allowances in favour of the several parties entitled to them, according to the afore-said estimates, or as directed by the Secretary at War.

G In this manner, the entire sums voted for the War Department for 1815, 1816, 1817 and 1818, had been received by Lukin and by him placed in the hands of Biddulph & Cox on the account and for the purposes before mentioned, and the sums retained out of the allowance to Christopher Holland, on the settlement of the said accounts had been since paid by Lukin, to the account of the Paymaster-General at the Bank of England.

H The allowance of £200 per annum was regularly paid to Holland, or to his order, from Mar. 3, 1815, to Mar. 24, 1816. Prior to this time, Holland became embarrassed in his circumstances and in consequence of certain of his pecuniary transactions, the defendant directed that £50 a year only of the retired allowance should be paid to him from Mar. 25, 1816, and that the remainder should accrue as a fund for liquidating the claims of certain half-pay officers, widows and persons on the compassionate list, for whom Holland had acted as agent. Holland remonstrated against this suspension of the retired allowance and requested the defendant to allow it to be paid to him, and a correspondence took place on the subject which was terminated by a letter from the defendant to Holland, dated Feb. 3, 1817, in which the

defendant stated that it was quite impossible for him to authorise any issue to Holland, on account of his retired allowance. A

A commission of bankruptcy was issued against Holland in April, 1816, under which he was duly declared a bankrupt and obtained his certificate under the same in July, 1816. At the time of the death of Holland, the sum which was retained out of his allowance for the purpose of liquidating the aforesaid claims, after deducting therefrom all the payments which had been made to him or to his order, amounted to £350 10s., for the recovery of which sum this action was brought. B

At the trial before DALLAS, C.J., a verdict was found for the plaintiff, the jury awarding him £350 10s. damages, subject to the opinion of the court on a Case which stated the facts set out above. The question for the opinion of the court was whether the plaintiff, as executor of Holland, was entitled to recover the said sum. If the court should be of that opinion, the verdict was to be entered for the plaintiff for that amount; if not, a verdict was to be entered for the defendant. C

Serjeant Taddy for the plaintiff.

Serjeant Vaughan for the defendant.

DALLAS, C.J., after stating the substance of the case, delivered the following judgment of the court.—On these facts the question arises whether, on all or any of the counts in the declaration, the present action can be maintained. We think that it cannot be maintained. D

It is not pretended that the defendant is to be charged in respect of any express undertaking or agreement between him and the testator, Holland, or in respect of any other character than his public and official character of Secretary at War. It is in that character, and in that only, that his duty is alleged to arise. It is, therefore, a duty as between him and the Crown only, and does not result from any relation to or employment by the plaintiff or under any undertaking in any way to be personally responsible to him. The money received is granted by the Crown, subject only to the disposition or control of the defendant as the agent or officer of the Crown, and responsible to the Crown for the due execution of the trust or duty so committed. There is, therefore, no duty from which the law can imply a promise to pay to the testator during his life, or to his executor after his death, nor can money be said to have been had and received to the use of the testator, which money belonged to the Crown, being received as the money of the Crown and the party receiving it being responsible only to the Crown in his public character. On this view of the case, it appears to us that this action cannot be maintained. E F G

It must fail also on another and a wider ground. This is an action brought against the defendant, as Paymaster-General, for an alleged breach of an implied undertaking said to attach on him in that character. With reference to this ground, it will be sufficient to advert to a class of cases, too well known and established to require to be more particularly mentioned and which, in substance and result, have established that an action will not lie against a public agent for anything done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment and constituting a particular and personal liability. Such persons, said LORD MANSFIELD, C.J., in *Macbeath v. Haldimand* (1), are not understood personally to contract. In the same case it was observed, by ASHURST, J. (1 Term Rep. at pp. 181, 182): H

"In great questions of policy, we cannot argue from the nature of private agreements. . . . Great inconveniences would result from considering a governor or commander as personally responsible. . . . No man would accept of any office of trust under government upon such conditions; and, indeed, it has frequently been determined, that no individual is answerable for any engagements which he enters into on their behalf. There is no doubt but the Crown will do ample justice to the plaintiff's demands, if they be well founded." I

BULLER, J., in the same case, adds (*ibid.* at p. 182):

"Where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable."

In *Unwin v. Wolseley* (2) it is held that a servant of the Crown, contracting on the part of government, is not personally answerable.

I am aware that these cases are not, in their circumstances, precisely similar to the present, and, perhaps, in respect of some of the circumstances belonging to the present case, I may personally have doubted longer than I ought to have done; but in their doctrine they go to this, that on principles of public policy, an action will not lie against persons acting in a public character and situation which, from their very nature, would expose them to an infinite multiplicity of actions, that is, to actions at the instance of any person who might suppose himself aggrieved; and though it is to be presumed that actions improperly brought would fail, and it may be said that actions properly brought should succeed, yet the very liability to an unlimited multiplicity of suits would, in all probability, prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself.

It is scarcely necessary to add, even to guard against any possible misconception, that the defendant on this record appears, in point of fact, to have acted on the purest motives of public and private justice to all parties concerned.

On the grounds which I have stated, we are of opinion that this action cannot be maintained and that the judgment, therefore, must be for the defendant.

Judgment for defendant.

BROWN v. DE TASTET

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), November 8, 9, 12, 1819, January 17, 18, February 27, May 19, 22, September 5, 1821]

[Reported Jac. 284; 37 E.R. 858]

Partnership—Dissolution—Death of partner—Business carried on by surviving partner—Profits—Duty to account—Remuneration for management.

On the death of one partner, the survivor who retains the capital of the deceased partner and employs it in the trade must account for the profits derived from it, but he is entitled to proper allowances for the management of the business.

Partnership—Transfer to stranger of moiety of share of one partner—Decree for account between transferor and transferee—Need to make other partners parties.

Where A., B., and C. are partners together, and A. agrees with D. to give him a moiety of his share in the concern, an account may be decreed between A. and D. without making B. and C. parties.

Notes. By s. 24 (6) of the Partnership Act, 1890 (17 HALSBURY'S STATUTES (2nd Edn.) 593) no partner is entitled to remuneration for acting in the partnership business; but this provision does not affect the right to claim expenses of management of the business after a dissolution.

Considered: *Stocken v. Dawson* (1848), 17 L.J.Ch. 282; *Lord Provost of Edinburgh v. Lord Advocate* (1879), 4 App. Cas. 823. Referred to: *Cook v. Collingridge* (1823), Jac. 607; *Lovegrove v. Nelson* (1834), 3 My. & K. 1; *Wedderburn v. Wedderburn* (1838), 4 My. & Cr. 41; *Portlock v. Gardner* (1842), 6 Jur. 795; *Willett v. Blanford* (1842), 1 Harc. 253; *Clegg v. Fiskwick* (1849), 1 H. & Tw. 390; *Lodge v. Prichard* (1853), 3 De G.M. & G. 906; *Wedderburn v. Wedderburn* (1856), 22 Beav. 84; *Vyse v. Foster* (1874), L.R. 7 H.L. 318; *Wilkes v. Saunior* (1877), 7 Ch.D. 188;

Re Norrington, Brindley v. Partridge (1879), 13 Ch.D. 654; *Cassels v. Stewart* (1881), 6 App. Cas. 64; *Re Aldridge, Aldridge v. Aldridge* (1894), 63 L.J.Ch. 465.

As to the right of partners to remuneration for management, see 28 HALSBURY'S LAWS (3rd Edn.) 528; and for cases see 36 DIGEST (Repl.) 531 et seq.

Case referred to :

- (1) *Crawshay v. Collins* (1808), 15 Ves. 218; 33 E.R. 736, L.C.; 36 Digest (Repl.) 541, 1024.

Appeals to the Lord Chancellor.

Anthony Mangin having for some years carried on business in London as a merchant and being advanced in years, agreed with the defendant De Tastet in September, 1800, to relinquish his business to him. By the agreement, Mangin's interest in the house was to cease from Sept. 1, 1800, and he was to have credit for what should appear due to him on the settlement of the accounts, and was to be at liberty to withdraw one-fourth of it immediately, another fourth in September, 1801; and the rest in the course of 1802, with the exception of about £3,000 or £4,000 which he was to leave in the house for eighteen months longer: the concern was to be carried on for four years under the firm of Anthony Mangin, and his retirement was not to be announced. De Tastet about the same time admitted M. A. De Paiva and Frederick Grellet into partnership with him in the business; they were each to have a one-fourth share. De Tastet was engaged in another mercantile house, under the firm of Firmin De Tastet & Co.; and the affairs of the house of Anthony Mangin were chiefly managed by De Paiva and Grellet. In the course of 1802 Mangin became desirous of again entering into the business, and De Tastet, at his request, agreed to let him have one-half of his (De Tastet's) moiety of the partnership for his life, to commence from September, 1800, the time when he retired. This agreement between De Tastet and Mangin was partly contained in a letter written by the latter to the former, agreeing to take a fourth share, and to run the risk of the business in halves with him; there was no other written memorandum relating to it. In July, 1803, Mangin died intestate, leaving one daughter, who with her husband was the plaintiff. At the time of Mangin's death a considerable part of his property was embarked in the house as his share of capital, of which De Tastet and his partners possessed themselves and continued to employ it, together with their own property, in their trade. Grellet retired from the partnership in 1807, and De Paiva in 1808, leaving De Tastet the sole proprietor of the house: on their retirement one of them received from him £5,000 and the other £6,000, subject to the taking of the accounts.

The plaintiff, who had taken out administration to Mangin, filed the bill in June, 1809, against De Tastet, praying an account of Mangin's property in the partnership, and of the profit or interest made with it since his death alleging as the cause of the delay that she had been put off from time to time by various excuses. In his answer De Tastet, admitting the circumstances as stated above and that he had in his hands a balance of £1,571 due to Mangin's estate, stated as a reason for not having sooner accounted with the plaintiff, that her legitimacy was questioned by some relations of Mangin, who claimed to be his next of kin, and had opposed her application for letters of administration in the ecclesiastical court; and he submitted that Grellet and De Paiva were necessary parties. The bill was then amended by adding them as defendants and also the persons who claimed to be next of kin to Mangin. Grellet was out of the jurisdiction. De Paiva, by his answer, stated his ignorance of the agreement in 1802 by which Mangin was readmitted into the business: it was a contract between Mangin and De Tastet only, and he, therefore, contended that he was not accountable to the former or his representatives. The question of the plaintiff's legitimacy was determined in her favour, by an issue directed in July, 1811, to try the fact. The balance admitted by De Tastet was paid into court in January, 1810.

The cause was heard before the Master of the Rolls on Mar. 6, 1812, when a decree

was made for an account of the dealings and transactions between De Tastet and Mangin in his lifetime, and of the property of Mangin which was in the hands of De Tastet, or of him and his partners De Paiva and Grellet at the time of Mangin's death, or which was afterwards possessed by him or them; and also an account of all profits and gains made of or by means of such property by De Tastet, or by him and De Paiva and Grellet; and it was ordered that what, upon the taking of such accounts, should appear to have come to the hands of De Tastet, or of him and De Paiva and Grellet, and to be the amount of the profits and gains so made of or by means of Mangin's property, should be answered by De Tastet. The bill was dismissed as against De Paiva with costs, to be paid by the plaintiff, and repaid by De Tastet. From this decree De Tastet appealed. Pending the appeal the accounts proceeded in the Master's office. The Master, by his report made in May, 1817, after stating that Mangin was at the time of his death a partner with De Tastet in the business of a merchant, carried on by them and De Paiva and Grellet, under the firm of A. Mangin, found a balance of £17,532 due to Mangin from the concern at that time, which sum continued to be employed in it, as well as certain other sums of money belonging to Mangin subsequently got in; he found that the property of Mangin formed a considerable part of the capital employed in the trade up to December, 1807, and from that time till December, 1810, exceeded the whole amount of the capital employed: in December, 1810, the trade was discontinued. He had given Mangin credit for a share of the profits of the business in proportion to his share of the capital employed in it down to December, 1807, and for the whole of the profits from that time to December, 1810, and found a balance of £62,604 due from De Tastet. The account had not been carried beyond 1810, and had not extended to profit or interest beyond that made in the business.

De Tastet took exceptions to the report, which were amended by order, and were first, that the property of Mangin only formed a part of the capital employed in the trade, and that a considerable part of that capital consisted of the moneys of De Tastet; secondly, that in taking the account of profits the Master ought to have ascertained what profit was actually made by means of the property of Mangin, or that he ought to have followed the original agreement, according to which, if the whole of the moneys employed in the business were to be considered as the property of Mangin, the clear gains arising from it could only be considered as one-fourth of the proceeds, the remaining three-fourths being to be allowed to the other partners for the assistance afforded by them to the business; thirdly, that the balance amounted only to £8,089.

It appeared that the Master had taken the account on the principle of adding to Mangin's capital his share of profits in each year; the amount thus constituted was taken as his capital in the next year and a proportionate share of the profits was assigned him. It was insisted on the part of De Tastet that great part of Mangin's property had been employed, not in the business but in discounting bills of exchange; and that a considerable portion of the profits was attributable to his own personal influence and connections and to the exertions of himself and his partners.

The exceptions were argued before the vice-chancellor, who on hearing them made an order dated July 22, 1818, referring it to the Master to review the report, and to inquire whether the concerns of the firm, as they stood at the death of Mangin, were in any manner and how kept separate and distinct from the concerns of the firm that was carried on after his death, and whether the concerns of the new firm were in any manner, and how and to what extent aided or supplied from the concerns of the old firm; and it was declared that the shares of profits which after the death of Mangin were paid by De Tastet to the junior partners of the concern were to be considered as in the nature of wages, and to be allowed to De Tastet in discharge of the account of the profits of the concern; and the Master was to inquire what would be a reasonable compensation to De Tastet for his personal attention and credit, which was also to be allowed to him. From this order the plaintiff appealed.

The appeal against the decree was heard before LORD ELDON, L.C., on Nov. 8,

9 and 12, 1819, when he desired that the appeal against the Vice-Chancellor's order should also be brought on; the argument on both appeals was renewed on Jan. 17, 1821, and several subsequent days. A

Sir Robert Gifford, Horne, Winthrop and Palmer for the plaintiff.

Hart and Wakefield for the defendant *De Paiva*.

Wetherell, Heald and Pepys for the defendant *De Tastet*. B

Sept. 5, 1821. **LORD ELDON, L.C.**, stated the decree, report and exceptions, and the order of July 22, 1818, and continued: This order does not appear to me to decide anything upon any one point of the exceptions: it only sends the cause back to the Master with certain declarations. When it came before me it occurred to me to doubt whether it was competent to the court upon exceptions to make an order not quite consistent with the original decree: from the time of the pronouncement of the decree all the subsequent proceedings should be consistent with it, and if upon the argument of exceptions it appears that the justice of the case cannot be got at without an alteration of the decree, it must be re-heard. I have also entertained doubts which I have not been able to subdue, as to there being anything to authorise the first inquiry directed; whether the concerns of the firm as they stood at the death of Mangin, were kept distinct from those of the firm continued afterwards. I mean, I doubt whether I could do it upon anything alleged in the pleadings; for it is certainly an important question, even if there be no foundation for it in the pleadings, whether the court could make a satisfactory decree without having such an inquiry made. C

I should have infinite difficulty in affirming the other declaration, that the sums paid to the junior partners should be considered as in the nature of wages; not that it may not turn out to be reasonable, but I apprehend that where the decree directs the Master to make all just allowances to the parties, the regular course of proceeding would have been to crave this deduction from the profits paid to the persons carrying on the business as a just allowance. If that be done it may be discussed before the Master, and when his report is made the court might be called on to decide it, not upon these general exceptions that are not pointed to it, but upon an exception as to that which had been submitted to him as a just allowance. It is not in the ordinary course for the court in matters of this nature to say in the first instance what is a just allowance. I do not say that it was an improper consideration, what was a just allowance, but this was not the proper mode of getting at it. The same observation applies to the inquiry as to what will be a reasonable compensation for *De Tastet's* personal attention. I do not mean to say that the Master should not have made such an allowance, or that the court might not by the original decree have directed his attention to it, but I think it could not be done upon exceptions. D

The consideration of the original decree is now regularly before the court, and speaking with great deference and great humility, I own I do not think that I should have made a decree in these terms. The bill aims at an account of the dealings of the partnership and of the personal estate of Mangin possessed by the defendant, and it seeks for all proper directions to be given with respect to the use made by the defendant and those in partnership with him of the property of Mangin, and considering the peculiar nature of such a bill, it seems to me that the terms of the decree are too loose to point the Master's attention to the matter with the precision and particularity with which such an account ought to be taken. E

I should here remark, before proceeding further, that upon reading the bill and the answer of *De Tastet*, I am satisfied with so much of the decree as considers him to be solely liable not only for his own transactions but for those of *De Paiva* and *Grellet*. F

The Master in the execution of the decree has, I am informed, proceeded on *Craushay v. Collins* (1). In that case three persons, Collins, Noble, and Boughton, G

carried on the business of pump and engine manufacturers in partnership together. In 1803 a commission of bankrupt issued against Noble, and in 1804 the bill was filed by his assignees, claiming three-eighths of the profits of the business which remained unaccounted for at the time of the bankruptcy, or which had accrued since, and also of two patents and the profits derived from them. The question, therefore, was whether the assignees of Noble were entitled to the same relief that he himself would have been entitled to if he had not become a bankrupt: a bankruptcy dissolving a partnership in the same manner as death, in this respect only that assignees have rights somewhat similar to those which the representatives have where the partnership is dissolved by death. It was argued that in both cases the demand to be made by the representatives of a deceased partner, or the assignees of a bankrupt, was limited to that sum of money which if the account had been taken at the dissolution, would have been found due from the surviving or solvent partner, leaving all the property in their hands. On the other hand it was argued that in many cases that could not be the law; for instance, if immediately after the bankruptcy all the stock, which in that case consisted of manufactured goods, pumps, and such things, had been sold for a sum of money, three-eighths of which would have been more than what was due to the bankrupt, taking the account as matter of debt, then the assignees being certainly tenants in common till the stock was converted, and the identical stock being sold, and three-eighths of it yielding more than what was due to the bankrupt at the time of his bankruptcy as the calculated value, what pretence could there be for saying that the assignees should not have a proportion of what it sold for?

But it is asked, will you say that in all cases where there is a partnership, such is to be the consequence of carrying on the business, that the profits shall be divisible in the same way as if the partner had not died or had not become bankrupt? I say no; I do not mean to say that it will be so in all cases: but on the other hand, I will not deny that it may be the law in some cases. The general principle, I should say, ought to be this: that as it is quite competent to the parties to settle the accounts and to mark out the relation between themselves as creditors or debtors, so where there is a non-settlement of the account (though a settlement may sometimes introduce great hardships and difficulties), yet those who choose to employ the property of another for the purposes of their trade, exposing it to all the risks of insolvency or bankruptcy, have no right to say, that the account shall not be taken, if it can be taken without incurring difficulties which might embarrass the house to such an extent as to make it unjust to demand it.

I had thought that I had always taken great care to lay down nothing that was more than law, and on reading my judgment in *Crawshay v. Collins* (1), I think it will be found that I have been sufficiently careful not to do it there. [His LORDSHIP read several passages from that case, and stated that the decree there was for an inquiry as to what profits had been made by means of the stock in trade and capital of the partnership business as the Master should find it to be constituted, adding that it was the simplest of all cases, being nothing but a manufactory of pumps and engines.] I think that decision goes no further than to call on me to consider what decree ought to have been made, under all the circumstances that belonged to De Tastet's possession of Mangin's property, and his applying it to a business which is no further explained in the report, than by being stated to be that of a merchant, which may mean five hundred different things; to consider whether I should have made this decree, or whether it would have been my duty to have directed special inquiries with a view to the determination of what I could or could not do, on a just application to this case of the principles which, in *Crawshay v. Collins* (1) appeared to me to be right, with that caution with which they are there laid down. I think some alterations in the original decree will be necessary. I shall not comment minutely on the

circumstance that the exceptions have been dealt with in a way as to which I should have entertained considerable doubt, according to my notions of the practice—first, considering that upon exceptions an order should not be made inconsistent with the decree; and secondly, because it would have struck me, rather to be matter to be infused into the decree, than to be made the subject of an order on exceptions. What I propose to do is so to alter the original decree as to bring out the case to which the principles that ought to govern as to the profits may be applied; to give such directions as may be necessary for that purpose, and to explain what it may be competent to crave as just allowance. I do not mean to intimate whether the Master should allow wages, as they are called, or compensation, but it cannot be denied that if the business be such that on the death of the party other persons are concerned in aiding it by the application of their skill, their services, and their money, a great deal may be included under the head of just allowances, which, till the Master has thoroughly sifted it, the court cannot determine.

The order pronounced upon the appeal from the decree was as follows: His LORDSHIP doth order, that the decree made in this cause, bearing date Mar. 6, 1812, be affirmed generally, but with this qualification, as to the part of it which directs the account of gains and profits, that if the Master, to whom this cause stands transferred, shall find that the late Anthony Mangin, by any written instrument contracted to receive interest, instead of gains and profits, during any particular period, the Master, in taking the accounts, is to have due regard to such contract, and to state in his report what would be the balance of the account between the parties, if, instead of gains and profits being accounted for during such period, interest only was allowed during such period; and it is ordered, that it be referred to the Master to tax the defendant, Manuel De Paiva, his costs of the said appeal, and that such costs, when taxed, be paid to him by the said petitioner Firmin De Tastet.

The order pronounced upon the exceptions was as follows: His LORDSHIP doth order, that the order made in this cause, bearing date July 22, 1818, be reversed, save so far as it directs the Master to review the said report, and his Lordship doth order that the said order be affirmed, so far as it doth so direct, with liberty for the defendant, Firmin De Tastet, in the proceedings upon such review, to submit to the judgment of the Master any claims as just allowances, which he may be advised ought justly to be made to him, by reason or on account of the management, transacting, and carrying on the business or concern, at any period or periods by them the said Firmin De Tastet, Manuel De Paiva, and Frederick Grellet, or any of them, or by them the said Manuel De Paiva and Frederick Grellet, or either of them, or any other person or persons; and it is ordered, that the said Master do state in his report the facts and reasons upon which he shall have adjudged any allowances to be just allowances, if on the behalf of the plaintiff he shall be requested so to do, and state the facts and reasons upon which he shall have adjudged any allowances prayed not to be just allowances, if he shall be requested on the behalf of the said defendant to make such statements.

The defendant appealed to the House of Lords where the LORD CHANCELLOR's decree was affirmed.

JOHNSON AND OTHERS v. LEGARD AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), July 10, 12, 21, 23, 1822]

[Reported Turn. & R. 281; 37 E.R. 1107]

Settlement—**Voluntary settlement**—**Contract by settlor to sell settled property**—**Creditors' claim for specific performance after death of settlor**—**Right to impeach settlement.**

By his marriage settlement made in 1782 the settlor, after providing for his wife and the issue of the intended marriage, settled his property on his brothers and their issue. By Act of Parliament in 1805 he was given leave to sell part of the settled estate, and in 1807 he entered into a contract of sale. At the time of his death in 1808 the contract had not been carried into effect although he had begun an action for specific performance. Creditors whose debts were contracted subsequently to the date of the settlement brought an action for specific performance of the contract.

Held: limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary, but a purchaser could not be compelled to take a title depending on the validity of those limitations, and the creditors' action must be dismissed, there having been subsequent dealings with the estate which might have confirmed the settlement, the agreement for purchase being suspicious, and it being doubtful whether the creditors could bring such an action.

Quære whether the creditors of a settlor of a voluntary settlement can bring an action after his death for the specific performance of a contract by him to sell the settled estate.

Notes. Considered: *Clarke v. Wright* (1861), 6 H. & N. 849; *Smith v. Cherrill* (1867), L.R. 4 Eq. 390. Explained: *Re Briggs and Spicer*, [1891] 2 Ch. 127. Referred to: *Gray v. Legard* (1831), 9 L.J.O.S.Ch. 80; *Doe d. Baverstock v. Rolfe* (1838), 8 Ad. & El. 650; *Davenport v. Bishopp* (1843), 2 Y. & C. Ch. Cas. 451; *Ford v. Stewart* (1852), 15 Beav. 493; *Holliday v. Overton* (1852), 19 L.T.O.S. 211; *Kingsford v. Ball* (1852), 2 Giff. App. I; *Wade v. Hopkinson* (1855), 19 Beav. 613; *Bentley v. Mackay* (1862), 31 Beav. 143; *Hepworth v. Hill* (1862), 30 Beav. 476; *Price v. Jenkins* (1876), 4 Ch.D. 483; *Mullins v. Gilfoyle* (1879), 39 L.T. 511; *Mackie v. Herbertson* (1884), 9 App. Cas. 303; *A.-G. v. Jacobs Smith*, [1895] 2 Q.B. 341.

As to position of grantor contracting to sell, see 17 HALSBURY'S LAWS (3rd Edn.) 670; and for cases see 25 DIGEST (Repl.) 267; as to who are within the marriage consideration, see 17 HALSBURY'S LAWS (3rd Edn.) 668; and for cases see 25 DIGEST (Repl.) 257.

Cases referred to in argument:

Jenkins v. Keymis (1664), 1 Lev. 150; Hard. 395; 83 E.R. 343; 25 Digest (Repl.) 250, 662.

Roscarrick v. Barton (1672), 1 Cas. in Ch. 217; 22 E.R. 769; 35 Digest (Repl.) 635, 3064.

Osgood v. Strode (1724), 2 P. Wms. 245; 10 Mod. Rep. 533; 24 E.R. 716, L.C.; 25 Digest (Repl.) 258, 660.

Stephens v. Trueman (1748), 1 Ves. Sen. 73; 27 E.R. 899, L.C.; 40 Digest (Repl.) 570, 760.

Ithell v. Beane (1749), 1 Ves. Sen. 215; 1 Dick. 132; 27 E.R. 990, L.C.; 25 Digest (Repl.) 199, 201.

Roe d. Hamerton v. Mitton (1767), 2 Wils. 356; 95 E.R. 856; 25 Digest (Repl.) 251, 594.

Staplehill v. Bully (1703), Prec. Ch. 224; 24 E.R. 109; 40 Digest (Repl.) 570, 757.

- Sutton v. Chetwynd* (1817), 3 Mer. 249; 36 E.R. 96; 25 Digest (Repl.) 200, 208. **A**
- Clayton v. Earl of Wilton* (1813), 3 Madd. 302, n.; 6 M. & S. 67, n.; 56 E.R. 516; 25 Digest (Repl.) 258, 664.
- Lord Teynham v. Mullins* (1674), 1 Mod. Rep. 119; 86 E.R. 778, sub nom. *White v. Stringer* (Lord Tenham's Case), 2 Lev. 105; 3 Keb. 322; 25 Digest (Repl.) 267, 759.
- Doe d. Otley v. Manning* (1807), 9 East, 59; 103 E.R. 495; 25 Digest (Repl.) 266, 749. **B**
- Metcalfe v. Pulvertoft* (1812), 1 Ves. & B. 180; 35 E.R. 71, L.C.; 39 Digest (Repl.) 40, 466.
- Leach v. Dene* (1640), 1 Ch. App. 461, n.; 1 Rep. Ch. 146; 12 Jur. N.S. 481, n.; 14 W.R. 811, n.; 21 E.R. 533; 25 Digest (Repl.) 268, 768.
- Douglasse v. Waad* (1668), 1 Cas. in Ch. 99; 22 E.R. 713, L.C.; 25 Digest (Repl.) 262, 700. **C**
- Parry v. Carwarden* (1778), Dick. 544; 21 E.R. 381; 25 Digest (Repl.) 252, 597.
- Buckle v. Mitchell* (1812), 18 Ves. 100; 34 E.R. 255; 25 Digest (Repl.) 266, 751.
- Smith v. Garland* (1817), 2 Mer. 123; 35 E.R. 887; 25 Digest (Repl.) 267, 754.
- Bennet v. Musgrove* (1750), 2 Ves. Sen. 51; 28 E.R. 34, L.C.; 25 Digest (Repl.) 216, 327. **D**
- Oxley v. Lee* (1736), 1 Atk. 625; 25 Digest (Repl.) 250, 577.
- Burke v. Dawson* (1805), Sugden's Vendors and Purchasers (5th Edn.) 569.
- Evelyn v. Templar* (1787), 2 Bro. C.C. 148; 29 E.R. 85, L.C.; 25 Digest (Repl.) 266, 748.
- Lacon v. Mertins* (1743), 3 Atk. 1; 26 E.R. 803, L.C.; 40 Digest (Repl.) 40, 222. **E**
- Buckmaster v. Harrop* (1802), 7 Ves. 341; 32 E.R. 139; on appeal (1807), 13 Ves. 456, L.C.; 40 Digest (Repl.) 38, 213.

Appeal to the Lord Chancellor.

By the settlement made on the marriage of Sir Digby Legard and Jane Cartwright in 1755, several estates including one at Etton, Yorkshire, were conveyed by Sir Digby Legard to the use of himself for life, remainder to the intent that Jane Cartwright if she survived him might during her life receive an annuity of £500 for her jointure, remainder to trustees for the term of two hundred years to secure the annuity, remainder to other trustees for the term of five hundred years, in trust to raise the sum of £6,000 for the portions of the younger children of the marriage, remainder to the first and other sons of the marriage successively in tail male, with divers remainders over. There was issue of the marriage, namely, John (afterwards Sir John) Legard, Thomas (afterwards Sir Thomas) Legard, a defendant, the defendant Digby Legard, and several other sons and daughters. Digby Legard died in 1773 and in May, 1782, John Legard suffered a recovery of the settled estates and declared the uses to himself in fee. **F**

By indentures of lease and release, dated June 14 and 15, 1782, made in contemplation of the marriage between Sir John Legard and Catherine Lapel Aston, between Sir John Legard of the first part, Henry Aston and Catherine Lapel Aston, of the second part, Thomas Grimston and Edward Dicconson of the third part, Thomas Eccleston and Edward Standish of the fourth part, and Henry Harvey Aston and Anthony Hodges of the fifth part, after reciting that the sum of £4,000 was to be received by Sir John Legard as the portion of Catherine Lapel Aston, Sir John Legard, in consideration of the intended marriage and of the portion and for making a provision for Catherine Lapel Aston and the issue of the marriage, and for settling the estates thereafter mentioned to the declared uses, conveyed the estates comprised in Sir Digby's marriage settlement, subject to the jointure and to the terms of two hundred years and five hundred years thereby created, to the use of himself for life, remainder to trustees during his life to preserve contingent remainders, remainder to the intent that Catherine Lapel Aston should during **G** **H** **I**

A her life receive thereout an annuity of £300 for her jointure, remainder to trustees for the term of one hundred years to secure the annuity, remainder to trustees for the term of five hundred years for raising portions for the younger children of the marriage, remainder to the use of the first and other sons of the marriage successively in tail male, remainder to the use of the first and other sons of Sir John Legard by any future wife successively in tail male, remainder to the use of the defendant Sir Thomas Legard for life, remainder to the use of the first and other sons of the defendant Sir Thomas Legard successively in tail male, with similar limitations in remainder to the defendant Digby Legard and the other brothers of Sir John Legard for their lives successively, and to their first and other sons successively in tail male with remainder to Sir John Legard in fee.

C In 1805 an Act of Parliament was passed on the petition of Sir John and Lady Catherine Legard, by which, after reciting that the sum of £6,000 raisable under the trusts of Sir Digby's marriage settlement had been raised by mortgage of the settled estates, and that those estates had been further mortgaged for the purpose of securing several sums of money which Sir John Legard had charged thereon under the powers of several Inclosure Acts, and that the inclosures not being yet completed further sums of money would be wanted for that purpose; D and also reciting that by an indenture dated Mar. 21, 1805, Lady Jane Legard had released the estate at Etton from her jointure, being satisfied that the residue of the estates subject thereto were an ample security for the same; several detached parts of the settled estates, including a part of the estate at Etton, were discharged from the uses limited by Sir John Legard's marriage settlement and vested in E trustees on trust to sell, and after applying the purchase-moneys in paying off the above-mentioned encumbrances on the settled estates, and reimbursing Sir John Legard the expenses of the inclosures not then completed, to the extent to which by virtue of the Inclosure Acts he was empowered to charge such expenses upon the settled estates, to lay out the surplus in the purchase of other estates to be limited to the uses of the settled estates.

F In October, 1807, Sir John Legard entered into a contract to sell the Etton estate to the defendant Richard Watt for £15,500; the agreement for sale recited that Sir John Legard was seised in fee of the estate, subject to the term of five hundred years for raising portions for his younger children, and also subject to a limitation to his first and other sons by Catherine his wife successively in tail, but discharged of all other encumbrances; and it provided that Sir John Legard G or his heirs should, on or before April 6, 1808, convey the estate to Watt, discharged of the term of five hundred years and the trusts thereof, and indemnified from the said limitation to his issue male. The agreement further provided that on the conveyance being made the purchase-money with interest should be secured by a mortgage of the estate and by the bond of Watt, and that it should remain upon that security during the life of Sir John Legard and for twelve months after H his decease, if the interest was regularly paid, and should not in any case be called in before the expiration of three years. It was also stipulated that if Watt, his heirs or assigns, should be deprived of the possession of the premises by any issue male of Sir John Legard, or by any other person claiming or deriving title through or under him, any sums of money laid out by Watt or his heirs in improvements or necessary alterations on the premises, with lawful interest for the same from I the time such sums were advanced, and also so much of the purchase-money as might have been paid, should be repaid by Sir John Legard, his heirs, executors, or administrators; the security for the purchase-money remaining unpaid was on the same event to cease and be void.

Sir John Legard died without issue in July, 1808, leaving the defendant Sir Thomas Legard his heir-at-law, and having by his will appointed the defendant Digby Legard to be his executor. At the time of his death the contract for the sale of the Etton estate had not been carried into effect, though he had instituted a suit for specific performance which was then pending. Previous to the death

of Sir John Legard a commission of lunacy had issued against Sir Thomas Legard, A
and the defendant Henry Willoughby was the committee of his estate.

The bill which was filed by creditors of Sir John Legard whose debts were
contracted subsequently to the date of his marriage settlement, charged that the
limitations contained in that settlement, subsequent to the limitations therein
contained to the first and other sons of Sir John Legard by any future wife, were B
fraudulent and void; and that no consideration had at any time been given by
or on the behalf of any of the objects of the said limitations in respect of the
estates limited to them respectively. The bill further charged that the defendant
Digby Legard refused to take the necessary steps for the purpose of enforcing
the contract, and alleging that the personal estate of Sir John Legard, exclusive
of the purchase-money, was insufficient for the payment of his debts, it prayed that C
it might be declared by the court that the limitations in remainder contained in
the indenture of release of June 15, 1782, subsequent to the limitations therein
contained to the first and other sons of Sir John Legard by any wife he should
afterwards marry in tail male, were, so far as respected the premises contracted
to be sold to Watt, fraudulent and void; and that the agreement of October, 1807,
might be specifically performed, and a proper conveyance executed to Watt of
the premises therein comprised; and that Watt might be directed to pay the D
purchase-money for which the premises were contracted to be sold to the defendant
Digby Legard, as part of the personal assets of Sir John Legard; and that the
same when received might be applied in a proper course of administration and
the debts due to the plaintiffs and the other creditors of Sir John Legard paid
thereout. The defendants Sir Thomas Legard and Thomas Digby Legard by their E
answers insisted that the limitations contained in the marriage settlement of
Sir John Legard sought to be impeached by the bill were good and valid; and
that the consideration appearing upon the settlement, and the natural love and
affection of Sir John Legard for his brothers, were sufficient to support the uses.
They also insisted that the Act of Parliament confirmed the settlement and that
if the settlement could be considered as voluntary, neither Sir John Legard, nor F
any persons claiming under him could call upon them to join in a conveyance of
the premises. The defendant Watt by his answer objected to the title on account
of the settlement, but submitted to perform the agreement on having a good title.

The cause was heard at the Rolls on Dec. 17, 1813, and it being then considered
necessary to obtain the opinion of a court of law on the validity of the limitations
in the settlement to the brothers of the settlor and their issue, a Case was by G
the decree directed to be made for the opinion of the Court of King's Bench on
that point. A Case was accordingly prepared in pursuance of the decree, stating
the settlement and that the estate had been conveyed to Watt for a valuable
consideration, but the conveyance was not stated to have been such as would
have been made if the terms of the agreement had been strictly pursued and no H
notice was taken of the Act of Parliament. The judges of the Court of King's
Bench having certified on the Case before them that none of the limitations to
the brothers of the settlor or their issue were valid against the defendant Watt
((1817), 6 M. & S. 60), the cause was heard, upon further directions, before the
vice-chancellor on July 18, 1818 ((1818), 3 Madd. 283), and a decree was made
by which it was declared that the limitations in remainder contained in the I
indenture of June 15, 1782, subsequent to the limitations therein contained to
the first and other sons of Sir John Legard by any wife he should afterwards
marry in tail male, were, so far as they respected the premises contracted to be
sold to the defendant Watt, fraudulent and void as against that defendant; and it
was referred to the Master to inquire whether a good title could be made to the
premises in question. The defendants Sir Thomas Legard and Thomas Digby
Legard appealed.

- A *Sir Robert Gifford, Shadwell and Hayter* for the plaintiffs.
Horne, Sugden and Lynch for the defendants, claiming under the settlement.
Hart and Wetherell for the defendant Watt.

LORD ELDON, L.C., in the course of the argument said that, if there had been nothing more in the case than that the settlement was made on the marriage, he thought that the remainders would have been held to be voluntary and void against a subsequent purchaser, but that he could not make up his mind to say that the Act of Parliament and the conveyance by Lady Jane Legard, made no difference in the case. His LORDSHIP observed that that part of the estate which was affected by the Act of Parliament could only be sold by a contract with the trustees, and then delivered the following judgment:

- C It appears to me at present that it is impossible to confirm these decrees. This is a bill brought by creditors of Sir John Legard, who made a settlement in the year 1782. The creditors by whom this bill is filed are persons whose debts were contracted subsequently to the date of the settlement; and if they can file any bill at all it must be upon the principle that Sir John Legard, having entered into a contract to sell this estate, has given them a right to say that he converted the fee-simple of the premises into personal estate; that he divested himself of all title to those premises as land and became entitled to consider himself as a creditor of Mr. Watt for £15,500; and that Digby Legard not choosing to enforce the contract, they have a right to do so. It is infinitely too late to comment on the original decisions on the Statute of Elizabeth [27 Eliz., c. 4; see now s. 173 of the Law of Property Act, 1925; 20 HALSBURY'S STATUTES (2nd Edn.) 788]: but when one looks at the terms of the statute one is certainly a little surprised to hear it said that if a man upon his marriage thinks proper, after providing for his issue, to limit his property to his own brothers and sisters, that is so fraudulent a thing that the party is to be considered guilty of a misdemeanor. It has been determined in this court that if a voluntary settlor enters into a contract to sell the estate and files a bill to carry the contract into execution the court will not assist him.
- F One difficulty in the way of assisting him is that he has no equity to defeat the act which he has done himself: but another consideration which has weighed in such cases is that if you compel a purchaser to take an estate at the instance of such a man, you cannot be quite sure that there may not have been some intermediate acts, which by matter ex post facto may have made the settlement good, which in its origin was not good. It cannot be denied with respect to persons
- G who make voluntary settlements, and those who are called volunteers, that they may come to such future bargains as to make that which was originally voluntary no longer to be so considered.

- Then how does this case stand? After this settlement was made, Sir John Legard applied to Parliament to enable him to sell a portion of the settled estates, and Parliament granted the application. There can be no doubt that Parliament would not have done that without the consent of all the persons having a present interest in the estate; and without entering into the question what would be the effect of such a thing, how is it possible for me to proceed upon the opinion of the Court of King's Bench, when that court had not the circumstance before it? The Case sent to the Court of King's Bench ought to have stated the Act of Parliament; and instead of stating a simple conveyance in fee to Watt, ought to have stated such a conveyance as would in all respects have carried into effect the agreement which was made. The result is that the case must be gone all over again and be considered as it was in 1813. But, independently of all the questions which have arisen in this case and without giving any opinion upon any of them, without entering into the question whether these creditors stand in a better situation than Sir John Legard or in the same situation as that in which he stood, I apprehend this is quite clear, that unless this court would compel Watt to take this title, the creditors cannot insist that this contract has converted
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into personal assets the estate contracted to be sold; and attending to the modern doctrines of the court, it does not appear to me that I could compel a purchaser to take this title. If however you like to have the Case sent to the Court of King's Bench again, stated in the way in which I think it ought to have been stated before, you may have it. [The plaintiffs declined to take the Case.] The decisions must be reversed: but I do not wish anything which I do to involve a doubt as existing on my mind upon the opinion of the Court of King's Bench. Adverting to the nature of the agreement adverting to the Act of Parliament and to the difficulty which there would be in making a title in any state of the case: and adverting also to the question whether the creditors have a right to institute this suit for the purpose of compelling the purchaser to take this property, if a good title could be made, when he could not have been compelled to take it, if the bill had been filed by the person with whom he contracted, I think this bill ought to be dismissed.

Bill dismissed.

GLADSTONE v. BIRLEY

[ROLLS COURT (Sir William Grant, M.R.), December 6, 1816, March 3, 1817]

[Reported 2 Mer. 401; 35 E.R. 993]

Shipping—Freight—Lien—Equitable lien—Parties “mutually bind” themselves, the ship, and cargo in penal sum for due performance of the charterparty. Lien—Equitable lien—No such lien for freight—No difference between law and equity as to possessory liens.

There are liens which exist only in equity and of which equity alone can take cognizance, but lien for freight is not one of them. As to liens on goods of one man in the possession of another, I know of no difference between the rules of decision in courts of law and in courts of equity. The question whether a tradesman has a lien on goods in his hands for the general balance, or only for so much as relates to the particular goods, is decided on the same grounds at law and in equity. To extend the lien, the party must show an agreement to that effect or something from which to infer an agreement, such as a course of dealing between the parties or a general usage of the trade. Lien, in its proper sense, is a right which the law gives. But it is usual to speak of lien by contract, though that be in the nature of a pledge. Taken either way, however, the question always is whether there be a right to detain the goods till a given demand be satisfied. That right must be derived from law or contract. A court of equity is not bound to find an equitable effect for a clause merely because the construction put on it at law would leave it inoperative: per SIR WILLIAM GRANT, M.R.

By a clause in a charterparty the parties “mutually bind themselves, especially the owners, the ship, her tackle, and the freighter the goods to be laden on board,” in a penal sum, “to the true and punctual performance thereof.” The Court of King's Bench held that the clause did not give the shipowners any lien on the goods brought home, for either dead freight or demurrage.

Held: there was only one construction of the clause at law and in equity, and there was no lien in equity.

Notes. Referred to: *Giles v. Grover* (1832), 6 Bli. N.S. 277; *McLean and Hope v. Fleming* (1871), L.R. 2 Sc. & Div. 128.

As to possessory liens generally, see 24 HALSBURY'S LAWS (3rd Edn.) 143 et seq.; and for cases see 32 DIGEST (Repl.) 254 et seq.

- A Bill to obtain a declaration that the plaintiffs (the shipowners) were entitled to a lien in equity on certain goods.

The Court of King's Bench having determined "that the shipowners had not a lien upon the goods brought home, for money claimed to be due in respect of goods put on board and re-landed, nor in respect of dead freight nor in respect of demurrage" (see *Birley v. Gladstone* (1814), 3 M. & S. 205), the present bill

- B was filed by the plaintiffs for the purpose of obtaining a declaration that the shipowners were entitled to a lien in equity by virtue of the following clause in the charterparty:

"And, lastly, for the true performance of every article, matter, and thing herein contained, the parties hereby mutually bind and oblige themselves, especially the owners the ship, her tackle and appurtenances, and Holt (the freighter) the goods and merchandises to be laden and put on board the same vessel on the said voyage, each unto the other and others of them, in the penal sum of £3,000 sterling, to be forfeited and paid by the party delinquent, to the party observant, to the true and punctual performance thereof."

Sir S. Romilly and Horne for the plaintiffs.

- D Wetherell and Heys for the defendant.

SIR WILLIAM GRANT, M.R.—The question in this case is whether the last clause in the charterparty can have any different effect in equity from what it has been determined to have at law. The clause is this: [HIS LORDSHIP read the clause, and continued:] It has been decided at law that this gave the present

E plaintiffs no lien on the goods brought home in the ship, either for what is called the dead freight, or the demurrage that became due by virtue of the covenants on the part of the freighter. The ground of the judgment was not, as I understand the report, that such a lien might not have been contracted for, but that the clause did not contain a contract to that effect. LE BLANC, J., says (3 M. & S. at p. 219):

- F "The clause could not mean to give the shipowners a lien: if such had been its intention, it might easily have been expressed in a very few words, that the shipowners should have a right to detain the goods which should be brought home, until all their demands under the covenants were satisfied."

There can be but one right construction of the clause, and if it could be said that

G the Court of King's Bench had ill construed it, this is not a court of appeal in which their decision can be corrected.

The plaintiffs however suppose that although a court of law has said that the clause does not give them a lien, a court of equity may say that it gives them what is precisely tantamount to a lien, namely, a right to have their demand satisfied out of the produce of the goods in preference to any other creditors of the bankrupt freighter. Putting this clause out of the question, it was not

H contended that equity gives the shipowner any lien for his freight beyond that which the law gives him. There are, to be sure, liens which exist only in equity and of which equity alone can take cognizance, but it cannot be contended that lien for freight is one of them. As to liens on the goods of one man in the possession of another, I know of no difference between the rules of decision in courts of

I law and in courts of equity. The question that so frequently occurs, whether a tradesman has a lien on the goods in his hands for the general balance due to him, or only for so much as relates to the particular goods, is decided in both courts in the same way and on the same grounds. To extend the lien, the party claiming it must show an agreement to that effect or something from which an agreement may be inferred—such as a course of dealing between the parties or a general usage of the trade. Lien, in its proper sense, is a right which the law gives. But it is usual to speak of lien by contract, though that be more in the nature of an agreement for a pledge. Taken either way, however, the question

always is whether there be a right to detain the goods till a given demand shall be satisfied. That right must be derived from law or contract. A

A court of competent jurisdiction has decided that neither law nor contract has, in this case, given any such right. Without directly contradicting that decision, it is impossible for me to say that the plaintiffs have a right to be first paid out of the produce of the goods, for if they had any such right, they would also have had a right to retain possession till they were paid. It was asked what effect the clause could have if it gave no lien either in law or equity. A court of equity is not bound to find an equitable effect for a clause, merely because the construction which a court of law has put upon it would leave it inoperative. In truth, it has been copied from foreign charterparties, with very little consideration of the effect that might be allowed to it by the law of this country. I think it very probable that in other countries it would have the effect of entitling the shipowner to retain the cargo for every sort of demand that could accrue to him under the charterparty. If that be not the effect of it, I do not see what other it can have. But bound as I am by the construction which it has received from a court of law, and conceiving that this is not a case in which equity can give a lien that does not legally exist, I must dismiss the plaintiff's bill. B

Bill dismissed. C

CLARIDGE v. EVELYN AND OTHERS D

[COURT OF KING'S BENCH (Abbott, C.J., Bayley and Holroyd, JJ.), October 27, 1821]

[Reported 5 B. & Ald. 81; 106 E.R. 1123]

Infant—Capacity—Public office—Clerk of court—Duty to receive money—Sheriff—Gaoler. E

An infant cannot hold an office of public or pecuniary trust, e.g., that of clerk of a Court of Requests where it is part of the duty of the clerk to receive the money of suitors. F

Per ABBOTT, C.J.: The offices of sheriff and of gaoler have been granted in fee and such grants are not void, on the ground that those offices may by descent vest in an infant. In those cases, the grantees have the power of appointing deputies. G

Notes. Courts of Requests were inferior courts having local jurisdiction in claims for small debts and were established in various parts of the kingdom by special Acts of Parliament. They were abolished with a few exceptions by the County Court Act, 1846, and the modern county courts took their place. H

As to civic rights and liabilities of infants, see 21 HALSBURY'S LAWS (3rd Edn.) 185 et seq.; and for cases see 28 DIGEST (Repl.) 491, 492.

Case referred to:

(1) *Young v. Fowler* (1640), Cro. Car. 555; March, 38; 79 E.R. 1078; 28 Digest (Repl.) 491, 89. I

Also referred to in argument:

Whywall v. Champion (1738), 2 Stra. 1083; 93 E.R. 1047; 28 Digest (Repl.) 518, 352.

Bristow v. Eastman (1794), 1 Esp. 172; Peake, 291; 28 Digest (Repl.) 526, 419.

Action on the case brought by the plaintiff against the defendants, as commissioners of a Court of Requests, established by 48 Geo. 3, c. 50, for a false return to a writ of mandamus.

A By the death of the late Richard Crow on Dec. 8, 1818, the office of clerk of the Court of Requests, constituted by the Act of Parliament 48 Geo. 3, c. 50, became vacant. On Jan. 8, 1819, the commissioners of the court, at a meeting duly summoned and held according to the directions of the Act, proceeded to the election of a clerk in the room of Crow. The plaintiff and one T. K. Crow were the candidates for the office. After the commissioners were assembled and immediately
B before the election commenced, T. K. Crow, in the hearing of the commissioners, was asked his age by Richard Allmett, which question he declined answering: and thereupon Richard Allmett, one of the acting commissioners, notified to the rest that T. K. Crow was an infant under the age of 21 years and on that account ineligible to the office of clerk and that if any commissioner should, after that, give his vote for T. K. Crow, such vote would be thrown away and void. At the election,
C each of the commissioners, as he came up to vote, was separately asked by Richard Allmett for whom he voted; and Richard Allmett in the hearing of each of the commissioners publicly protested against each of the votes for T. K. Crow immediately on its being tendered and before the same was taken down or recorded, on the ground of the deficiency of T. K. Crow. At the close of the poll, the numbers were,
D for T. K. Crow, 87; G. Claridge, 44. T. K. Crow was, therefore, immediately after the election declared by the commissioners to be elected by them as such clerk, and was returned as such clerk and admitted to the office and had hitherto continued to serve and act as clerk. T. K. Crow, at the time of the election, was an infant under the age of 21 years and, at that time, under articles of clerkship to Richard Crow, having attained the age of 20 on Dec. 28, 1818; but he had, for about two
E years, occasionally acted for Richard Crow in his office of clerk of the Court of Requests, but without any appointment pursuant to the provisions of the Act of Parliament.

At the trial before ABBOTT, C.J., the jury found a verdict for the plaintiff subject to the opinion of the court on a Case which stated the facts above set out. The question for the opinion of the court was whether T. K. Crow was duly elected to the office.
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Tindal for the plaintiff.

Chitty for the defendants.

ABBOTT, C.J.—No authority has been cited to show that the grant of an office of public and pecuniary trust to an infant is valid. It is true that the offices of sheriff and of jailor have been granted in fee and that such grants are not void, on
G the ground that those offices may by descent vest in an infant. In those cases, however, the grantees have the power of appointing deputies. In *Young v. Fowler* (1), where a grant by the bishop of the office of register of a diocese to an infant was held good, the grant was in reversion and the grantee attained full age before the office descended to him. Besides, the duties of that office are not stated in the report of the Case. Looking at this Act of Parliament, 48 Geo. 3, c. 50, it appears
H that this is an office of pecuniary trust and it seems to me, therefore, impossible to allow the grant of such an office to an infant, for in the event of his being guilty of negligence with respect to the moneys placed in his hands the suitors of the court might be deprived of that remedy which they ought to have against a public officer entrusted with their money. If, on the other hand, he were to conduct him-
I self so as to be criminally liable, he would be placed in a situation of peril, which the law is anxious he should avoid. I am of opinion, therefore, that he was ineligible to this office; and due notice of his incapacity having been given to the electors at the time of their election, their votes were thrown away and, consequently, there must be judgment for the plaintiff.

BAYLEY, J.—I am of the same opinion. The commissioners are bound to appoint a fit and proper person. A person who is not legally responsible for the discharge of the duties of the office cannot, in point of law, be considered a proper person to execute it. The clerk in this case is to have the money of the suitors

entrusted to his care; he ought, therefore, to be civilly answerable for that money, either if misapplied by himself or lost by the negligence of his deputy. Possibly he might be liable for a tortious conversion of the money by himself, but he would not be so liable where the money was lost either by his own negligence or that of his deputy; and, therefore, the public, by the appointment of an infant to the office would lose that privilege which the law gives them against the principal. I am, therefore, of opinion that an infant was not eligible to this office and, consequently, that there must be judgment for the plaintiff. A
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HOLROYD, J.—I am of opinion that this is an office which an infant cannot legally hold. The officer is to receive the money which is paid into court. The Act of Parliament 48 Geo. 3, c. 50, puts a special trust and confidence in him in that respect; and, that being so, I am of opinion that, independently of the provisions of the Act, he could not legally appoint a deputy. In COMYNS' DIGEST, tit. Officer, D. 2, it is laid down that a deputy cannot be appointed to an office if the grant imports a trust or confidence in the person; as to be squire to the king's body if a deputy is not allowed by his patent, and for that the YEAR BOOK, 11 Edw. 4, 1, is cited. By the provisions of this Act of Parliament, it depends entirely on the discretion of the commissioners whether they will, in any case, allow a deputy to be appointed; and they may insist that the office shall be executed by the party in person. I think, therefore, that the Case must be considered as if the office was to be executed by the infant in person. Besides, as the law will not allow an infant to act on his own discretion so as to be civilly responsible for his own acts, it will not allow him to be responsible for the acts of others and, therefore, if he could appoint a deputy, he would not be liable for his acts; and if he is not responsible, he is not a fit person to be put in trust for others, for the public who paid money to him would be in a worse situation than if the office was filled by a person of full age who might be sued. I am, therefore, clearly of opinion that an infant is not a competent person to execute the special trust reposed in the officer by this Act of Parliament; and, consequently, there must be judgment for the plaintiff. C
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Judgment for plaintiff.

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RAITT v. MITCHELL AND ANOTHER

[COURT OF KING'S BENCH (Lord Ellenborough, C.J.), May 7, 1815]

[Reported 4 Camp. 146]

B

Lien—Debt—Need for debt to be due, not accruing—Repair of ship—No express agreement as to time of payment—Credit given under trade custom.

Per LORD ELLENBOROUGH, C.J.: A lien is wholly inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment work is completed. There can be no lien without an immediate right of action for the debt, and that does not accrue till the period of credit has expired.

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Accordingly, a shipwright **held** not to have any lien on a ship taken into his dock to be repaired without an express agreement regarding the time of payment, credit being given by the usage of trade to the owner of the ship for the repairs.

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Notes. Applied: *The Alan Ker, How v. Kirchner* (1857), 30 L.T.O.S. 296. Referred to: *Re Westlake, Ex parte Willoughby* (1881), 16 Ch.D. 604.

As to possessory lien on a ship, see 35 HALSBURY'S LAWS (3rd Edn.) 787; and for cases see 42 DIGEST (Repl.) 1099 et seq. As to essential ingredients of lien, see 24 HALSBURY'S LAWS (3rd Edn.) 143 et seq; and for cases see 32 DIGEST (Repl.) 256 et seq.

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Action on the case for wrongfully detaining the plaintiff's ship which had been delivered to the defendant to be repaired.

The defendants were shipwrights, and had a dock in the river Thames. The plaintiff, having purchased an East Indiaman called the *Ocean*, delivered her to the defendants to be repaired, and she was placed in their dock for that purpose. Nothing whatever passed between the parties with respect to the time or manner in which the repairs were to be paid for when they were completed. The plaintiff having then required that the ship should be delivered back that she might proceed on her voyage to the East Indies, the defendants said that she should not leave their dock till security was given for the repairs, which amounted to above £3,000 and considerably exceeded what they supposed would have been necessary. The plaintiff, protesting against the defendants' right to detain the ship was willing to give them security for the fair amount of their bill; and to ascertain this, several meetings took place between the parties, and arbitrators were appointed. They could arrive at no conclusion on the subject, and the defendants peremptorily refused to allow the ship to be undocked till the whole of their demand was paid, or security given for it. The plaintiff brought an action against the defendants for wrongfully detaining the ship, and proved that, by the usage of trade in the river Thames, where there was no express agreement as to the time of payment, the shipwright invariably gave credit for repairs to the owner of the ship repaired. The credit varied in different trades. It was generally fifteen months; with respect to East India ships, it was eighteen months; but without a previous stipulation for that purpose, neither a ready money payment, nor security was ever required.

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Park, Scarlett and Campbell for the plaintiff.

Garrow and Barrow for the defendants.

LORD ELLENBOROUGH, C.J.—I am of opinion that in this case the defendants had no right to detain the plaintiff's ship. It is distinctly proved that, where there is no express stipulation for a ready money payment, credit is invariably given by shipwrights in the river Thames. The period of credit varies in the different trades in which ships are employed; but in each trade it appears to be uniform; and for the repairs of Indiamen we are told that it is eighteen months, at the expiration of which time it is expected they shall have returned from their

voyages and put funds into the hands of their owners by the freight which they have earned. This being the invariable usage, I must consider it as the basis of the contract between these parties; and their respective rights and liabilities are precisely the same as if without any usage they had entered into a special agreement to the like effect. In that case, it seems to be admitted that no lien could be claimed. To be sure, a lien is wholly inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed. I do not say that a shipwright has not a lien on a ship in his dock, where he is to be paid in ready money as soon as the repairs are finished. On the contrary, I am inclined to think that he has a lien like other artificers. But there can be no lien without an immediate right of action for the debt, and that does not accrue till the period of credit has expired.

Verdict for plaintiff.

PRIDDY AND OTHERS v. ROSE AND OTHERS

[ROLLS COURT (Sir William Grant, M.R.), April 29, May 1, 6, July 29, 1817]

[Reported 3 Mer. 86; 36 E.R. 33]

Crown—Crown servant—Money in hand issued by government for individual—Liability to pay.

Where a public officer has in his hands money issued by the government for the use of an individual a suit may be maintained by the individual or his assignee against the officer for the recovery of the money, for it is the duty of the officer to the Crown, as well as to the individual, to apply the money to its destined purpose.

Chose in action—Assignment—Subject to equities to which liable in hands of assignor—Assignment of dividends under settlement to secure annuity.

The assignee of a chose in action takes it subject to all the equities to which it was liable in the hands of the assignor.

By a covenant in a marriage settlement the husband undertook to pay to the trustees a sum of £4,000 the dividends of which were made payable to him for life. Without paying the £4,000 he granted annuities secured by the assignment of the dividends. The trustees had no notice of the assignment. In an action against the trustees by the assignees of the dividends,

Held: the trustees had the right at any time to stop payment of the dividends to the husband on his failure to perform his covenant; the assignees took subject to that right; and, therefore, they were not entitled to recover against the trustees.

Notes. Assignment of naval pensions was prohibited by s. 4 of the Naval and Marine Pay and Pensions Act, 1865 (22 HALSBURY'S STATUTES (2nd Edn.) 738). Many statutes creating pensions contain a provision against assignment.

Considered: *Re Prior, Ex parte Young* (1835), 4 Deac. & Ch. 645. Applied: *Smith v. Smith* (1835), 1 Y. & C. Ex. 338. Distinguished: *Houlditch v. Wallace* (1838), 5 Cl. & Fin. 629. Considered: *Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164. Referred to: *Re Brown, Ex parte Turpin* (1832), Mont. 443; *Burridge v. Row* (1844), 1 Y. & C. Ch. Cas. 183; *Courtenay v. Williams* (1844), 3 Hare, 539; *Jones v. Mossop* (1844), 3 Hare, 568; *Cole v. Muddle* (1852), 10 Hare, 186; *Re Tönnies* (1873), 28 L.T. 567; *Ballard v. Marsden*, [1874-80] All E.R. Rep. 999; *Dingle v. Coppen* (1898), 68 L.J.Ch. 337; *Re Jewell's Settlement, Watts v. Public Trustee*, [1918-19] All E.R. Rep. 1161.

- A** As to choses in action, as pensions, not capable of assignment, see 4 HALSBURY'S LAWS (3rd Edn.) 518 et seq., and as to personal liability of Crown servants at common law upon contracts made in their official capacity, see 7 HALSBURY'S LAWS (3rd Edn.) 252; and for cases see 8 DIGEST (Repl.) 564 et seq. As to money in the hands of public servants, see 30 HALSBURY'S LAWS (3rd Edn.) 702, and as to retainer by trustees against beneficiaries, see 38 HALSBURY'S LAWS (3rd Edn.) 934; and for cases see 38 DIGEST (Repl.) 54; 47 DIGEST (Repl.) 427 et seq.
- B**

Cases referred to :

- (1) *Row v. Dawson* (1749), 1 Ves. Sen. 331; cited in 1 De G.M. & G. 774; 27 E.R. 1064, L.C.; 8 Digest (Repl.) 582, 294.
- (2) *Ex parte Mitford* (1784), 1 Bro. C.C. 398; 3 Mer. at p. 105; 28 E.R. 1202; 4 Digest (Repl.) 308, 2786.

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Bill by the plaintiffs, annuitants, to recover from the defendants, the Treasurer of the Navy, the Attorney-General, and the trustees of a marriage settlement, sums due in respect of three annuities granted by the defendant Hunt by two deeds, dated Oct. 3, 1802, and June 18, 1809, secured by assignment of his pension from the Treasury and dividends due to him under a marriage settlement dated April 4, 1795.

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By settlement, made previous to the marriage of the defendant Hunt with Catherine Davie, dated April 4, 1795, it was recited that C.D. was entitled to two several sums of £5,145 and £1,029, and that it had been agreed that the said sums should be assigned to the defendants Praed and Short, their executors, etc., upon the trusts thereof, and had been further agreed that the defendant Hunt, should previous to the marriage, lay out and invest £4,000, and should enter into a covenant for investing, within four years, a further sum of £4,000, in the purchase of stock, in the names of the trustees, upon the same trusts; and that, in part performance of the agreement, the first £4,000 had been already invested in the purchase of £6,438 3 per cents., which then stood in the names of the trustees at the bank. It was witnessed that C. D. thereby assigned to the trustees, their executors, etc., the sums of £5,145 and £1,029, and all interest, etc., and Sir John Davie (her father) covenanted within two years to raise and pay the same, with interest in the meantime; and the trusts thereof, and also of the £6,438 stock, were declared, to pay to the defendant Hunt, or permit him to receive, the interest and dividends thereof for his life, and, after his decease, in trust for the wife and children of the marriage as therein mentioned. And the defendant Hunt thereby covenanted as to the further sum of £4,000, to be invested as aforesaid, according to the recital.

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The marriage took place, and the two sums of £5,145 and £1,029 were paid to the trustees at different times, and invested by them in stock, making, together with the £6,438, in all, £15,585 3 per cents., standing in their names on the trusts of the settlement; the dividends whereof the defendant Hunt received up to Jan. 5, 1810, when he absconded, without having ever paid the second £4,000 according to his covenant; after which time the trustees received the dividends, and invested the same from time to time in stock, in satisfaction, as they themselves alleged, of that covenant.

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In 1802, by grant under his sign manual, His Majesty, in consideration of the long and faithful services of the defendant Hunt as a commissioner for conducting the transport service, granted to him an annuity, or yearly pension, of £500, payable out of moneys to arise from the sale of naval stores, to commence from May, 15, 1802, and to continue during his life; to be suspended, nevertheless, when and so long as he should be and continue in possession of any office, place, or employment, or offices, places, or employments, the annual value of which, taken separately or together, should amount to £1,000 or upwards—or not amounting to £1,000 per annum, then, as to so much of the pension, as, together with the annual value aforesaid, should exceed £1,000 per annum—and, by a warrant dated May 17, 1802, signed by the Commissioners of the Treasury, and directed to the Treasurer

I

of the Navy, it was ordered that, out of any moneys that might or should from time to time be and remain in the Treasurer's hands, or in the hands of his cashier, to arise by the sale of old naval stores, the Treasurer should pay or cause to be paid to the defendant or his assigns the annuity or pension, to continue during his natural life, but to be suspended nevertheless in the case and in the manner before mentioned. A

By deed, dated Oct. 3, 1802, the defendant Hunt, in consideration of £4,000, granted the plaintiff Priddy, his executors, etc., an annuity of £500 during the life of the defendant, for securing the payment whereof, he assigned to a trustee for the plaintiff the pension of £500, and all powers and remedies which he had for recovering or obtaining payment thereof, appointing him his attorney B

"to demand, recover, and receive the same from the Treasurer of the Navy for the time being, or other person or persons who should be warranted or authorised to pay the same," C

and also to receive from the trustees of his marriage settlement, the dividends of the stock to which he was entitled for life as aforesaid, upon the trusts therein mentioned.

The defendant Hunt afterwards surrendered his pension and obtained a new grant, by warrant under the sign manual, also addressed to the Treasurer of the Navy, of a pension of £537 18s. payable in like manner and subject to similar conditions, with the former, but to be suspended only in case of the defendant's being in possession of any office, etc., to the amount of £1,500 per annum. D

By deed dated July 8, 1806, the defendant granted two other annuities, of £305 14s. to the plaintiffs Holme and Pollard, secured in like manner with the former, by an assignment of the pension and dividends of stock. E

The three annuities so granted were regularly paid up to June 18, 1809, since which no further payment had been received in respect thereof. The bill, alleging the above facts, further stated that, by reason of the regular payment of the annuities to the time aforesaid, the defendant Hunt had been suffered to continue in receipt of the dividends of stock, and of the pension; that he received the latter to June 23, 1809, and the former to Jan. 5, 1810, since which he had received nothing in respect of either; and that in February, 1810, he went abroad, and had ever since continued abroad. The bill charged that the defendant Rose, as Treasurer of the Navy, received the pension which became due on June 23, 1810, out of the money applicable to the payment thereof, and had, in pursuance of His Majesty's warrant, appropriated the same; that the plaintiffs had caused notices to be served on the trustees of the settlement, and applications to be made to them, and to the Treasurer of the Navy, with which they had respectively refused to comply. The bill therefore prayed that accounts might be taken of what was due on the annuities, and of the arrears of pension, and dividends; that the plaintiffs might be paid thereout, etc.; and for an injunction to restrain the Treasurer of the Navy, and the trustees, from paying away any of the moneys coming to their hands respectively. From the answers of the Treasurer of the Navy and of the Attorney-General, it appeared that the defendant Hunt was, in April, 1807, appointed to the office of Treasurer of the Ordnance, which he held till January, 1810, when he absconded, and, upon investigation of his debts, was found to be indebted to the Crown in £93,834, in respect of moneys received as Treasurer; upon which extents were issued, and the balance still remaining due was £90,000 and upwards; and that by an Order in Council dated Mar. 4, 1812, it was ordered that his pension be withdrawn and no longer allowed, and such part thereof as remained unpaid up to Dec. 30, 1811, be withheld, and considered as applicable to the liquidation of his debt to the public. F G H

The defendants, the trustees of the settlement, by their answer, said they had had no notice or knowledge of the annuities until February, 1810 (after Hunt had absconded), when they were first served with a written notice of the deeds of 1802 and 1806. They put in issue the validity of those instruments, stating different I

A objections thereto, on the grounds of inadequacy of price, and defect of memorials; and, as to the second, of its containing in fact two grants of distinct annuities, with only one stamp for both. They alleged that Hunt, having broken his covenant to invest the £4,000, had become a debtor to them for that amount, and that they were, therefore, entitled to retain, as against him and all claiming under him, the dividends of stock, until that sum should be raised, the money due in respect of
B dividends being a just debt at law, and upon a covenant entered into for valuable consideration. They insisted that the plaintiffs could be in no better situation than Hunt himself, claiming through him; alleging that the plaintiffs had notice of the covenant from the indenture of settlement, and that they had made no inquiry respecting the same previous to the grants of their respective annuities.

C *Hart, Bell and Heald* for the plaintiffs.

Sir A. Pigott and Mitford for the Attorney-General.

Jarvis and Wyatt for the defendant, the Treasurer of the Navy.

Sir S. Romilly and Winthrop for the defendants, the trustees in the settlement.

SIR WILLIAM GRANT, M.R.—The plaintiffs are annuitants of Mr. Joseph Hunt, who, as a security for the annuities which he granted them, assigned to them
D a pension he had from the Crown, and the dividends of certain funds, to which he was entitled for his life under his marriage settlement. The bill is filed against the Treasurer of the Navy, and the Attorney-General, for the recovery of what is in the hands of the former on account of Mr. Hunt's pension, and against the trustees in the settlement for the dividends that have accrued on the funds since the time when Mr. Hunt himself ceased to receive them. On the part of the Treasurer of the
E Navy, and the Attorney-General it is objected that the court has no jurisdiction to order the payment of this money. On the part of the trustees, it is stated that although by the settlement Mr. Hunt was entitled to the dividends in question for his life, yet by the same settlement he had covenanted to pay £4,000, to be laid out on the like trusts as the other funds, and that, as he has never performed his
F covenant, they have a right to stop the dividends, and to apply them as far as they will go, to make good the sum which Mr. Hunt ought to have paid them.

As to the first demand—where a public officer has in his hands money issued by the government for the use of an individual, it is clear that a suit may be maintained against the officer for the recovery of such money; for it is his duty to the Crown, as well as towards the individual, to apply the money to its destined purpose. But
G here the officer is commanded by government to withhold the money from Mr. Hunt, and to apply it towards satisfaction of a debt which Mr. Hunt owes the public. Then the question is between government and Mr. Hunt, or Mr. Hunt's assignee, and it is not, I apprehend, in this court that such a question can be decided. In *Row v. Dawson* (1), LORD HARDWICKE, L.C., entertained the jurisdiction singly on the ground that the officer admitted the money to be in his hands for the use of the
H person under whom the litigating parties made their claim. That was the case of a public officer who had given a draft, for payment of a sum which he had borrowed, upon money due to him out of the Exchequer, and afterwards became bankrupt; and the question was whether the defendants, to whom the draft had been given, were first entitled by a specific lien upon the sum due to the bankrupt's estate; or whether the plaintiffs, the assignees under the Commission, were entitled to have
I the whole sum paid to them; it being insisted for them, that this draft was in nature of a bill of exchange, and that the property was not divested out of the bankrupt at the time of his bankruptcy. The Lord Chancellor said (1 Ves. Sen. at p. 332):

"At first I little doubted about my own jurisdiction, and whether the plaintiffs [the assignees] ought not to have gone into the Exchequer as being a court of revenue; for this was not a personal credit given to, or demand upon, the officer, but to be paid out of the money issued out of the Exchequer to the officer, and this is on warrant to be paid out of the revenue of the Crown for public services."

He adds :

"But there is something in the present case delivering it from that : the officer admits he has received a sum of money applicable to this demand; which brings it to the old case of a liberate, which a person has under the Great Seal for the payment of money, upon admission that the officer had money in his hands applicable to the payment, and proof thereof, that would give courts of law a jurisdiction; so that an action of debt might be maintained on the liberate."

It is sufficiently evident that, if the officer had, on behalf of government, disputed Gibson's right to the fund, LORD HARDWICKE, L.C., would not have proceeded in the cause; but Gibson's right being admitted, it was a merely equitable question, which of the parties claiming under him had the best title to the money. Besides, if, in this case, the assignment (as is contended by the plaintiffs) passed not merely the equitable, but the legal title to the pension, why does the assignee come into a court of equity? If, on the other hand, he be only an equitable assignee, and as such stands precisely in Mr. Hunt's place, he would probably find it difficult, in any court, to maintain that the pension can be claimed from government, while the debt to government remained unsatisfied. However, that is a question which I do not think this court ought to determine. The bill must be dismissed as against the Attorney-General and the Treasurer of the Navy.

As to the question between the plaintiffs and the trustees, it arises on the following facts. Mr. Hunt's marriage settlement was in April, 1795. The £4,000 became payable in four years afterwards, that is, in April, 1799. It does not appear that the trustees ever made any application for the payment of the money. The first annuity was granted in 1802; the others in 1806; Mr. Hunt absconded in 1810; down to which time he had received the dividends under a power of attorney from the trustees, and had paid the annuities as they became due. No notice had ever been given to the trustees, of the assignment of the dividends, until after Mr. Hunt had absconded. The question is whether the dividends can be stopped. See how the case would have stood between the trustees and Mr. Hunt himself. I apprehend it to be clear that he could not have claimed a benefit under the settlement without making good his part of it. The trustees might give him what credit they chose, subject to their responsibility to their cestuis que trust; but they might, at any time after the £4,000 became due, have stopped the dividends, if the money was not paid. Supposing he had become a bankrupt, the trustees would have this equity as against the assignees, as was determined by LORD THURLOW, L.C., in *Ex parte Mitford* (2).

Mr. Mitford, under the marriage settlement, was entitled to an annuity of £24 per annum, and to the dividends of certain stock during his life. He had covenanted to pay £6,000 in the whole to the trustees, at different periods, and on different events. It became a question whether the whole of this sum had become a debt at the time of the bankruptcy. The trustees in the settlement presented a petition praying to be at liberty to prove the whole sum under the commission, and to be permitted to retain the interest the bankrupt took under the settlement, in part satisfaction of the debt. The order made was as follows : It was

"declared that the petitioners were, at the time of issuing the commission, creditors of the bankrupt for the sum of £3,000 only, which, by the settlement, was payable at the times and in the manner mentioned in the petition, free from any contingency; and that the petitioners were entitled to retain the value of the bankrupt's equitable interest under the settlement in an annuity of £24 and a sum of £2,074 bank annuities towards satisfaction of the said £3,000. . . ."

If, as against Mr. Hunt, the trustees had the equity of stopping the dividends to make good the debt of £4,000, could he by this act, without their knowledge or

- A consent, deprive them of that equity? The assignee for the annuitants, taking no legal interest in the funds, could only take subject to the same equity to which the assignor was liable. What was the original equity of the trustees? Not to stop the dividends merely at the first moment the debt became due, but whensoever they might think the interests of the trust required that step to be taken. They had no room to imagine that it signified to any but their cestui que
- B trust, whether this debt was, or was not exacted, when it became due. Why is a third person, who asked no question upon the subject, and gave no notice of his having any interest in the matter, to tell the trustees that it was their duty towards him to have called in the debt sooner, and that they are not now to be permitted to resort to any means which they may have in their own hands, of satisfying any portion of that debt? Nobody could take an assignment of
- C Mr. Hunt's interest under the settlement, without seeing the covenant for the payment of the £4,000. The person proposing to take the assignment could ask the trustees whether that money was paid; but the trustees had no opportunity of apprising him that it was not paid; for they knew nothing of the transaction. They have been guilty of no bad faith towards the plaintiffs, but the plaintiffs have been wanting in common prudence in not consulting the trustees before they
- D took the assignment. It was surely a rash conclusion, that the money must necessarily have been paid, because the period of payment was past. But did the annuitants really believe that this money was paid? They were evidently getting from Mr. Hunt the security of every fund he could give them. If the £4,000 had been paid, it would have been invested and additional dividends would in all probability have been included in the security.
- E

However, it is enough that the trustees have done nothing to mislead the plaintiffs, or to forfeit the right, which originally they had, of applying Mr. Hunt's dividends to the satisfaction of Mr. Hunt's debt. I presume, there is no question that the dividends received prior to Mr. Hunt's death are insufficient to satisfy the debt; and, therefore, the bill must be dismissed.

Judgment for defendants.

DOE d. HANLEY v. WOOD

[COURT OF KING'S BENCH (Abbott, C.J., Bayley and Holroyd, JJ.), June 18, 1819]

[Reported 2 B. & Ald. 724; 106 E.R. 529]

Minerals—Right to work—Licence coupled with an interest—Right to search and get ore with grant of such ore found and got—Grantee no estate in land or property in ore ungot.

By deed the owner of the fee granted to A., and his partners free liberty to dig for tin and other metals throughout lands therein described, to raise, make merchantable, and dispose of the same to their own use, and to make adits, etc., necessary for the exercise of that liberty, together with the use of all waters and watercourses, excepting to the grantor liberty to drive any new adit within the lands granted and to convey any watercourse over the premises granted, for a term of twenty-one years. The grantee covenanted to pay a one-eighth part of all ore gotten to the grantor, and all rates, taxes, etc., and to work effectually the mines during the term. On failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor.

Held: the deed did not amount to a lease, but merely contained a licence to dig and search for minerals, and the grantee could not maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee.

Minerals—Lease—Termination—Re-entry—Surrender of grant of licence—Grant of new lease.

The grantee commenced working the mines, but after some time discontinued, not being prevented by want of water or any other inevitable accident. The grantor, after some lapse of time, verbally authorised other persons to dig for ore throughout part of the land described in the deed, met those persons on part of the land, and pointed out the boundaries within which they were to exercise the liberty. Subsequently, the grantor entered into a mining adventure with other persons which was carried on within the limits described in the deed, and afterwards, in consideration of the surrender of the first grant and certain payments, he demised the premises to a lessee for twenty-one years. On the execution of this lease the original deed was delivered up, but there was no formal surrender in writing.

Held: these acts amounted to a re-entry by the grantor, inasmuch as, unless they referred to the exercise of that right, they would be acts of trespass by him.

Per Curiam: Instead of parting with, or granting, or demising all the minerals which were then existing within the land, the words of the deed import a grant of such parts only as should, upon the licence and power given to search and get, be found within the described limits, which is nothing more than the grant of a licence to search and get (irrevocable on account of its carrying an interest) with a grant of such of the ore only as should be found and got, the grantor parting with no estate or interest in the rest. And the grantee had no estate or property in the land itself, or in any particular portion thereof, or in any part of the ore, ungot thereof: but he had a right of property only, as to such part thereof as upon the liberties granted to him should be dug and got.

Notes. Distinguished: *Jones v. Reynolds*, [1835-42] All E.R. Rep. 630. Considered: *Muskett v. Hill*, [1835-42] All E.R. Rep. 89. Distinguished: *Rogers v. Brenton* (1847), 10 Q.B. 26. Considered: *Martyn v. Williams* (1857), 1 H. & N. 817. Distinguished: *Low Moor Co. v. Stanley Coal Co.* (1876), 34 L.T. 186.

A Referred to: *R. v. Trent and Mersey Canal Co.* (1825), 3 L.J.O.S.K.B. 140; *Vice v. Thomas* (1842), 4 Y. & C. Ex. 538; *Re Stroud* (1849), 8 C.B. 502; *Watson v. Spratley* (1854), 10 Exch. 222; *Holmes v. Powell* (1856), 8 De G.M. & G. 572; *Lee v. Stevenson* (1858), E.B. & E. 512; *Griffiths v. Jenkins* (1864), 3 New Rep. 489; *Roads v. Trumpington Overseers* (1870), L.R. 6 Q.B. 56; *Sutherland v. Heathcote*, [1892] Ch. 475.

B As to mining licences, see 26 HALSBURY'S LAWS (3rd Edn.) 444 et seq.; and for cases see 33 DIGEST (Repl.) 779 et seq. As to agreements creating licences, see 23 HALSBURY'S LAWS (3rd Edn.) 429 et seq.; and for cases see 30 DIGEST (Repl.) 542 et seq.

Cases referred to:

C (1) *Earl of Huntington and Lord Mountjoye's Case* (1583), 4 Leon. 147; 1 And. 307; Moore, K.B. 174; 74 E.R. 786; sub nom. *Lord Mountjoy and Earl of Huntington's Case*, Gedb. 17; 30 Digest (Repl.) 531, 1689.
 (2) *Chetham v. Williamson* (1804), 4 East, 469; 102 E.R. 910; sub nom. *Cheetham v. Williamson*, 1 Smith, K.B. 278; 33 Digest (Repl.) 837, 965.

Also referred to in argument:

D *Parker v. Plummer* (1590), Cro. Eliz. 190; 78 E.R. 446; 44 Digest 664, 5038.
R. v. Winter (1705), 2 Salk. 587; 91 E.R. 493; sub nom. *Anon.*, 3 Salk. 223; 31 Digest (Repl.) 33, 1899.

Paramour v. Yardley (1579), 2 Plowd. 539; 75 E.R. 794; 30 Digest (Repl.) 515, 1549.

Ward v. Petifer (1634), Cro. Car. 362.

E *Wheeler v. Toulson* (1663), Hard. 330.

Throckmorton v. Tracy (1555), 1 Plowd. 145; 75 E.R. 222; sub nom. *Throgmorton v. Tracey*, 2 Dyer, 124 a; 30 Digest (Repl.) 482, 1242.

Treuer v. Roberts (1664), Hard. 366.

Havergil v. Hare (1616), 3 Bulst. 250; Cro. Jac. 510; 81 E.R. 211; 8 Digest (Repl.) 620, 606.

F *Jepson v. Jackson* (1677), 2 Lev. 194.

Right d. Green v. Proctor (1768), 4 Burr. 2208; 98 E.R. 151; 21 Digest (Repl.) 341, 906.

Butler and Baker's Case (1591), 3 Co. Rep. 25 a; 1 And. 348; 3 Leon. 271; Poph. 87; Moore, K.B. 254; 76 E.R. 684; 25 Digest (Repl.) 570, 145.

Digges's Case (1600), 1 Co. Rep. 173 a.

G *Winnington's Case* (1598), 2 Co. Rep. 59 a.

Norway v. Rowe (1812), 19 Ves. 144; 34 E.R. 472, L.C.; 33 Digest (Repl.) 749, 236.

Action of ejectment which came before the court upon a special verdict.

H By a deed dated Mar. 1, 1806, Thomas Carlyon, being seised in fee of the premises, granted unto John Amler Hanley, his partners, fellow-adventurers, executors, administrators, and assigns, free liberty, licence, power, and authority to dig, work, mine, and search for tin, tin ore, etc., and all other metals and minerals whatsoever, throughout all that part of the lands of Thomas Carlyon, commonly called Crinnis, therein limited and described; and the tin, tin ore, etc., and other metals and minerals there found, to raise, and bring to grass, and there to stamp, spall, pick, dress, cleanse, and make merchantable, and dispose of, to their own use, at their pleasure, subject to certain reservations; and within the limits of the set thereby granted to dig, and make such adits, shafts, etc., and to erect such sheds, engines, and other buildings, as they should from time to time think necessary or convenient, for the more effectual exercise of the liberties thereby granted, together with the use of all such water and watercourses arising or running within the limits of the set thereby granted, as were not in grant to any other person at that time (except the pot-water belonging or running to the tenements of Crinnis and Merthen), with liberty to divert and turn such

waters and watercourses, except as aforesaid, and to cut any channels for conveying the same over any part of the lands lying within the limits of the set, for the purpose of more effectually and beneficially exercising and enjoying the liberties thereby granted; except to Thomas Carlyon, his heirs and assigns, and his and their workmen, etc., free liberty of driving any new adit from any adit driven, or thereafter to be driven, within the lands thereby granted, and of quietly entering into and driving such new adits through the same, or any part thereof, and of sinking any shaft therein necessary and proper for the driving of such adit, into any other lands of T. Carlyon, or into the lands of any other person, at his and their pleasure; and also except to T. Carlyon, his heirs and assigns, full liberty to convey any watercourse over the premises granted, or any part thereof, in such manner as he or they respectively should think meet for any purpose whatsoever, doing no injury to the workings of J. A. Hanley, his partners, etc.; to have, hold, use, exercise, and enjoy the said several liberties, licences, etc., for the term of twenty-one years, fully to be complete and ended.

The indenture contained covenants for the payment of an eighth share of all ore to T. Carlyon, and that J. A. Hanley and his partners would pay all rates and taxes, and would effectually work the premises, and support the adits, etc., and then contained a proviso, that in case of the neglect or failure in the performance of any of the covenants, it should be lawful for T. Carlyon, his heirs or assigns, upon the lands, or any part thereof, in the name of the whole to enter, and the same to have again, re-possess, and enjoy.

The special verdict then stated, that the surface of the lands was, during all the time, occupied by T. Carlyon, and his tenants of the surface, and that J. A. Hanley soon after the execution of the indenture, dug for tin, etc., and that about July, 1806, J. A. Hanley made an excavation or adit within the limits horizontally into the earth, from the sea shore, on the level of the sea, about seven or eight fathoms, when it cut a vein, containing a small quantity of copper ore, and that J. A. Hanley then worked on the course of this vein towards the west, and got a small quantity of copper, but none of the copper was sold, and no profit was made, nor were any dues rendered to T. Carlyon in respect thereof; and that J. A. Hanley afterwards pointed out a spot within the limits where he intended to sink a shaft down to the adit, and four pins were sunk in the ground to mark out the spot, but no such shaft was ever made, nor any building erected, or other work done by J. A. Hanley within the limits aforesaid; and that J. A. Hanley did occasionally work within the limits, until about six weeks before he died; when declaring that it was not worth while to work, and that he would not work any more in any of the excavations or adits, he directed the materials to be removed, and that all the timber that was there should be knocked away and carried off. In pursuance of which direction, the timber was knocked away and entirely removed, excepting one piece of timber of very small value, which the men refused to knock away on account of the danger to themselves in doing so; and the sea filled up the entrance to the excavation or adit.

It then stated the death of J. A. Hanley intestate, and the grant of letters of administration to Nevel Norway, one of his creditors, who having died, letters of administration de bonis non were granted on Aug. 9, 1815, to George Hanley, the lessor of the plaintiff, the only child of J. A. Hanley. Neither J. A. Hanley nor his administrators or assigns were in any manner prevented, either by water or any other inevitable impediment from working within the limits.

In October, 1809, no person having in the interval dug for any ore, William Brown, on behalf of Joshua Rowe, and others entered into a negotiation with Thomas Carlyon for a set to be made and granted by T. Carlyon to J. Rowe and the others authorising them to dig for tin, etc., and all other metals and minerals throughout part of the lands described in the former deed; which set T. Carlyon, about Oct. 11, 1809, verbally agreed to make, and settled with W. Brown the amount of the dues to be reserved on such set. In November, 1809, T. Carlyon

A and W. Brown met J. Rowe and J. Kroger on part of the land described in the former deed; and T. Carlyon pointed out some of the boundaries of the set to be made to J. Rowe and the others; and shortly after this J. Rowe dug for copper, copper ore, etc., within the limits of the verbal agreement. On July 10, 1810, T. Carlyon became jointly concerned and interested with Oliver Woodcock, John Carne, and others in mining and searching for tin and tin ore in certain other lands, B part whereof lay within the limits of the deed of Mar. 1, 1806; and on that occasion a memorandum of agreement was made and entered into by T. Carlyon and the others under which the co-adventurers engaged therein dug for tin and tin ore, etc., within the limits of the first deed, and raised and got a small quantity of tin and tin ore therefrom, and rendered the dues payable in respect thereof to T. Carlyon.

C On Jan. 12, 1811, another deed was made, sealed by T. Carlyon, and delivered to J. Rowe, by which deed it was, among other things, witnessed that as well in consideration of the surrender of a certain grant or set made and granted by T. Carlyon to J. A. Hanley, being the deed of Mar. 1, 1806; as in consideration of certain payments T. Carlyon demised the premises in question to J. Rowe D for twenty-one years. Upon T. Carlyon delivering this deed, dated Jan. 12, 1811, to J. Rowe, the latter, who had previously got possession of the one dated Mar. 1, 1806, being the holder of a sixty-fourth share, as a fellow adventurer with J. A. Hanley under it, delivered up that deed to T. Carlyon, but no surrender in writing was ever made or executed thereof to T. Carlyon. The limits mentioned and described in this last deed dated Jan. 12, 1811, were not co-extensive with the limits mentioned and described in the deed dated Mar. 1, 1806, and the works E constructed by J. Rowe were at a distance from and did not communicate with any part of the works done by J. A. Hanley, nor were in any manner connected therewith.

After the making of the deed dated Jan. 12, 1811, J. Rowe continued to dig F for copper and copper ore, and other metals and minerals within the limits specified, and dug and made a mine therein, and got quantities of copper and copper ore therefrom, and disposed of the same, and rendered the dues to T. Carlyon. And J. Rowe, for the purpose of more effectually prosecuting the works, erected a counting house, stables, and other buildings within the limits. There never was any building within the same limits except those erected and built by J. Rowe since the execution of the last deed. The surface of the ground under which the work- G ings of J. A. Hanley were made was waste land which was in possession of T. Carlyon, and since the execution of the deed of Jan. 12, 1811, the persons claiming under the same have, by the permission of T. Carlyon, got stone on the waste ground, and used a road over it, and have paid money to T. Carlyon for the getting of such stone, and the use of the road. The special verdict then set out the entry of the lessor of the plaintiff, the demise, and the ouster.

H Adam for the lessor of the plaintiff.
Wylde for the defendant.

Cur. adv. vult.

I ABBOTT, C.J., delivered the following judgment of the court.—This case, which came before the court upon a special verdict, was lately argued at Serjeants' Inn, before my brothers BAYLEY, HOLROYD, and myself, my brother BEST declining to attend, by reason of his having been formerly engaged as counsel in the cause.

Upon the argument, three principal questions were made: [the first question was not proceeded with]; secondly, upon the legal effect and operation of the deed of Mar. 1, 1806, viz., whether this deed operated as a demise of the metals and minerals, so as to vest in the lessee a legal estate therein, during the term, upon the conditions mentioned in the deed, or only as a licence to work, and get the metals and minerals that might be found within the limits described; and, supposing the deed to operate as an actual demise of the metals and minerals,

then, thirdly, whether the acts done by the grantor, and under his authority, amount to, and are to be considered as a re-entry under the proviso, so as put an end to the term of years created by the deed. A

Upon the second question, it was argued, on the part of the lessor of the plaintiff, that the deed of Mar. 1, 1806, operated as an actual demise of the metals and minerals, and conveyed the legal estate in them during the term, as a chattel real. This proposition is necessary to the maintenance of the present action, because if the deed operated as a licence only, then, admitting that a party claiming under such a deed, and who should have actually opened and worked, and should be in the actual possession of a mine, might, if ousted of such possession, maintain an ejectment get such a right, supposing its existence (and upon the question of its existence it is not necessary for us to decide) would not sustain the present action, inasmuch as the defendant was not shown to be in possession of any mine worked under the deed in question, but only of other mines and parts of the metals and minerals lying at a distance from the workings of the grantee; and which workings had even been long abandoned by him. It is our opinion, that this deed operates as a licence only. B C

The doubt has arisen from the inaccuracy of some of its expressions, which seem to import that the grantor supposed himself to have done that by granting part of the deed, which it is insisted on by the defendant, the words of the granting part do not warrant. But this instrument, though inaccurate, is a regular formal deed, containing all the formal or orderly parts of a deed of conveyance, enumerated by SIR EDWARD COKE (in Co. Litt. 6 a) except the clause of warranty; viz., the parties between whom it is made of the one part and of the other part; a full description of the premises it purports to grant, with the exceptions or reservations thereout; the habendum; the reddendum; the covenants and proviso for re-entry; the incujus rei testimonium, and the witnesses. One of the proper offices of the premises or granting part of a deed, as is there stated by SIR EDWARD COKE, is, "to comprehend the certainty of the tenements" to be conveyed. This deed, in its granting part, does not purport to demise the land, or the metals or minerals therein comprised. The usual technical words of demising such matters are well known and usually adopted in a formal deed, where the intent is to demise the land, or metals or minerals; but the purport of the granting part of this deed, is to grant, for the term therein mentioned, a liberty, licence, power, and authority, to dig, work, mine, and search for metals and minerals, in and throughout the lands therein described, and to dispose of the ore, metals, and minerals only, that should within that term be there found, to the use of the grantee, his partners, etc.; and it gives also further powers for the more effectual exercise of the main liberty granted. Instead, therefore, of parting with, or granting, or demising all the several ores, metals, or minerals, that were then existing within the land, its words import a grant of such parts thereof only as should, upon the licence and power given to search and get, be found within the described limits, which is nothing more than the grant of a licence to search and get (irrevocable, indeed, on account of its carrying an interest) with a grant of such of the ore only as should be found and got, the grantor parting with no estate or interest in the rest. If so, the grantee had no estate or property in the land itself, or any particular portion thereof, or in any part of the ore, metals, or minerals, ungot therein; but he had a right of property only, as to such part thereof as upon the liberties granted to him should be dug and got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it, being very different from a grant or demise of the mines, or metals, or minerals, in the land; and is such a right only as, under the circumstances stated in this case, is not sufficient to support the present action of ejectment. D E F G H I

This, we think, is the effect and operation of the deed, considering it with

A reference to its granting part only; and we are fortified in this opinion by the construction given to similar words of grant in *Lord Mountjoy's Case* (1), and in *Chetham v. Williamson* (2); even if the liberty granted be to be considered a liberty to get, exclusive of the grantor; and a fortiori, if it be, as in those cases, to be considered as not exclusive: that, however, is a point which it is unnecessary for us now to decide.

B It was contended, that in order to make a demise, or to pass such an interest in the soil as will support an ejectment, formal words of demise need not be used; and that words importing an intent in the grantor to divest himself of the possession for a time and vest it in another, operate in law as a lease, whatever may be their form; and further, that words showing such intent appear in different parts of this deed. The words alluded to are such as these, viz.: "the land hereby granted," "the ground and premises hereby granted," and "the land or ground hereby granted," which occur in some of the clauses and covenants of the deed; and among others, in the clause of re-entry, upon which particular reliance was placed. A proviso of re-entry is in itself not less applicable to a licence to dig, work, mine, and search for metals and minerals, than to a demise of metals and minerals, because, under such a licence, works may be effected, and a corporal possession had, which it may be competent for the grantor to resume; so that the argument rests upon the particular expressions used in the deed, and not upon the nature or quality of the clauses or provisions in which they are used. These expressions may probably be attributed to want of care and caution in the preparation of the deed; but supposing them not to be attributable to inadvertency, or supposing that we should not be justified in so attributing them, still they can, in our opinion, have no further effect, than to show, that the grantor who used them supposed that the soil or minerals and not a mere liberty or privilege, passed by his deed and if the words used in the granting part of the deed were of doubtful import, and would bear the construction for which the lessor of the plaintiff contends, such doubtful words of grant, aided by the others, showing the intent, might be sufficient to pass the land or soil, or minerals themselves, and to support an action of ejectment.

E But whatever doubts these expressions may cast, yet we think they are not sufficient to vary the construction that must be given to the words of the granting part of this deed, as those words are, in themselves alone, plain and not of doubtful import, and as the proper office of that part of the deed is to denote what the premises or things are that are granted, and is the place where the intent of the grantor, and what he has actually done in that respect, is more particularly to be looked for, recourse must be had to the proper and efficient part of the deed, to see whether he has actually granted what it is urged his expressions denote that he supposed that he had granted: for the question properly is not what he supposed he had done, but what he really has done by his grant. For these incorrect expressions, the precise import of which he might not accurately attend to, are not sufficient to constitute a grant, or to operate so as to extend the grant, by converting the things granted from incorporeal to corporeal, and from chattels personal when gotten, into a chattel real, previously to their being gotten, which must be the case, if we were to adopt the reasoning on behalf of the lessor of the plaintiff, as to the effect and operation of the deed, and which would carry the rights of the grantee much further than the grant of a licence or authority extends.

I Upon the third question we are also of opinion in favour of the defendant, and think the acts mentioned in the special verdict as done by the grantor, and under his authority, amount to, and are to be considered as a re-entry under the proviso so as to put an end to the term created by the deed. It is clear that the grantor had, under the proviso, a right to re-enter by reason of the grantee's breach of covenant in not effectually working when not prevented by water or other inevitable impediment. The acts done either by the grantor himself, or under his

authority, on part of the lands within the above limits, either in consequence of his negotiation and agreement with W. Brown, or of his agreement with Oliver Woolcock and others, or of his deed made to J. Rowe, amount in law, we think, to a re-entry and to a determination of the above grant of Mar. 1, 1806. Those acts, if done by a stranger, or other person having no right or authority to enter, would be wrongful, and so they would be in the present case though done by the grantor, or under his authority, if the above grant can be considered to have operated as a demise either of the soil or of all the ore, metals, and minerals within the described limits, unless those acts be deemed to be in law an entry by the grantor, and a remitter of him to his former estate by a determination of his grant; and the authorities show that those acts must be deemed to be in law such an entry and remitter. In *Plowden*, 92, it appears that if a person having a right of entry has done any act, so that the disseisee might have an action against him if he was a stranger, the law saith that rather than he shall be punished it shall be an entry and remitter to him. So in *Co. Litt.* 55, entry into land without the consent of the lessee, and cutting down a tree where the trees were not excepted out of the demise, are considered to be an implied ouster, and a determination of the will, for that it would otherwise be a wrong in him; and a lessor's putting in his beasts to use the common appendant is also considered as a determination of the will. And in *Co. Litt.* 245, b, the mulier's coming upon the ground upon his own head, and cutting down a tree, and digging the soil, or taking any profit, are stated to be interruptions, for (the book says)

"rather than the bastard shall punish him in an action of trespass, the act shall amount in law to an entry. So it is, if the mulier put any of his beasts into the ground, or command a stranger to put on his beasts, these do amount in law to an entry."

It was urged on the part of the lessor of the plaintiff, that the words of the deed of Jan. 12, 1811, by which that deed is expressed to be made partly in consideration of the surrender of the grant of 1806, together with the fact of the actual receipt of the deed of that date by Mr. Carlyon, from Mr. Rowe, into whose hands it had come, showed that none of the acts done by the grantor, were or were intended to be a re-entry under the proviso contained in the deed of 1806. But we think such an effect cannot properly be given to those circumstances, and that they ought to be considered only as matters of caution, intended to preclude the question which, unfortunately, has since been raised. If, therefore, the grant in question can be considered to have been a demise of the land, or of all the ores, metals, and minerals within the limits described, yet it was determined by the above acts done by the grantor, or under his authority, amounting in law to a re-entry; in which case the present action of ejectment cannot be maintained. For these reasons, the judgment of the court must be for the defendant.

Judgment for defendant.

COLLINS AND OTHERS v. PROSSER AND OTHERS

[COURT OF KING'S BENCH (Bayley, Holroyd and Best, JJ.), Easter Term, 1823]

[Reported 1 B. & C. 682; 3 Dow. & Ry. K.B. 112; 1 L.J.O.S.K.B. 212;
107 E.R. 250]

Bond—Discharge—Three obligors binding themselves and each of them for himself for whole sum—Seal of one obligor removed from bond.

Sir N. C., G. S. W., and J. W. acknowledged themselves in a bond given by the testator to the plaintiffs held and bound to the plaintiffs in £1,000 each, for which they bound themselves and each of them for himself "for the whole and entire sum of £1,000 each." Sir N.C. having sealed and delivered his bond, his seal was taken from the bond."

Held: the bond was a several and not a joint and several bond, and the removal of the seal of one of the obligors did not discharge the others.

Notes. Referred to: *Servante v. James* (1829), 5 Man. & Ry. K.B. 299; *Lee v. Nixon* (1834), 1 Ad. & El. 201; *Caldwell v. Parker* (1869), 17 W.R. 955.

As to liability of two or more obligors to a bond, see 3 HALSBURY'S LAWS (3rd Edn.) 348; and for cases see 7 DIGEST (Repl.) 198, 199.

Cases referred to:

(1) *Cowell v. Edwards* (1800), 2 Bos. & P. 268; 126 E.R. 1275; 26 Digest (Repl.) 149, 1094.

(2) *Matthewson v. Lydiate* (1597), Cro. Eliz. 546; 78 E.R. 792; sub nom. *Mathewson's Case*, 5 Co. Rep. 22 b; 17 Digest (Repl.) 246, 494.

Also referred to in argument:

Mills v. Marshall (circa 1616), J. Bridg. 63; 123 E.R. 1202.

Slingsby's Case (1587), 5 Co. Rep. 18 b; Jenk. 262; 77 E.R. 77; sub nom.

Beckwith's Case, 3 Leon. 160, Ex. Ch.; 12 Digest (Repl.) 32, 81.

Anderson v. Martindale (1801), 1 East, 497; 102 E.R. 191; 12 Digest (Repl.) 32, 85.

Southcote v. Hoare (1810), 3 Taunt. 87; 128 E.R. 36; 12 Digest (Repl.) 36, 127.

Seaton v. Henson (1678), 2 Show. 28; 2 Lev. 220; 89 E.R. 772; 7 Digest (Repl.) 239, 766.

Nichols v. Haywood (1545), 1 Dyer, 59 a; 73 E.R. 130; 17 Digest (Repl.) 246, 489.

Michael v. Stockwith (1588), Cro. Eliz. 120; Gouldsb. 83; 78 E.R. 377; sub nom. *Michaell's Case*, Owen, 8; 7 Digest (Repl.) 239, 767.

Dering v. Earl of Winchelsea (1787), 1 Cox, Eq. Cas. 318; 29 E.R. 1184; sub nom. *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270; 26 Digest (Repl.) 143, 1065.

Hungate's Case (1600), 5 Co. Rep. 103 a; sub nom. *Huntgate v. Mease and Smith*, Cro. Eliz. 885; Moore, K.B. 642.

Anon. (1536), 1 Dyer, 19 b.

Constable v. Clobery (1626), Poph. 161; Lat. 49; Palm. 397; 79 E.R. 1259; sub nom. *Conustable v. Clowbury*, Noy, 75; 12 Digest (Repl.) 30, 65.

Bayly v. Garford (1641), March, 125; 82 E.R. 441; 7 Digest (Repl.) 242, 804.

Pearsall v. Summersett (1812), 4 Taunt. 593; 128 E.R. 465; 7 Digest (Repl.) 189, 216.

Liverpool Waterworks Co. v. Atkinson (1805), 6 East, 507; 2 Smith, K.B. 654; 102 E.R. 1382; 7 Digest (Repl.) 188, 215.

Hassell v. Long (1814), 2 M. & W. 363; 105 E.R. 416; 26 Digest (Repl.) 55, 395.

Payler v. Homersham (1815), 4 M. & S. 423; 105 E.R. 890; 12 Digest (Repl.) 570, 4340. A

Skip v. Huey (1744), 3 Atk. 91; 26 E.R. 855; sub nom. *Skip v. Edwards*, 9 Mod. Rep. 438, L.C.; 26 Digest (Repl.) 204, 1568.

Ex parte Gifford (1802), 6 Ves. 805; 31 E.R. 1318, L.C.; 26 Digest (Repl.) 143, 1045.

Action of debt on a bond, given by the defendants' testator, George Samuel Wegg, in his lifetime, to the plaintiffs for £1,000 as surety for George Boulton Mainwaring. B
The first plea set out the bond on oyer, which was in the following form :

"I G. B. Mainwaring am held and firmly bound to [the plaintiffs] in the sum of £12,000, for which I bind myself, etc.; and I J. E. Wodehouse am held and firmly bound in the sum of £3,000, for which I bind myself, etc.; and we, P. Presland, S. Jackson, and W. Everett, are also held and firmly bound in £2,000 each, for which we bind ourselves and each of us for himself, for the whole and entire sum of £2,000 each; and we, Sir Nathaniel Conant, G. S. Wegg [the testator], and J. Weyland, are also held and firmly bound in £1,000 each, for which we bind ourselves and each of us for himself, for the whole and entire sum of £1,000 each." C D

That plea then set out the condition of the bond, whereby (after reciting that G. B. Mainwaring had been appointed by the plaintiffs (the justices assembled at the quarter sessions) receiver for the county of Middlesex and it being thought proper by the court that an adequate security should be given to the county to the amount of £12,000, that the obligors in that bond had agreed to become surety for the several sums set to their names respectively (and not further or otherwise) the condition was stated to be that G. B. Mainwaring should duly account for all moneys which were then or should thereafter be in his hands as treasurer; and concluded that the bond was not the deed of the testator. Second plea that Sir Nathaniel Conant sealed and delivered the bond, and afterwards his seal was taken from the bond without the privity or consent of the testator or the defendants as executors. Third plea that the seal of Sir Nathaniel Conant was taken from the bond with the privity and consent of the plaintiffs. Replication that, before the seal of Sir Nathaniel Conant was taken from the bond, one Francis Const agreed to become surety in his place and executed a bond to the plaintiffs for £1,000, conditioned as the one declared on, and thereupon the seal of Sir Nathaniel Conant was taken from the bond, and that Francis Const had since paid to the plaintiffs the sum of £1,000 in which he was so bound, and the bond was delivered up to him. The defendants demurred to the replication. E F G

Littledale for the defendants in support of the demurrer.

Rogers for the plaintiffs.

BAYLEY, J.—Where parties enter into a joint and several bond for payment of an entire sum of money, whatever discharges one of the obligors may discharge them all; but I am satisfied that this was a several, and not a joint and several bond. It would work great injustice to allow the obligees the option of treating it as a joint and several bond. The recital in the condition shows that each of the parties intended to enter into a security as to a specific limited sum; setting the sum opposite to one of the names is decisive as to that. But, looking at the obligatory part of the deed, one party is bound in £5,000, three in £2,000 each, not in one entire sum; then the three, Sir Nathaniel Conant, Wegg, and J. Weyland in £1,000 each. That, as to the £1,000 parties, is either a several bond or, to a certain extent, joint. If the former, it binds each one to the payment of £1,000; but, if joint, then you might sue them all three times over for £1,000, and if only one were solvent he would be compelled to pay £3,000; whereas it is quite manifest that neither of them intended to be bound beyond £1,000. I am, therefore, satisfied that the effect of the word "each" was to make this a several and not a joint H I

A and several bond. Then does the removal of the seal of one destroy the bond as to all? That is the argument for the defendants. If it be right then, in the case of a bond whereby different parties are severally bound in different sums from £5,000 to £20, cancelling the bond as to the latter would avoid the bond as to all. If there were any authority for the position, I might feel myself bound by it; but, in the absence of that, we must proceed on principle. It is said that the right of contribution against Sir Nathaniel Conant is taken away. If that were so, still, is there any reason for saying that the defendants shall be exonerated from the whole because they have lost part of their right to contribution? But if the defendants ever would have had a right to contribution from Sir Nathaniel Conant, that right may still be enforced in equity. For these reasons, I am of opinion that the facts disclosed in the pleas afford no answer at law to this action, and that the plaintiffs are entitled to recover.

HOLROYD, J.—This is not a joint and several bond. The word “each,” following the penalty would, by itself, make it a several bond; and the question is whether that which follows, viz., “for which we bind ourselves and each of us for himself, for the sole and entire sum of £1,000 each,” makes it joint. On the contrary, those words are merely accumulative and make it more clearly several. The next question is whether cancelling the bond as to one destroys it altogether. It has been argued that it does, because the obligors are in a worse situation in law than they otherwise would have been. If the parties had been severally bound in one penalty only, there would be force in the argument. But this is not a bond for the payment of the same sum; each is bound in a different penalty, although to the same amount, and it does not make any one responsible for the penalty of the other. But it is said that the parties have a right to contribution at law. If, indeed, they had all been bound severally in the same penalty, then anyone paying would pay that which another was liable to pay, and so benefit him. That would give him a remedy at law for contribution. But the remedy at law is founded on the principle that one pays that to which all are liable, and it goes no further. If, therefore, one obligor be insolvent, contribution for his share cannot be recovered against the others; it is the subject-matter of a proceeding in equity and not at law: *Cowell v. Edwards* (1). Suppose a judgment in this action be for £1,000 and the defendants claim for contribution against any other obligor, they will not have paid any penalty to which another was liable and, therefore, can have no contribution at law. It is true that G. B. Mainwaring’s conduct, the subject-matter of the security, was joint; but still the penalties were, at law, the several debt of each. A court of equity might give relief, but none can be had at law. The defendants are not, then, placed in a worse situation by the removal of Sir Nathaniel Conant’s seal and, consequently, cannot set up that as a defence to the present action.

BEST, J.—Two points have been urged for the defendants in this case. First, that the bond is joint and several; and, secondly, that, whether it be so or not, still the defendants are discharged by the removal of Sir Nathaniel Conant’s seal. If the bond be several *Matthewson’s Case* (2) is decisive of the last point. No case has been referred to which at all shakes the doctrine there laid down. Contribution by action at law is a modern proceeding, and the introduction of that cannot alter the common law as to the effect of taking off the seal of one co-obligor in a several bond. But it is very questionable whether under any circumstances contribution at law could have been had on this bond. The doubt expressed by Lord Eldon in *Cowell v. Edwards* (1) is entitled to great weight. The right to contribution in equity still subsists. If, indeed, the bond were joint and several, the removal of the seal might have avoided it as to all, but in fact it begins as a several bond and continues so throughout. If it be construed *reddendo singula singulis*, no doubt can be entertained on that point. I, therefore, agree in thinking that the plaintiffs are entitled to judgment.

Judgment for plaintiffs.

SUMNER v. POWELL

A

[ROLLS COURT (Sir William Grant, M.R.), November, 1816]

[Reported 2 Mer. 30; 35 E.R. 852]

[LORD CHANCELLOR'S COURT (Earl of Eldon, L.C.), December 3, 1823]

[Reported Turn. & R. 423; 37 E.R. 1163]

B

Indemnity—Joint indemnity—Joint indemnity given by surviving partners to representative of deceased partner—Subsequent claim against estate of deceased partner—Right of representative to be indemnified out of the estates of other deceased partners.

There is no principle of equity that every joint covenant is to be considered as joint and several, and, therefore, binding on the estate of a deceased covenantor.

C

Where there has been an antecedent joint debt due from the parties to a joint obligation the court considers the obligation as joint and several and pursues the assets of the deceased debtors until the demand is satisfied, for the obligation to pay exists independently of the particular instrument by which the debt may be secured, as in the cases of partnership debts and bonds. Where, however, the obligation to pay exists only by virtue of a covenant, its extent can only be measured by the words in which it is conceived, and, in the absence of any mistake in drawing up the deed or evidence of any agreement for a covenant of a different sort, a party taking a joint covenant or joint indemnity in such a case must abide by it.

D

The representative of a deceased partner, the account between him and the partnership being at the time unsettled, agreed with the surviving partners to assign to them all his interest in the concern upon being paid a certain sum of money and having an indemnity against all claims upon the partnership. The assignment was executed, the money paid, and a joint covenant of indemnity given by the surviving partners.

E

F

Held: the covenant was not to be considered in equity as a joint and several covenant, and, therefore, the representative could not claim against the representatives of other deceased partners to be indemnified under the covenant for a claim made against him upon the partnership.

Notes. For the liability of partners for debts of partnership, see now s. 9 of the Partnership Act, 1890 (17 HALSBURY'S STATUTES (2nd Edn.) 586).

G

See also *Thorpe v. Jackson*, [1835-42] All E.R. Rep. 541, which is contrary to the decision in this case, but which has been doubted.

Considered: *Beresford v. Browning*, *Browning v. Beresford* (1875), L.R. 20 Eq. 564. Referred to: *Devaynes v. Noble*, *Baring v. Noble* (1831), 2 Russ. & M. 495; *Lloyd v. Lloyd* (1837), 2 My. & Cr. 192; *Wilmer v. Currey* (1848), 2 De G. & Sm. 347; *Stamford, etc., Banking Co. v. Ball* (1862), 4 De G.F. & J. 320.

H

As to joint contracts, see 26 HALSBURY'S LAWS (3rd Edn.) 918; and for cases see 12 DIGEST (Repl.) 26 et seq. As to the nature and extent of equitable jurisdiction in regard to partnership, see 14 HALSBURY'S LAWS (3rd Edn.) 499-501; and for cases see 36 DIGEST (Repl.) 495 et seq.

Case referred to:

I

(1) *Devaynes v. Noble*, *Sleech's Case* (1816), 1 Mer. 529, 539; 35 E.R. 767, 771; 36 Digest (Repl.) 494, 623.

Also referred to in argument:

Bishop v. Church (1751), 2 Ves. Sen. 371; 28 E.R. 238, L.C.; 7 Digest (Repl.) 198, 323.

Primrose v. Bromley (1739), 1 Atk. 89; 26 E.R. 58; 26 Digest (Repl.) 216, 1667.

Hoare v. Contencin (1779), 1 Bro. C.C. 27.

A *Ex parte Kendall* (1811), 17 Ves. 514; 34 E.R. 199; sub nom. *Re Dawes, Ex parte Kendall*, 1 Rose, 71, L.C.; 36 Digest (Repl.) 492, 601.

Appeal to the Lord Chancellor from an order of SIR WILLIAM GRANT, M.R.

B In 1792, Samuel Castell, Walter Powell, and William Sumner (the plaintiff's testator), carrying on business in partnership, as bankers, under the firm of Castell, Powell & Co., received a power of attorney from the trustees in the marriage-settlement of Cookson and wife, to receive dividends on £5,325 stock, including an authority to transfer. Under this authority, Powell alone, in the month of August in that year, sold the stock, and applied the produce to the purposes of the partnership, without the knowledge either of the trustees or of his partners. Some time after this transaction took place, the name of Wilson, who had for many years acted as clerk to the partnership, at a fixed salary, appeared for the first time in the firm as one of the partners, and continued to be so used till December, 1803, when he quitted the partnership; but, during the whole of that time, it appears that he had no participation in the partnership profits, only retaining his former salary. In 1795, Walter Powell the younger was admitted into the partnership.

D In June, 1797, Sumner died, having appointed the plaintiff his sole executor; and by indenture, dated May 20, 1801, between the plaintiff of the one part, and the surviving partners (including Wilson) of the other part, it was recited that the said William Sumner, at the time of his death, and for some years previous thereto, was a partner with the said Samuel Castell, Walter Powell the elder, Walter Powell the younger, and William Wilson, in the banking business, which partnership determined by the death of the said William Sumner, so far as regarded his interest in the partnership; and that the partnership accounts between the said William Sumner and his said partners were unsettled for several years previous to his death, and that much question had arisen between the plaintiff, as executor of the said William Sumner, and the said Samuel Castell, W. Powell the elder, W. Powell the younger, and W. Wilson, as to the statement of the partnership accounts up to the day of the death of the said William Sumner, and as to the amount or valuation of the partnership effects at that time. It was further recited that the plaintiff, on or about Nov. 22, 1798, took up from the said Samuel Castell, etc., the sum of £1,500, intending to consider the same as in part of the moneys which should be due from the partnership to the estate of the said William Sumner, but giving his note for repayment thereof, with interest, by way of security, in case such sum should not be found due to him; and that, to put an end to all questions that might arise upon any of the matters aforesaid, the plaintiff had proposed, in consideration of the delivery up to him of his said note, and of the payment of a further sum of £2,750, to give up all further claim or demand upon the partnership in respect of the interest of the said William Sumner therein, and to release or assign to them the said Samuel Castell, etc., all his share and interest as executor of the said William Sumner, of and in all the outstanding debts due and owing to the said copartnership, they the said Samuel Castell, etc., agreeing, not only to make such payment, but to execute to the plaintiff a release of all demands upon the estate of the said William Sumner, and to indemnify him against all engagements or responsibility which the estate of the said William Sumner might be liable to from his having been in partnership as aforesaid; which proposal had been acceded to.

I It was witnessed,

“that, in consideration of the delivery up to the plaintiff of his said note for £1,500 and interest (which was then cancelled) and in consideration of the further sum of £2,750, and of the release and covenant of the said Samuel Castell, etc., thereafter contained, the plaintiff assigned and released to the said Samuel Castell, etc., all his share and interest, as personal representative of the said William Sumner, of and in all and singular the credits and effects of the late co-partnership, and of and in all sums of money and securities outstanding or due to the said copartnership, either at the time of the death of the

said William Sumner, or at the day of the date of the said indenture; to hold, etc., unto the said Samuel Castell, etc., to and for the sole use and benefit of them, their executors, administrators, and assigns, absolutely and for ever."

It was thereby further witnessed,

"that, for the considerations aforesaid, the plaintiff released and discharged them the said Samuel Castell, etc., and every of them, their and every of their executors and administrators, of and from all claims and demands whatsoever which the plaintiff, as executor of the said William Sumner, might have against them, or on account of any share in the said partnership concern; and that, in consideration of such release, they the said Samuel Castell, etc., did, and every of them did, release, acquit, and for ever discharge the plaintiff, as such executor as aforesaid, his executors and administrators, and all and singular the estate and effects of the said William Sumner, of and from all claims and demands whatsoever, which they the said Samuel Castell, etc., or any of them might have against the plaintiff, as such executor, by reason or upon account of the said William Sumner having been a partner with them as aforesaid."

The indenture also contained the following covenant:

"And the said Samuel Castell, Walter Powell the elder, Walter Powell the younger, and William Wilson, for themselves, their heirs, executors, and administrators, do hereby covenant, promise, and agree, to and with the said (plaintiff) his executors and administrators, that they the said Samuel Castell, etc., their heirs, executors, and administrators, shall and will, from time to time, and at all times hereafter, save harmless and keep indemnified the said (plaintiff) his heirs, executors, and administrators, and his and their estates and effects, goods and chattels, and all and singular the estate and effects of the said William Sumner deceased, of and from all and singular the debts and engagements of the said late copartnership, wherein the said William Sumner was concerned as aforesaid; and of and from all payments in respect thereof, and all costs, charges, suits, actions, damages and demands, whatsoever, which can, shall, or may be incurred, sustained, prosecuted, or recovered, against the said (plaintiff) his executors or administrators, as personal representative of the said William Sumner, or to which the estate and effects of the said William Sumner can, shall, or may be liable, in any way howsoever, by reason of his having been a partner in the said partnership concern."

In 1802, Walter Powell the elder died, having appointed the defendants, Whiston Powell and Sarah Powell, executors of his will. In December, 1803, Wilson quitted the partnership. In September, 1804, Castell and Walter Powell the younger (the two continuing partners) became bankrupt. In 1805, Wilson died, having appointed the defendants, Wilkinson and Blackmore, executors of his will.

In 1806, a bill was filed by the parties interested under Cookson's settlement against the surviving trustee of that settlement, and against the bankrupts and their assignees, and against the representatives of all the deceased partners, to have the stock replaced, or for an account of the produce thereof, with interest, from the time of the transfer. On July 14, 1809, an order was made in that cause, by which it was declared that the present plaintiff, one of the defendants thereto, admitting assets of his testator, and the other defendants, the representatives of Powell the elder, and Wilson, were liable, out of the assets of their respective testators, to pay what should be found due, for principal and interest, on taking the account thereby directed; and it was ordered that they should pay the same accordingly.

The bill brought by the present plaintiff, after stating the above facts, and that he, the said plaintiff, had already, as such executor of G. H. Sumner, deceased, under the said order and a decree made on further directions, paid into the bank the sum of £1,256 for interest on the principal sum reputed due, and was

A then liable to pay the further sum of £2,064, with interest and costs; and after further stating that Castell had since died an uncertificated bankrupt, and that Walter Powell the younger, having obtained his certificate, had become bankrupt a second time, but no assignment of his estate and effects had yet been executed; insisted that, by virtue of the deed of indemnity, dated May 20, 1801, he was entitled to be repaid out of the estates of the two Powells and Wilson
B all such sums as he had already paid, or should pay, under the said decree; therefore, praying accordingly.

To this bill the defendants (the executors of Wilson) put in an answer, alleging, that, although the name of the testator appeared in the banking concern, yet in fact he never was a partner therein, or in any manner participated in the profits or losses thereof; and, therefore, insisted that his estate was no way subject or liable
C to repay the plaintiff what he had so paid, or should pay, in pursuance of the said decree.

The question was as to the liability of Wilson's estate under the covenant in the deed of indemnity; and this depended on the effect of that deed, as constituting an obligation which, though only joint at law, would, as it was argued, be held in equity to be several as well as joint, and, therefore, binding on the estate of the
D deceased covenantor.

Hart and Heald for the plaintiff.

Sir Samuel Romilly, Wetherell and Barber for the representatives of Wilson.

SIR WILLIAM GRANT, M.R.—The question is whether any other effect can be given to this covenant in equity than it has at law. It has never
E been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors. In *Devaynes v. Noble, Sleech's Case* (1) (1 Mer. at p. 563), I had occasion to examine the authorities on this subject, and found no such general proposition anywhere laid down. When the obligation exists only by virtue of the covenant, its extent can be measured only
F by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each partner, though at law it is only the joint debt of all. But, there, all have had a benefit from the money advanced or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured. So, where a joint bond has, in equity, been considered as
G several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the bond that first created the liability to pay. But in this case the covenant is purely matter of arbitrary convention, growing out of no antecedent liability in all or any of the covenantors to do what they have thereby undertaken.

Instead of winding up the partnership concern, and dividing what might remain, after satisfying all claims upon it, the parties make an arrangement, by which Mr.
H Sumner was immediately to receive what was estimated to be his testator's share of the joint estate, he releasing to the other partners all interest in the residue. Why was Mr. Sumner's share of the partnership estate to remain unaffected by any claims by which that estate might afterwards be diminished? There was no equity that entitled him to demand from the other partners an engagement to that effect. But they are contended to give him a covenant of indemnity. As it is only a joint
I covenant that is given, how can I say that it is anything more than a joint covenant that was meant to be given?

It is not attempted to be shown that there was any mistake in drawing the deed, or that there was any agreement for a covenant of a different sort. There is nothing but the covenant itself, by which its intended extent can be ascertained.

There is no ground, therefore, on which a court of equity can give it any other than its legal operation and effect.

SIR WILLIAM GRANT, M.R., having dismissed the bill, the plaintiff appealed.

Dec. 3, 1823. LORD ELDON, L.C.—I have doubted much whether the decision

of SIR WILLIAM GRANT, M.R., in this case was right; but, upon considering the case, A
it appears to me at present that his judgment ought to be supported.

The late Mr. Sumner was a partner in the banking-house of Castell, Powell & Co. B
That partnership from time to time admitted new members, and, during its existence, C
two gentlemen, being trustees of a sum of stock of between £5,000 and £6,000, executed a power of attorney to the house, enabling them to receive the dividends upon the stock; the power of attorney, either from its being so intended by the parties, or from want of attention on their part, authorised a transfer of the stock; and the fact is, that Powell, one of the partners, did transfer the stock, and apply the money arising from the transfer to the use of the banking-house, from time to time leading the parties interested to believe that the stock was still standing in the names of the trustees, by paying them the dividends as they became due till the failure of the banking-house. Before that event happened the late Mr. Sumner died, and the plaintiff became his personal representative. It is quite clear that under these circumstances, the banking-house being debtors by the receipt of the money arising from the sale of the stock, the trustees and cestuis que trust became entitled to proceed, not only against the surviving partners, but against the assets of the deceased partners, till their demand was made good. After the death of the late Mr. Sumner, the plaintiff, not wishing to continue in the concern, came to an arrangement with the surviving partners, by which he was to be paid two sums of £1,500 and £2,750, and to have an indemnity against all claims upon the partnership, assigning to the surviving partners all his interest in the concern. How the accounts would have stood between the plaintiff, as the representative of the late Mr. Sumner, and the surviving partners, if this arrangement had not been come to I cannot tell; but such an arrangement as I have stated was made, and then, of course, if proper care had been taken, the plaintiff would have had not only an indemnity, but a full and effectual indemnity. The indemnity taken however was the joint covenant of the partners who remained in the concern, and not their joint and several covenant. Demand being afterwards made in this court, it turned out that the plaintiff, as the representative of the late Mr. Sumner, was compelled to pay a considerable sum of money on account of the produce of the stock sold out, and by this bill he claims, against the representatives of the deceased partners, to be indemnified under the effect of the joint covenant. D E F

The case on his part was rested on the ordinary doctrine of this court, that, where there has been an antecedent joint debt due from the parties to a joint obligation, this court considers the obligation as joint and several, and pursues the assets of deceased debtors until the demand is satisfied. The Master of the Rolls was well prepared to give judgment in this case, the subject being one of which he had acquired very extensive knowledge. What he says is, that where there is no antecedent debt or antecedent liability, a party taking a joint covenant or a joint indemnity must abide by it; that a court of equity gives no more relief in such cases than a court of law does; and that, there being in this case no antecedent liability to indemnify him, the plaintiff must abide by his joint covenant, and can only go against those against whom he has a remedy at law. The question is whether it is so or not. I confess I have felt a strong opinion that it was difficult to distinguish this case from the case of antecedent debt looking at the plaintiff as buying his indemnity by taking it in discharge of what was due to him from the partnership. The question will be, therefore, whether the case is not reduced to this—that in order to get rid of all sorts of difficulties, the surviving partners said to the plaintiff, there is an account between us, take the £4,250, take the indemnity, and let us have nothing more to do with it. If that was the case, it comes to the question which the Master of the Rolls has considered. That appears to me to have been the case, and, therefore, I do not see any ground to disturb this judgment. There can be no doubt in the world that if this covenant had been a joint and several covenant it would have done, and, therefore, any evil which might otherwise arise out of the case, may be avoided by the addition G H I

A of a single word. I do not think that any case can be found, in which, where a joint obligation has survived, it has been carried into effect against the assets of a deceased obligor in a case of indemnity.

Appeal dismissed.

B

HUTTON v. EYRE

C

[COURT OF COMMON PLEAS (Gibbs, C.J., and other judges), June 14, 1815]

[Reported 6 Taunt. 289; 1 Marsh. 603; 128 E.R. 1046]

Contract—Release—Covenant not to sue joint promisor—No release of other promisor.

A covenant not to sue one of two joint debtors does not operate as a release to the other.

D

Contract—Joint contractors—Money paid by one contractor for another under equitable claim—Right of recovery.

One joint contractor who pays money for another under an equitable claim may recover it from the other as money paid to his use.

E

Notes. Considered: *Cocks v. Nash* (1832), 9 Bing. 341; *Walmesley v. Cooper* (1840), 10 L.J.Q.B. 49; *Willis v. De Castro* (1858), 4 C.B.N.S. 216. Referred to: *Ford v. Beech* (1848), 11 Q.B. 852; *Duck v. Mayeu*, [1891-4] All E.R. Rep. 410; *Apley Estates Co. v. De Bernales*, [1947] 1 All E.R. 213.

As to release of one joint promisor, see 8 HALSBURY'S LAWS (3rd Edn.) 219; and for cases see 12 DIGEST (Repl.) 574. As to payment under compulsion of money due from defendant to third party, see 8 HALSBURY'S LAWS (3rd Edn.) 227; and for cases see 12 DIGEST (Repl.) 591.

F

Cases referred to:

(1) *Dean v. Newhall* (1799), 8 Term Rep. 168; 101 E.R. 1326; 12 Digest (Repl.) 575, 4411.

(2) *Lacy v. Kinnaston* (1701), Holt, K.B. 178; 1 Ld. Raym. 688; 12 Mod. Rep. 548; 3 Salk. 298; 90 E.R. 996; 12 Digest (Repl.) 563, 4272.

G

(3) *Fitzgerald v. Trant* (1709), 11 Mod. Rep. 254; 88 E.R. 1022; 12 Digest (Repl.) 575, 4410.

Also referred to in argument:

Toussaint v. Martinnant (1787), 2 Term Rep. 100; 100 E.R. 55; 12 Digest (Repl.) 683, 5257.

H

Rule Nisi obtained by the defendant to set aside the verdict for the plaintiff and enter a nonsuit in an action of assumpsit brought to recover the sum of £2,788, with £292 interest, for money paid by the plaintiff to the defendant's use.

At the trial before BAYLEY, J., at the Lincoln Spring Assizes, 1815, it appeared that the plaintiff and the defendant had been partners as merchants and insurance brokers, and by indenture of Aug. 26, 1809, they dissolved their partnership as from Jan. 1, then next, and mutually covenanted that neither of the partners should after the date of those presents, and before the period fixed upon for the dissolution of the partnership, either in his own name, or in the name or names of any other person, or in the firm of Eyre and Hutton, make any purchase of goods in their business so as to bind the other party, but that if any purchases of goods were made they should be on private accounts. The defendant later contracted five large debts after which, on Oct. 27, 1810, by indenture between the defendant, two of his creditors, Todd and Lamarche, and the other creditors whose names were subscribed, the defendant conveyed all his estate and effects

I

to Todd and Lamarche in trust to sell, and out of the proceeds to retain their costs and make a dividend of 5s. in the pound among all the creditors who should execute within three months, next to divide the residue of the proceeds among the creditors to the amount of their respective debts, and pay the surplus, if any, to the defendant. In consideration of the premises, the other parties thereto severally covenanted with the defendant not to sue or prosecute the defendant for any debt then due and if any creditor should sue the defendant the deed should release the defendant, provided that a creditor who had any security for his debt might execute the deed without prejudice to it and with the trustees' consent might convert it into money, and receive a dividend with the other creditors on so much of the debt as should not be paid out of the produce of that security, with an exception of notes of hand or other personal security. A

The firm of Hutton and Eyre was a creditor of the defendant for £1,000 on a banking account, and the plaintiff executed this deed of composition for that sum, and received a dividend of 5s. in the pound, so that he was party to the deed. The five creditors above mentioned executed the deed of composition, and received the like dividend, and afterwards called on the plaintiff for the residue of their debts, which the plaintiff paid. At the trial before BAYLEY, J., two points were made for the defendant: first, that if the plaintiff could maintain any action, it ought to be covenant on the deed of dissolution, and not assumpsit; secondly, that the covenant not to sue contained in the defendant's deed of composition operated as a release in law to both the partners, of the five debts, which the plaintiff had, therefore, paid in his own wrong, and consequently was not entitled to recover them back from the defendant. BAYLEY, J., reserved both the points, subject whereto the jury found a verdict for the plaintiff. The defendant obtained a rule nisi to set aside the verdict and enter a nonsuit. B

Shepherd and Serjeant Copley for the plaintiff, showed cause against the rule.
Serjeant Vaughan for the defendant, supported the rule. C

Cur. adv. vult. D

GIBBS, C.J., delivered the following judgment of the court. This is an action for money paid. Two objections are made to the plaintiff's recovery: first, that if anything be due to the plaintiff, it is not due to him on a parol contract, but in consequence of the breach of a covenant contained in the deed of dissolution of partnership; next, that if an action for money paid be the correct form, the money was paid unnecessarily by the plaintiff, and in his own wrong, and, therefore, cannot be recovered of the defendant. E

HIS LORDSHIP stated the facts, and continued: We think that the first objection cannot avail, for the covenant amounts only to an arrangement that he who after the dissolution contracts debts for goods shall pay the money. Eyre, therefore, being bound to pay the money, this money is paid by the plaintiff (who was in the firm when the debts were contracted, and therefore was jointly liable for the use of Eyre, and we think that notwithstanding this objection Eyre must repay him. Another objection taken by Eyre is that Hutton had in the deed of 1810 a legal answer to those demands, and he having a legal discharge, ought not to have paid the money, and, therefore, has paid it in his own wrong. Hutton replies, that was a covenant not to sue Eyre, but it was not a covenant not to sue for joint debts, nor does it operate as a release of joint debts: that if Eyre had been sued for a joint debt, his remedy would have been to sue on this covenant against the creditor who sued him. The principal on which the covenant not to sue is held to operate as a release, is to avoid circuity of action; but it goes no further. Eyre says it goes much further: it is a release as between me and those to whom I and Hutton were jointly indebted, and being a release to me, it is a release to Hutton, who was jointly with me obliged for payment of that debt, and he relies on certain authorities which, however, show that the rule is not universal, that a covenant not to sue is a release of those, jointly with whom F

A the covenantee may be sued. *Dean v. Newhall* (1) is cited. There an issue was joined on the release of another party, with whom the defendant was jointly and severally bound; and it was contended that a covenant not to sue, and the covenant that those presents should be a sufficient release of the other obligor, would operate as a release to the defendant who was bound with him; but the court were of opinion that the rule how far a covenant not to sue should operate

B as a release, was limited to the parties themselves. Certainly that case in all its parts is not like the present: there the party was jointly and severally answerable to the plaintiff, who might sue the one obligor without the other: and in *Lacy v. Kinnaston* (2) in 12 Mod. Rep. 548, on which *Dean v. Newhall* (1) is much founded, it was stated as the reason of the judgment, that the bond being joint and several, the obligee might sue one without the other.

C The fact is not so here, therefore, the same doctrine is not applicable, and we must consider it on principle, whether that law applies to the present case. In the case of a creditor suing a single debtor whom he has covenanted not to sue, it not only promotes the doctrine, which prevails so strongly in the law, of preventing circuity of action, but it falls in with the intent of the parties, to hold that the covenant shall operate as a release; but it is impossible that it should here be

D in the contemplation of the parties, that in covenanting not to sue Eyre, the insufficient debtor, he meant to release Hutton, who was sufficient. It was as easy to insert in the deed a release, as a covenant not to sue, and it would have been shorter; it must be inferred that the parties did not insert a release, because it would release Hutton also; but it is this day contended that a covenant not

E to sue has the same effect. Where the words, by being extended beyond their obvious intent would, as it seems, go beyond the intent of the party, the court ought not to put that construction on them. It was urged at the Bar that the creditors might sue Hutton alone, and non constat that he would plead in abatement; but putting that out of the case, we think the rule that a covenant not to sue operates as a release applies only to cases where the covenantor and covenantee are single.

F Another ground on which we found our judgment, is this. LORD KENYON, C.J., in *Dean v. Newhall* (1), says (8 Term Rep. at p. 171):

“Even if the defendant had succeeded here, a court of equity would have given the plaintiff full relief. I am glad to find by the two cases cited by the plaintiff [i.e., *Fitzgerald v. Trant* (3) and *Lacy v. Kinnaston* (2)], that we

G are fully warranted in deciding in favour of the plaintiff on legal grounds.”

Here, if the plaintiff had paid this money either under the fear of process of a court of equity, or of a court of law, unquestionably he could have recovered it from the defendant; and if a court of equity would have restrained the plaintiff from setting up this covenant as a release, the equitable call on him justified him in paying the money, and gave him this remedy over against the defendant.

Rule discharged.

A

OMMANNEY v. BUTCHER

[ROLLS COURT (Sir Thomas Plumer, M.R.), July 21, 22, 1823]

[Reported Turn. & R. 260; 37 E.R. 1098]

*Charity—Uncertainty—Gift “in private charity.”**Will—Residue—Property comprised in residuary gift—Direction to sell specific items and to pay certain legacies—Gift of “any money remaining”—Not gift of general residue.*

B

A testator, after bequeathing to A. and B. legacies of stock unequal in amount and giving several legacies to public charities, requested A. and B. to be his executors, and gave to them as such 100 guineas each. He then ordered his books, jewels, plate, and household furniture to be sold, and, after desiring mourning to be provided for his servants and five guineas each to be given to several persons named in the will and to his two executors for a ring as a token of remembrance, concluded his will in the following manner: “In case there is any money remaining I should wish it to be given in private charity.”

C

D

Held: (i) the general residue of the testator's personal estate consisting of a leasehold estate, money in the funds, and a balance in cash was not comprehended in the residuary clause, which was confined to the residue of the produce of the articles which the testator directed to be sold; (ii) private charity was an object too indefinite to give the Crown jurisdiction, or to enable the court to execute the trust; (iii) the executors having, as executors, equal legacies, could not take beneficially, and the next of kin were, therefore, entitled to the general residue of the testator's personal estate, including what was comprehended in the residuary clause.

E

Charity—Administration by court—Capacity of trust to be under control of by court—Administration by Crown by sign manual.

F

Per curiam: Where there is a general indefinite charitable purpose not fixing itself upon any particular object, the disposition is in the Crown by the sign manual, but where the gift is to trustees with general or some objects pointed out, the court will take upon itself the execution of the trust. . . . A trust, to be carried into execution by the court, must be of such a nature that it can be under the control of the court. . . . If a particular object, as the erection of a school, or even a general object, provided it can be seen what the purpose is, is pointed out, the court will execute the trust, although the object pointed out may fail.

G

Notes. At common law, the appointment of executors operated, if there was no effective disposition in the will of the residuary personalty, as a gift thereof to them beneficially *virtute officii*. The next of kin or the Crown might claim, but they could only do so by showing that the executors were not intended to take beneficially; and it was presumed that the executors were not intended to take undisposed of property beneficially where there were equal pecuniary legacies to all the executors, since it would not be thought that the testator would expressly give a part when he was also giving the whole.

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This has now been altered by statute, and in the case of persons dying after 1952, is governed by the Administration of Estates Act, 1925, s. 49 (1) (b) as amended by the Intestates' Estates Act, 1952, ss. 3 and 4, and as so amended, is set out in the First Schedule to the 1952 Act.

I

Applied: *Williams v. Kershaw* (1835), 5 Cl. & Fin. 111; *Dawson v. Gaskoin* (1837), 2 Keen, 14; *Briggs v. Penny* (1851), 21 L.J.Ch. 265; *Lowe v. Thomas* (1854), 23 L.J.Ch. 453. Considered: *Larner v. Larner* (1857), 26 L.J.Ch. 668. Distinguished: *Patrick v. Yeatherd* (1864), 3 New Rep. 367. Referred to: *Douglas*

- A *v. Congreve* (1836), 1 Keen, 410; *Whicker v. Hume* (1858), 7 H.L. Cas. 124; *Gibson v. South American Stores, Ltd.*, [1949] 2 All E.R. 18.

As to public benefit as a requisite of charity, see 4 HALSBURY'S LAWS (3rd Edn.) 209-212; as to "private" charities, see *ibid.* 232; as to the jurisdiction of the Crown over charities, see *ibid.* 407, 408; as to the jurisdiction of the courts over charities, see *ibid.* 414 et seq.; as to right of personal representative to take beneficially, see 16 HALSBURY'S LAWS (3rd Edn.) 408, 420; as to residuary gifts, see *ibid.* 377, and 39 HALSBURY'S LAWS (3rd Edn.) 1030; and for cases see 8 DIGEST (Repl.) 389, 390; 503 and 509. For s. 49 of the Administration of Estates Act, 1925 (as amended and set out in the First Sched. to the Intestates' Estates Act, 1952), see 32 HALSBURY'S STATUTES (2nd Edn.) 130, 131.

C Cases referred to:

- (1) *Moggridge v. Thackwell* (1803), 7 Ves. 36; 32 E.R. 15, L.C.; affirmed (1807), 13 Ves. 416, H.L.; 8 Digest (Repl.) 503, 2229.
- (2) *Morice v. Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, 836.
- (3) *Hotham v. Sutton* (1808), 15 Ves. 319; 33 E.R. 774, L.C.; 44 Digest 723, 5740.
- (4) *Legge v. Asgill* (1818), 3 Hare, 194, n.; Turn. & R. 265, n.; 67 E.R. 352; 44 Digest 725, 5780.

D

Also referred to in argument:

Davers v. Dewes (1730), 3 P. Wms. 40; 24 E.R. 961, L.C.; 44 Digest 747, 6047.

E

A.-G. v. Johnstone (1769), Amb. 577; 27 E.R. 373, L.C.; 44 Digest 421, 2521.
Page v. Leapingwell (1812), 18 Ves. 463; 34 E.R. 392; 44 Digest 667, 5068.
James v. Allen (1817), 3 Mer. 17; 36 E.R. 7; 8 Digest (Repl.) 391, 839.
Waldo v. Caley (1809), 16 Ves. 206; 33 E.R. 962, L.C.; 8 Digest (Repl.) 316, 17.
Vezev v. Jamson (1822), 1 Sim. & St. 69; 57 E.R. 27; 8 Digest (Repl.) 394, 864.
Goff v. Webb (1602), Toth. 30; 21 E.R. 114; 8 Digest (Repl.) 316, 15.

F

White v. White (1802), 7 Ves. 423; 32 E.R. 171; 8 Digest (Repl.) 316, 16.

Bill to determine the respective rights and interests of the parties in the residue of the personal estate of the testator, Buckeridge Ball Acworth.

G

Buckeridge Ball Acworth, by his will, which was in his own handwriting and the commencement of which was in the following form: "I Buckeridge Ball Acworth, this—day of May, 1818, considering in what manner I should have my fortune disposed of in case of my death do make this my will," bequeathed to several persons considerable legacies of stock, and among others to the plaintiff Sir Francis Molyneux Ommanney £800 bank stock for his life, and after his death to be divided among his children, and £600 3 per cent. stock at his own disposal; and to Andrew Edge and his wife the interest of £600 4 per cent. stock; for their lives, and after their deaths to be divided among their children.

H

The testator then gave the following legacies to the undermentioned charities, of which he was a governor or trustee: to St. Margaret's Hospital £600 4 per cent. stock; to the Deaf and Dumb Charity £300 4 per cent. stock; to the Grey Coat Hospital £400 4 per cent. stock; to the Blue Coat School £600 4 per cent. stock; to the Westminster New Charity School £400 4 per cent. stock; to the Western Dispensary £400 4 per cent. stock; to the Westminster Hospital £300 3 per cent. stock;

I

to the Society for Propagating the Gospel in Foreign Parts £100 bank stock; to the Society for Promoting Christian Knowledge 50 guineas; to the British and Foreign Bible Society 50 guineas; and to the Magdalen Hospital £200. After disposing of some books and other specific articles he concluded his will in the following manner:

"I request my cousin the said Francis Molyneux Ommanney, and my friend the said Andrew Edge, to be the executors of this my will, and give them as such 100 guineas each. I would have my books, except those bequeathed,

sold; also I would have my jewels plate and household furniture sold; I desire that my clothes and linen may be divided between my servants, and that they may have handsome mourning given to them; I desire to be given to Mr. Ellis, Mr. George Ellis, Mr. Bates, and Mr. Sutherland, and to my two executors, 5 guineas each for a ring, as a token of remembrance; in case there is any money remaining, I should wish it to be given in private charity. B. B. Acworth."

The testator died in August, 1818, and the bill was filed by the executors, against the next of kin and the Attorney-General, praying that the respective rights and interests of the plaintiffs and defendants in the residue of the personal estate of the testator might be ascertained and determined by the decree of the court.

By the decree made upon the hearing of the cause, it was referred to the Master to take the usual accounts of the testator's personal estate, and it was ordered, that the Master should ascertain the clear residue of the testator's estate, and state of what the same consisted. The Master by his report found that the clear residue of the testator's personal estate consisted, among other things, of a leasehold estate at Chatham, of the several sums of £525 bank stock, £750 4 per cent. consols, £4,500 3 per cent. consols, £3,600 New South Sea annuities, £1,000 New South Sea 3 per cent. annuities of the year 1751, of a balance in cash, and of other sums which had arisen from the dividends of the above-mentioned stocks.

The cause now came on for further directions.

Sir G. Wilson and Newland for the plaintiffs.

Wingfield, Sugden, Roupell, Moore and Polson for the next of kin.

Shadwell and Mitford for the Crown.

SIR THOMAS PLUMER, M.R., after observing that it was impossible to suppose the testator could have been ignorant of the nature and amount of the property he had to dispose of, and that it was evident, not only from the first sentence, in which a blank was left for the date, but from other parts of the will, that the testator considered it as an imperfect instrument, proceeded to comment upon the will, and remarked, that the expression, "I request my cousin and my friend to be my executors," was easily understood, if it was meant that they should undertake a troublesome duty, but was not likely to have been made use of, if the testator intended to constitute them his residuary legatees; and that although in the early parts of the will the executors were not the objects of equal favour; yet that equal legacies were given to them wherever they were taken up together as executors. His Honour then proceeded in the following manner: The first question to be considered is whether the executors are entitled to the general residue of the testator's estate. Let us suppose that the last clause of this will, upon which the material questions have arisen, had been altogether omitted; to whom would the testator's undisposed of property have gone; can there be a doubt that the executors would have been trustees for the next of kin. There never has been a case in which executors have been permitted to take the residue for their own use and benefit, when equal legacies have been given to them, and given to them as executors. Their having equal legacies marks them as being intended to discharge laborious duties, and not to take for their own use and benefit what may be left as residue. If the last clause of this will had been omitted, I am clearly of opinion that the executors would have been trustees for the next of kin; then the question is whether, as to this point, the last clause makes any difference; whatever construction may be put upon that clause, whether it embraces the whole, or only a small portion of the residue, there is nothing in it which at all alters the character or situation of the executors, or gives any interest to them. Their claim, therefore, to have the residue for their own use and benefit cannot be sustained, and the question rests entirely between the next of kin and the Crown.

The law upon cases of this sort is now reduced to very clear and distinct

A principles. Where there is a general indefinite charitable purpose not fixing itself upon any particular object, the disposition is in the king by the sign manual; but where the gift is to trustees with general or some objects pointed out, the court will take upon itself the execution of the trust: *Moggridge v. Thackwell* (1). Then what is the nature of this case; is it a case in which the objects are pointed out? is it a case in which a discretionary power is vested in selected individuals

B to execute a purpose expressed by the testator? Can the trust be discovered from the expression "I desire it may be given in private charity?" because a trust, to be carried into execution by the court, must be of such a nature that it can be under the control of the court: *Morice v. Bishop of Durham* (2); if the trust cannot be ascertained, the court cannot see to the execution of it; it becomes too general and indefinite, and the consequence is that the fund must either

C go as an absolute gift to the individual selected to distribute it, or that individual must be a trustee for the next of kin. If the testator meant to create a trust, and the trust is not effectually created, or fails, the next of kin must take; and on the other hand if the party selected to make the distribution is to take, it must be upon the ground that the testator did not intend to create a trust, but to leave it entirely to the discretion of the party to apply the fund or not. The points to be

D considered in these cases are, whether the object is definite, whether the person is described by whom the distribution is to be made, and whether that individual is, as in *Moggridge v. Thackwell* (1), a mere instrument to carry into execution the objects stated, or is to take the fund for his own benefit. If he is not to take for his own benefit, the consequence is, that if a particular object, as the erection of a school, or even a general object, provided it can be seen what the purpose

E is, is pointed out, the court will execute the trust, although that object may fail, because then it has something to act upon: but if there is an absence of discretion in individuals, and the object to which the fund is to be applied is of a general indefinite nature, the law casts the application of the fund upon the king as *parens patriæ*.

F It is material upon this subject to consider, that in those cases where there is no direct charity pointed out, there may be a legal purpose of trust created to be carried into execution, not a superstitious use, not an illegal use. It is competent to a testator to direct his executors to give to his poor relations; that is not charity, but it is a trust to give to poor relations. So with respect to provisions for the distribution of books; if the object is not illegal, why is not the court to see that

G the intention is carried into execution; all those cases, not being cases of charity, in which the court has interfered, only prove that the court will execute a trust which is not illegal.

The cases which most nearly resemble the present are those in which there is a general description, such as in *Morice v. Bishop of Durham* (2). The bequest there was in trust for such objects of benevolence and liberality as the Bishop of Durham in his own discretion should most approve; an individual was there designated trustee; the question was, not whether the trust was illegal, but whether it was sufficiently definite for the court to execute. Liberality and benevolence include charity, but they are not convertible terms. The case, therefore, not ranking under those which belong to charity, the question came to be considered whether the purpose was sufficiently definite for the court to execute. The court

H held that it was not. The fund, therefore, belonged to the next of kin. It did not belong to the Crown because it was not charity, it did not belong to the court because it was not sufficiently definite for the court to execute, and a trust having been created it devolved to the next of kin. That was the principle laid down in *Morice v. Bishop of Durham* (2). In all cases falling within that principle, where there is a generality which the court cannot execute, and a trust imposed upon the individual who is selected to distribute, the trust fails, and the fund is held by the trustee for those persons to whom the law has given personal property which is not disposed of.

I

Two questions arise upon the last clause of the will of this testator: First, what is meant to be included in it; secondly, In what manner is the property included to be disposed of. The language of the clause in question is such as applies to a small sum only, small in regard to the property of the individual. It is spoken of as contingent, a circumstance, which if any other meaning can be put upon the clause, excludes the idea that the testator had in contemplation the general parts of his property of which he had made no disposition. Again the words of the will are, if there be any money remaining. *Hotham v. Sutton* (3) has established that money does not by the force of the word include stock. If then reason and the nature of the context negative the probability that the testator was adverting to the stock, why is the court to put a construction upon the word money which it does not naturally import? Is it remarkable that up to a certain extent all the dispositions in this will are legacies of stock; the testator, therefore, has distinguished where he meant stock to be the subject of his disposition, and the context shows that in the clause in question he was not adverting to the stock. To construe the word money to mean stock would be to alter the words of the will contrary to the context. I own there is difficulty in knowing what the testator meant, but in cases of this sort we must do our best to put the most natural construction upon the words. My opinion is that the testator was adverting to that which he has directed to be converted into money, and that the clause in question does not comprehend the general residue, but must be considered as applying to the residue of the produce of those articles which the testator has directed to be sold, after providing for the payments which are ordered to be made.

Supposing that to be the case, it remains to be considered whether the Crown is to distribute this sum, or whether it belongs to the next of kin. The amount is small, but the principle is considerable. It appears to me that this case falls within the principle of the cases cited in which there is no object sufficiently definite to give the Crown jurisdiction, or to enable the court to execute the trust. There is no case in which private charity has been made the subject of disposal in the Crown, or been acted upon by this court. The charities recognised by this court are public in their nature, they are such as the court can see to the execution of. In this case the difference is obvious; if a party is to execute the purpose of this testator he cannot give to public charities; the disposition must be confined to private charity. In what respect does private charity differ from benevolence? Assisting individuals in distress is private charity, but how can such a charity be executed by the court or by the Crown. In all cases the general principle is that the trust must be of such a tangible nature as that the court can deal with it; when it is mixed up with general moral duty it is not the subject of the jurisdiction of a court of justice. Private charity is in its nature indefinite—how can it be controlled, how can it be carried into execution? As a general purpose of charity the object of this testator cannot be carried into execution, as a trust it is not sufficiently specific or definite. The sum in question must, therefore, go to the next of kin. With respect to *Legge v. Asgill* (4), the testatrix in that case in the body of her will says: "I believe there will be sufficient money left to pay my funeral expenses;" and in the codicil she uses the expression: "If there is money left unemployed I desire it may be given in charity." In the will, the word "money" must have referred to the general residue, because it was out of the general residue that the funeral expenses must be paid; and it could not be doubted but that the same word in the codicil must have reference to the same subject.

The decree declared that the plaintiffs the executors were trustees for the next of kin, as well as of the remainder of the money arising or to arise from the sale of the specific articles and things directed to be sold by the will of the said testator Buckeridge Ball Acworth, as of the general residue of the testator's personal estate.

A

WRIGHT v. HOWARD

[VICE-CHANCELLOR'S COURT (Sir John Leach, V.-C.), February 4, 5, 8, 19, 1823]

[Reported 1 Sim. & St. 190; 1 L.J.O.S.Ch. 94; 57 E.R. 76]

B

Water—Diversion—Diversion from neighbouring land—Right dependent on grant, licence, or twenty years' enjoyment.

Every owner of land on the banks of a river has, *prima facie*, an equal right to use the water, and no owner can acquire a right to throw the water back on the proprietor above or to divert it from the proprietor below without an actual grant or licence from the proprietors affected or proof of uninterrupted enjoyment for twenty years.

C

Notes. Approved: *Mason v. Hill* (1832), 3 B. & Ad. 304; *Acton v. Blundell* (1843), 12 M. & W. 324. Considered: *Embrey v. Owen* (1851), 6 Exch. 353. Applied: *McBryde v. Weekes* (1856), 22 Beav. 533. Explained: *Ennor v. Barwell* (1860), 2 Giff. 410. Referred to: *Mason v. Hill* (1883), 5 B. & Ad. 1; *Walker v. Jeffreys* (1842), 1 Hare, 341; *Bower v. Cooper* (1843), 2 Hare, 408; *Sampson v. Hoddinott* (1857), 1 C.B.N.S. 590; *Chasemore v. Richards*, [1843-60] All E.R. Rep. 77; *Wilts and Berks Canal Navigation Co. v. Swindon Water Works Co.* (1873), 9 Ch. App. 453, n.

D

As to rights of riparian owners in flowing waters, see 39 HALSBURY'S LAWS (3rd Edn.) 506, 516-522; and for cases see 44 DIGEST 11 et seq. As to the acquisition of rights over water, see 39 HALSBURY'S LAWS (3rd Edn.) 508, 518, 528; and for cases see 44 DIGEST 6 et seq. As to the grant of specific performance after a lapse of time, see 36 HALSBURY'S LAWS (3rd Edn.) 322-326; and for cases see 44 DIGEST (Repl.) 110 et seq.

E

Cases referred to in argument:

Crofton v. Ormsby (1806), 2 Sch. & Lef. 581; 44 Digest (Repl.) 96, *277.

F

Parker v. Frith (1819), 1 Sim. & St. 199; 57 E.R. 80; 30 Digest (Repl.) 432, 749.

Bill for specific performance of a contract for the sale of land.

The original bill in this case filed by the plaintiff, the vendor, Nathaniel Wright, prayed for the specific performance of an agreement, contained in three several memoranda in writing for the purchase of land, and of the right of using the stream of the river Goit by impounding the water. The cross-bill was filed by Jesse Howard, the purchaser, and prayed that the agreements might be delivered up to be cancelled; because they had been obtained by fraud and misrepresentation, and also because the vendor could not make a good title.

G

Before the agreement in question was made, Wright, the plaintiff in the original suit, was in possession of land situated on the bank of the river Goit, and had erected a weir on that river to divert the stream into his land, with a view to erecting a mill, which was to be wrought by this stream. He had also made a sluice and two reservoirs for the water diverted by the weir, to secure a constant supply to a stream which was to be used for the mill. By the agreement in question, Wright agreed to sell to Howard, the defendant in the original suit, the land, the weir, the sluice, and the reservoirs for the purpose of erecting a cotton manufactory, together with the right to turn the water after it had been used in the manufactory, through a piece of land called the Woodheys into the river Mersey, below the junction of the Goit with that river. By turning the water in at this place and in this direction, a fall of twenty-three feet was obtained. But between the weir and the point where it was thus agreed that the water should be turned in, there were three proprietors on the banks of the river: namely, the Duke of Norfolk (then Mr. Bernard Howard), Mr. Arden, and Mr. Tatton. The only question of title was as to the right to the water and to the reservoirs.

I

The first memorandum of agreement, was dated Sept. 6, 1809. It recited that the

plaintiff had a waterfall on the river Goit, upon which he had erected a weir, and made a goit (sluice) to other of his lands, called Woodhead and Woodheys; and it then contained an agreement to sell the waterfall, weir and goit, and the lands and buildings, to the defendant, reserving a yearly rent of £330; and the defendant was to covenant, that he would, within five years, erect buildings to the value of £7,500 on the land. A

The second memorandum was dated Sept. 15, 1809, and was made for the purpose of stating the agreement more distinctly. It was expressed as follows: B

"Mr. Wright to convey to Mr. Howard at his expense, the fee-simple of and in a messuage, . . . [describing the land, buildings, and other particulars] also the weir, culvert and stop-gates erected by Mr. Wright across the river Goit, and the privilege of impounding the stream of the river Goit thereby, as high towards Marple Bridge as Mr. Wright has power to do; and also of using the goit (sluice) lately made by Mr. Wright through his field, called the Ridge-eyes-fold into the Woodhead, with the intention of diverting the said stream; also the use of the reservoirs made by Mr. Wright for preserving the stream of water." C

The third memorandum was dated May 25, 1810; and, after reciting the agreement, it provided that, in lieu of the yearly rent of £330, Howard should pay the sum of £6,600 in two payments, £3,000 on June 24, 1810, and £3,600 without interest, on June 24, 1813; for which last sum Howard was to give his bond; and it then stated that Howard should have full power, right, and title to turn and discharge the water into the river Mersey, through any part of the Woodheys which he should think proper. D E

Soon after this memorandum was executed, some difficulties occurred to Howard as to the power of the plaintiff, Wright, to make a title to the privileges thus agreed to be sold; and, as these difficulties seemed to him insurmountable, on July 16, 1810, he sent a notice in writing to the plaintiff, stating that, in consequence of the defects in the title, he relinquished and gave up the agreement, and required that that part of the purchase-money which he had paid should be returned to him. F

* When Wright produced his title, it appeared that he had not a fee-simple interest in the right to use the water; and that part of the land which formed one of the reservoirs was leasehold for a term of years. His title to the water was by a lease from Mr. B. Howard (now the Duke of Norfolk), dated October 30, 1809. By this lease, which was for the term of ninety-nine years, the land, of which a part was covered by one of the reservoirs included in the agreement, was demised to Wright, his executors, administrators, and assigns, together with an authority to divert the water of the river Goit, by means of the weir which he had then lately erected, for the purpose of a cotton manufactory, into the land agreed to be sold to Howard; but upon the express condition that he returned a part of the water so used into the river Goit, at a point far above its junction with the Mersey, and, therefore, far above the Woodheys, the place at which it was stipulated by the agreement that Howard should have the privilege of returning it. G H

Besides this, it appeared that between the junction of the Goit and Mersey, and the place at which, according to the agreement, the water was to be returned through the Woodheys, two other proprietors, Mr. Tatton and Mr. Arden, possessed lands on the banks of the Mersey. I

Mr. Howard having given notice that he would not perform the agreement on account of defect in the title, Mr. Wright, on Feb. 11, 1811, filed the original bill for a specific performance of the contract. In February, 1815, Howard filed the cross-bill. On Mar. 14, 1816, Wright obtained a new lease from the Duke of Norfolk, on the surrender of his lease of October 30, 1809; and, by this new lease, all that was comprised in the former lease was re-demised to him for the term of ninety-four years, and the obligation to return the stream of the river Goit into that river

A before its junction with the Mersey, was discharged, and an unrestricted enjoyment of the stream was granted during the continuance of the lease.

In 1818 Wright died; and in that year his representatives filed a supplemental bill, which stated this new lease, and insisted on the specific performance of the agreement.

B It appeared by the evidence, that if the stream, the use of which was to be granted to Howard, was turned into the Mersey through the Woodheys, according to the agreement, a greater fall by three feet would be gained than could be had by returning it into the river Goit at any point above the junction of that river with the Mersey. This additional fall was of great importance to the cotton manufactory. It also appeared that the privileges as to the use of the water, which were contained in the agreement, constituted the most valuable part of the subject of the contract; and that, without these privileges, the property was not worth more than one-third of the price which Howard agreed to pay.

C The objections to the title which were insisted upon by Howard were as follows : First, as to the weir that Wright, as against the Duke of Norfolk, the proprietor of land on one bank of the river above the weir, had acquired no right to maintain it beyond the term of his lease; whereas, the language of the agreement imported an absolute right; secondly, that the agreement was expressed for an unqualified grant, in fee-simple, of the use of the two reservoirs; whereas one of these reservoirs was upon a part of the land demised for a term of years by the Duke of Norfolk to Wright; thirdly, that, at the time when the last memorandum of agreement was executed, by which Wright expressly engaged that Howard should have the power of turning the stream into the river Mersey through any part of the field called the Woodheys, which was the subject of Howard's purchase, Wright had no power to grant any such privilege; but was bound by his lease from the Duke of Norfolk to return the water into the river Goit at a point much above the Woodheys, and was, consequently, then unable, as against the Duke of Norfolk, to perform his contract. That, although by the new lease of March, 1816, the Duke of Norfolk had dispensed with that obligation, yet he had dispensed with it only for a term of years, and not absolutely; and that, as against Mr. Tatton and Mr. Arden, the other proprietors of land between the weir and the Woodheys, there was no ground for stating that Wright had acquired the power of diverting the water into the river Mersey, which he had undertaken to grant to Howard.

D Besides these objections, Howard insisted, in his answer to the supplemental bill, that, at such a distance of time (it being then ten years since the agreement was made) the vendor was not entitled to have it specifically performed; that the land and buildings had become waste and dilapidated, so as to have greatly decreased in value; that he had entered into the agreement for the purposes of trade; and that, on account of the delay, together with the change of times and circumstances, he could not now make use of the subject of the contract for the purposes intended at the time when the agreement was made; although they might have been advantageously used for those purposes, at the time when the agreement was made, if Wright had been able to make a title to the stream of water according to his contract. It was also stated by Howard, in his answer to the original bill, that it would cost £15,000 to build the intended cotton manufactory, so as to have the benefit of the stream of water, and that, after expending so large a sum, the right to the use of the water must determine with the lease.

E The original and cross-cause were heard together. There was no evidence in support of the fraud charged by the cross-bill; which was not insisted on at the hearing.

Bell and Koe for the plaintiff, in the original cause.

Pechel for one of the representatives of Wright.

Agar, Heald and Parker for the defendant in the original suit.

SIR JOHN LEACH, V.-C.—The first consideration is whether the original plaintiff, Wright, could, when he received the notice of abandonment from Howard, or at the time when the original bill was filed, give to Howard an effectual title to the different subjects of the contract. The next consideration will be whether he can now make such effectual title. It is objected to the title, first, that as to the weir itself, Mr. Wright had no right to maintain it for the purpose of throwing back the water as against the Duke of Norfolk, considered as the proprietor of the land above, except originally for the term of the lease of Oct. 8, 1809, and now for the term of the lease of Mar. 14, 1816. Secondly, that, as against the Duke of Norfolk, considered as the proprietor of the land below, Mr. Wright had no title to turn the water, diverted by means of the weir, into the Mersey, from the western point of the Woodheys, until he obtained the lease of March, 1816, and that he now has no right so to turn the water, except for the term of that lease. Thirdly, that as against Mr. Tatton and Mr. Arden, the other proprietors of the land below the weir, Mr. Wright never had, and his representatives have not now, any title to turn the water, diverted by means of the weir, into the Mersey, from the said western point of the Woodheys. Lastly, that as to one of the two reservoirs, the unqualified use of which Mr. Wright agreed to grant to Mr. Howard, it is made, in part, upon land demised by the Duke of Norfolk originally by the lease of October, 1809, and now by the lease of March, 1816; and, consequently, Mr. Wright or his representatives, have no title to it, except for the term of the lease.

The right to the use of water rests on clear and settled principles. *Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right of use the water which flows in the stream; and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above.

Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or licence from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years: which term of twenty years is now adopted, upon a principle of general convenience, as affording conclusive presumption of a grant. It appears to me that no action will lie for diverting or throwing back water, except by a person who sustains an actual injury; but the action must lie at any time within twenty years when the injury happens to arise, in consequence of a new purpose of the party to avail himself of his common right. The question of title as to the water in this case will readily be tried by these plain principles. It appears by the recitals in the lease from the Duke of Norfolk in October, 1809, that the weir which throws the water back above, was erected by Mr. Wright in 1804; and, consequently, Mr. Wright could have no title to maintain this weir against the Duke of Norfolk, considered as the proprietor of land above, except by actual grant; and that grant is to be found in the lease of October, 1809, and also in the subsequent lease of March, 1816, and, therefore, endures only for the term of the latter lease, and is not a grant in fee-simple, according to the effect of Mr. Wright's agreement with Mr. Howard.

As against the Duke of Norfolk, considered as the proprietor of land below, Mr. Wright was bound by the lease of October, 1809, to return the water which should be diverted by the weir into the river Goit, at a certain point stated, and consequently had no title to enable Mr. Howard, according to the agreement, to turn the water so diverted into the Mersey, at the west end of the Woodheys. Mr. Wright afterwards, by the lease of March, 1816, acquired, as against the Duke

- A** of Norfolk, considered as such proprietor below, this right to turn the water into the Mersey; but he acquired it, not in fee-simple, according to the effect of his agreement with Mr. Howard, but for the term of that lease only. With respect to Mr. Tatton and Mr. Arden, the other proprietors of the land below, between the weir and the west end of the Woodheys, it is clear that Mr. Wright could have no right, at the time of filing the original bill, to turn the water into the
- B** Mersey below their lands; except by express grant or licence; and no such grant or licence is pretended. The time that has since elapsed can afford no presumption of such a grant; because, in fact, the water has not been so turned into the Mersey. The last objection to the title does not apply to the use of water, but to the land demised by the Duke of Norfolk, which forms a part of one of the reservoirs. Mr. Wright has undertaken to grant the use of this reservoir, in fee-simple, to Mr. Howard. It is plain he can make no title to it, except for the term of the Duke of Norfolk's lease.
- C**

- Upon the whole, I am of opinion that Mr. Wright not only could not make a good title, in the four respects which have been stated, at the time when Mr. Howard gave notice of his intention to abandon the contract, and at the time of filing the original bill, but that he cannot now make a good title in either of these respects. Without thinking myself called upon to make any general declaration as to the distinction between land contracted for as mere property and land contracted for with a view to be used for a commercial establishment, I cannot now give to the representatives of Mr. Wright the chance of perfecting their title before the Master, in order that I may compel Mr. Howard, at the distance of fourteen years, to return to a commercial speculation, which he was then obliged to desert,
- E** from Mr. Wright's inability to perform his engagement.

- The bill must be dismissed, with costs, except as to so much of the costs as may have been occasioned by Mr. Howard's suggestions of fraud and misrepresentation, which are altogether disproved: and let those costs be paid by Mr. Howard. With respect to the cross-bill, I shall direct the three agreements to be delivered up to be cancelled; but I shall make this decree without costs; because this cross-bill prays that it may be declared that these agreements were obtained by fraud and misrepresentation, allegations which, I have before stated, were altogether disproved; and it is the duty of the court to discourage the abuse of its proceedings by the introduction of imputations disgraceful to character, which prove to be altogether unfounded.
- F**

Bill dismissed.

TOWNSON v. TICKELL AND ANOTHER

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), November 6, 1819]

[Reported 3 B. & Ald. 31; 106 E.R. 575]

Will—Devise—Presumption of acceptance by devisee—Disclaimer—Disclaimer by deed.

The law presumes that an estate devised will be beneficial to the devisee and that he will accept it unless there is proof to the contrary. The law will not force a devisee to take an estate against his will. He may disclaim the devise, and a disclaimer by deed is sufficient.

Executor—Assent—Assent by one co-executor—Assent to bequest to himself.

One of several co-executors may assent to the vesting of a bequest of personalty in himself.

Notes. Followed: *Begbie v. Crook* (1835), 2 Scott, 128. Considered: *Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517. Applied: *Xenos v. Wickham* (1862), 13 C.B.N.S. 381; *Peacock v. Eastland* (1870), L.R. 10 Eq. 17; *Re Parsons, Parsons v. A.-G.*, [1942] 1 All E.R. 631. Explained: *Re Stratton's Deed of Disclaimer, Stratton v. I.R. Comrs.*, [1957] 2 All E.R. 594. Referred to: *Doe d. Palmer v. Andrews* (1827), 4 Bing. 348; *Doe d. Winter v. Lawes* (1837), 7 Ad. & El. 195; *Browell v. Reed* (1842), 1 Hare, 434; *Siggers v. Evans* (1855), 5 E. & B. 367.

As to disclaimer of gifts under will, see 39 HALSBURY'S LAWS (3rd Edn.) 932, 933; and for cases see 44 DIGEST 399, 400. As to assents by executors, see 16 HALSBURY'S LAWS (3rd Edn.) 338-342; and for cases see 23 DIGEST (Repl.) 393 et seq.

Cases referred to:

- (1) *Thompson v. Leach* (1690), 2 Vent. 198; 86 E.R. 391; on appeal (1692), 2 Vent. 208, H.L.; 25 Digest (Repl.) 569, 144.
- (2) *Bonifant v. Greenfield* (1587), Cro. Eliz. 80; 1 Leon. 60; 78 E.R. 340; sub nom. *Bonefant v. Greinfeld*, Godb. 77; 24 Digest (Repl.) 629, 6237.
- (3) *Brovingre's Case* (1410), Y.B. 11 Hen. 4, fo. 83, pl. 32.

Also referred to in argument:

- Butler and Baker's Case* (1591), 3 Co. Rep. 25 a; 1 And. 348; 3 Leon. 271; Poph. 87; Moore, K.B. 254; 76 E.R. 684; 25 Digest (Repl.) 145, 570.
- Hawkins v. Kemp* (1803), 3 East, 410; 102 E.R. 655; 37 Digest (Repl.) 272, 292.
- Denne d. Bowyer v. Judge* (1809), 11 East, 288; 103 E.R. 1014; 38 Digest (Repl.) 825, 377.
- Smith v. Wheeler* (1671), 1 Vent. 128; 86 E.R. 88; sub nom. *Smyth v. Wheeler*, 2 Keb. 772; 47 Digest (Repl.) 176, 1443.
- Doe d. Mansfield v. Peach* (1814), 2 M. & S. 576; 105 E.R. 496; 37 Digest (Repl.) 266, 242.

Action of covenant by one of two devisees of a reversion against the defendants, as lessees.

By the declaration it was stated that one Jacob Astley, being seised in fee of part, and possessed for long terms of years of other parts of the premises, by indenture, demised the same for certain terms therein mentioned, to the defendants; that Astley, by his will, devised the reversion of the demised premises unto the plaintiff and one John Lock, and that he appointed his daughter, Harriet Anne Bush, his executrix, and Joseph Astley and the plaintiff and John Lock executors of his will.

It then stated the death of Astley, and averred that John Lock never would or did assent to the said will, nor to the appointment of him the said John Lock therein contained, to be one of the executors thereof, nor to any bequest or devise therein contained, nor in any manner prove or join in the proof of, or act as or

- A become an executor, or take upon himself the execution thereof; but always from the time of the death of the said Jacob Astley wholly omitted and refused so to do, and on May 18, 1818, by his deed, sealed with his seal, duly renounced the execution thereof; and afterwards, on May 19, 1818, by a deed, absolutely disclaimed and renounced all and singular the estate and estates, trusts, powers, and authorities given by the said will.
- B The said Harriet Anne, Joseph, and the plaintiff, afterwards, on June 25, 1818, duly proved the said will; and the plaintiff, afterwards, on that day assented to the devise and bequest of the said residue of the said reversion to him the said plaintiff in the said will contained, whereupon he became and thereafter remained seised and possessed of the reversion of and in the said residue of the said demised premises for the residue of divers of the said long terms of years, then and still to come and unexpired. The declaration contained breaches of covenants. The defendants demurred.
- C

Manning for the defendants, in support of the demurrer.

Bayly for the plaintiff.

- D **ABBOTT, C.J.**—The law certainly is not so absurd as to force a man to take an estate against his will. *Prima facie*, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge, and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift. The question here is, in what mode that refusal is to be made? In this case the renunciation has been by deed under the hand and seal of the party. It has been argued, however, that nothing short of renunciation or disclaimer in a court of record will avoid the devise; and if there had been any distinct authority to that effect, we should have been bound to give due weight to such authority.
- E

- F It does not seem to me, however, that the cases have gone the length of deciding that the renunciation must take place in a court of record. Counsel has not been able to suggest any mode by which the devisee could have disclaimed in a court of record, and certainly it could not be done, unless some other person had thought fit to cite him, there to receive his disclaimer, and if the estate were *damnosa hereditas*, that would not be likely to happen. It might, therefore, in some instances, be a matter of difficulty to make a disclaimer in a court of record. *Thompson v. Leach*
- G (1) seems to me to be a strong authority to show that that is not necessary. Three of the judges there held that an estate did not pass by surrender to the surrenderee till he expressly accepted it. *VENTRIS, J.*, differed, and held that it passed immediately, liable to be divested by the dissent of the surrenderee. His judgment is, however, wholly founded on this, that a party to whom an estate is given must be taken to give an implied assent to that which is for his benefit till the contrary appears.
- H That learned judge expressly states, that a man "cannot have an estate put into him in spite of his teeth." I concur in that opinion, and think that the renunciation here having been by deed under the hand and seal of the party, must have the effect of making the devise with respect to him null and void, and, consequently, that there must be judgment for the plaintiff.

- I **BAYLEY, J.**—I am of the same opinion. There are many instances in which a devise to a party might subject him to great inconvenience, as for instance, a devise of an estate clothed with trusts. As in such a case, a party cannot be forced to be a trustee, it would be absurd that the estate should be in him and remain in him until he can prevail upon some person to institute legal proceedings under which he is to disclaim in a court of justice. The good sense of the thing is quite the other way; the law indeed presumes that the estate devised will be beneficial to the devisee, and that he will accept it, until there is proof to the contrary. Here is a renunciation by a most solemn act, *viz.*, by deed; and by that he has said that he

did not choose to accept that which is devised to him. It seems to me that the effect of that is that the estate never was in him at all. For I consider the devise to be nothing more than an offer which the devisee may accept or refuse, and if he refuses, he is in the same situation as if the offer never had been made; and that being so, I am of opinion, that the disclaimer, in this case, was sufficient, and that there ought to be judgment for the plaintiff. A

HOLROYD, J.—I think that an estate cannot be forced on a man. A devise, however, being *prima facie* for the devisee's benefit, he is supposed to assent to it, until he does some act to show his dissent. The law presumes that he will assent until the contrary be proved; when the contrary, however, is proved, it shows that he never did assent to the devise, and, consequently, that the estate never was in him. I cannot think that it is necessary for a party to go through the form of disclaiming in a court of record, nor that he should be at the trouble or expense of executing a deed to show, that he did not assent to the devise. Unless some strong authority were shown to that effect, I cannot think that the law requires either of these forms: I am confirmed in that opinion by *Bonifant v. Greenfield* (2). There the devise was to four executors: one of the executors refused to take out administration of the will, and it was objected that the sale was not good; to which it was answered, that as it was devised unto him for the intent to sell, if he refused to sell he refused to take the estate, and so that it was unnecessary that he should join in the sale; the court, however, held the sale good, although the devisee had not renounced the estate either by matter of record or by deed. It seems to me, therefore, both upon the reason of the thing and the authority of this case, that the disclaimer need not be either by matter of record or by deed. In this case, however, the party has disclaimed by deed, which, in my opinion, is sufficient. The whole legal estate, therefore, is vested in the plaintiff; and, consequently, he is entitled to the judgment of the court. B C D E

BEST, J.—I am entirely of the same opinion. Although an estate is generally beneficial to the devisee, yet estates are often devised to persons as trustees for others. If the only mode by which such trusts could have been renounced, was by disclaimer in a court of record, innumerable instances must have occurred: none, however, have been cited; and that affords the strongest argument against the necessity of having recourse to such a mode of proceeding. It seems to be contrary to common sense to say, that an estate should vest in a man not assenting to it: there must be the assent of the party, before any interest in the property can pass to him. It is stated in the declaration, that this party has, by his solemn deed, expressed his dissent, and renounced the estate devised by the will. It appears to me, therefore, that no interest ever vested in him; and, therefore, there is nothing more to be done for the purpose of giving the sole property to the plaintiff. F G

Manning then urged that the plaintiff had not conveyed to himself a good title to the lands, in which the testator had only a leasehold interest. The plaintiff now claims as personal representative of the testator; and the declaration states, that he, being one of several executors, assented to the bequest to himself. In *COMYNS' DIGEST* tit. Administration, C 8, it is said: "If the devise be to one executor he may take, by his own assent, without the other." For which, the reference is to 1 Roll. Abr. 618, l. 47; but *ROLLE* himself refers to Y.B. 11 Hen. 4, fo. 84 (*Bovingre's Case* (3)) in which the only point decided was, that a legatee, who is named one of the executors, by taking the property bequeathed to him is estopped from saying that he never administered. He also referred to Y.B. Trinity 5 Hen. 7, fo. 5, pl. 5. H I

Per Curiam: One co-executor may release a debt, and do other acts, without his companion, and he may, therefore, assent to a bequest to himself.

Judgment for plaintiff.

A

TAYLOR AND ANOTHER v. PLUMER

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., and other judges),
February 10, 1815]

[Reported 3 M. & S. 562; 2 Rose, 457; 105 E.R. 721]

B *Trust—Trust property—Following trust property—Money entrusted by principal to broker—Money misappropriated by broker and used for purchase of stock and bullion—Right of principal to follow trust property against trustee in bankruptcy of broker.*

C A draft for money was entrusted to a broker to buy exchequer bills for his principal. The broker received the money and misapplied it by purchasing American stock and bullion, intending to abscond with it and go to America. He did abscond, but he was taken before he left England, and thereupon surrendered the securities for the American stock and the bullion to his principal who sold them and received the proceeds. The broker became bankrupt on the day on which he received and misapplied the money.

D **Held:** the property of a principal entrusted by him to his factor for a specified purpose belonged to the principal notwithstanding any change which it might undergo in point of form, and, if the property was capable of being identified and distinguished from other property, it was as recoverable from the assignees of the factor in the event of his becoming a bankrupt as it would have been from the factor himself before his bankruptcy; the difficulty of identification which arose in the case of money was one of fact, not of law; in the present case that which the factor had bought was the identifiable trust property of the principal, and the principal could retain it against the assignees in bankruptcy of the factor.

E **Notes.** Followed: *Twiss v. White* (1826), 3 Bing. 486. Applied: *Small v. Atwood* (1831-2), You. 407. Distinguished: *Ashmall v. Wood* (1856), 28 L.T.O.S. 30. Applied: *Re Hammond, Ex parte Brook* (1869), 20 L.T. 547; *Re Strachan, Ex parte Cooke* (1876), 4 Ch.D. 123; *Birt v. Burt* (1877), 36 L.T. 943. Considered: *Re Hallett's Estate, Knatchbull v. Hallett, Cotterell v. Hallett*, [1874-80] All E.R. Rep. 793. Applied: *Harris v. Truman* (1881), 7 Q.B.D. 340; *Collins v. Stimson*, [1881-5] All E.R. Rep. 382; *Patten v. Bond* (1889), 60 L.T. 583. Distinguished: *Lister & Co. v. Stubbs* (1890), 62 L.T. 654; *King v. Hutton*, [1899] 2 Q.B. 555. G Considered: *Sinclair v. Brougham*, [1914-15] All E.R. Rep. 622; *Banque Belge Pour L'Etranger v. Hambrouck*, [1921] 1 K.B. 321. Referred to: *Neete v. Harding* (1851), 6 Exch. 349; *Muttyboll Seal v. Dent* (1853), 5 Moo. Ind. App. 328; *Re West of England and South Wales District Bank, Ex parte Dale* (1879), 11 Ch.D. 772; *Crowther v. Elgood* (1887), 56 L.J.Ch. 416; *Madras Official Assignee v. Krishnaji Bhat* (1933), 49 T.L.R. 432; *Re Diplock's Estate, Diplock v. Wintle*, [1947] 1 All E.R. 522. H

As to borrowing trust property, see 14 HALSBURY'S LAWS (3rd Edn.) 628 et seq; as to misappropriation by agent, see 1 HALSBURY'S LAWS (3rd Edn.) 212; as to relation between broker and client, see 36 HALSBURY'S LAWS (3rd Edn.) 514, 515; and for cases see 47 DIGEST (Repl.) 462 et seq.; 1 DIGEST (Repl.) 653 et seq.

I Cases referred to:

- (1) *Scott v. Surman* (1742), Willes, 400; 125 E.R. 1235; 1 Digest (Repl.) 653, 2266.
- (2) *Whitecomb v. Jacob* (1710), 1 Salk. 160; 91 E.R. 149; 1 Digest (Repl.) 653, 2265.
- (3) *L'Apostre v. Le Plaistrier* (1708), cited in 1 P. Wms. at p. 318; 24 E.R. 406; 44 Digest (Repl.) 239, 617.
- (4) *Copeman v. Gallant* (1716), 1 P. Wms. 314; 24 E.R. 404, L.C.; 5 Digest (Repl.) 752, 6469.

- (5) *Ryall v. Rolle* (1749), 1 Atk. 165; 1 Wils. 260; 1 Ves. Sen. 348; 9 Bli. N.S. 377; 26 E.R. 107, L.C.; 35 Digest (Repl.) 287, 80. A
- (6) *Ex parte Chion* (1721), 3 P. Wms. 187, n.; 24 E.R. 1023; 5 Digest (Repl.) 754, 6483.
- (7) *Hassall v. Smithers* (1806), 12 Ves. 119.
- (8) *Lane v. Dighton* (1762), Amb. 409; 27 E.R. 274, L.C.; 47 Digest (Repl.) 462, 4131. B
- (9) *Kirk v. Webb* (1698), Prec. Ch. 84; Freem. Ch. 229; 2 Eq. Cas. Abr. 743; 24 E.R. 41, L.C.; affirmed (1699), Prec. Ch. p. 88, H.L.; 47 Digest (Repl.) 108, 785.

Also referred to in argument:

- Burdett v. Willett* (1708), 2 Vern. 638; 23 E.R. 1017; 5 Digest (Repl.) 755, 6485. C
- Cox v. Bateman* (1715), 2 Ves. Sen. 19; 28 E.R. 13, L.C.; 47 Digest (Repl.) 462, 4129.
- Perry v. Phelps* (1798), 4 Ves. 108; 31 E.R. 56; 20 Digest (Repl.) 524, 2366.
- Gladstone v. Hadwen* (1813), 1 M. & S. 517; 2 Rose, 131; 105 E.R. 193; 5 Digest (Repl.) 739, 6399.
- Winch v. Keeley* (1787), 1 Term Rep. 619; 99 E.R. 1284; 5 Digest (Repl.) 753, 6470. D
- Balgney v. Hamilton* (1729), cited in Amb. at p. 414.
- Wilson v. Foreman* (1782), 2 Dick. 593; 21 E.R. 402, L.C.; 47 Digest (Repl.) 463, 4137.
- Miller v. Race* (1758), 1 Burr. 452; 2 Keny. 189; 97 E.R. 398; 35 Digest (Repl.) 182, 5. E
- R. v. Egginton* (1786), 1 Term Rep. 369; 99 E.R. 1144; 4 Digest (Repl.) 307, 2777.

Case reserved for the opinion of the court in an action in which the plaintiff, as the assignee in bankruptcy of Walsh, sued the defendant, Sir Thomas Plumer, in trover for the certificates or securities for 50 shares in the bank of the United States of America, and for the certificates or securities for certain sums in the 3 per cent. funded stock of the United States, and the powers of attorney respectively relating thereto, and also for certain bullion, viz., 71 doubloons and a half. Plea, general issue. F

At the trial before LORD ELLENBOROUGH, C.J., at the London sittings after Michaelmas Term, 1813, there was a verdict for the plaintiffs, damages £10,459 18s. 6d. in respect of the securities, and £302 in respect of the bullion, separately, subject to the opinion of the court upon a Case reserved, which stated the plaintiffs to be the assignees of Walsh under a commission of bankruptcy of Dec. 10, 1811. Walsh was a stock-broker, who had occasionally been employed by the defendant for some time before 1811. In August of that year the defendant, expecting to have occasion for a large sum of money at Michaelmas to pay for an estate which he had contracted to purchase, consulted Walsh on the propriety of selling out stock to provide for such payment, and desired him to inform him when he, Walsh, thought it would be most expedient to do so. In November, the title to the estate not having been then completed, Walsh, thinking the funds likely to fall, recommended to the defendant to sell out stock, being principally in a fund which is regularly shut from the beginning of December till about Jan. 7; and the defendant having considered the matter, on Nov. 28 sent Walsh orders to sell. Sales were accordingly effected by Walsh as broker on the 29th to the amount of £21,744 5s. sterling, the transfers to be made and the money to be paid on Dec. 4. On the 4th the stock was transferred by the defendant, and the price was received by Walsh, who on the same day paid £21,500, part of the said price, into the hands of Messrs. Goslings & Co., the defendant's bankers, to the defendant's account, and saw the defendant and informed him of it. The defendant proposed to Walsh to invest the money in exchequer bills until it should be wanted to pay for the estate, and in the evening G
H
I

A desired him to call the following day for a draft in order that he, as broker, might buy exchequer bills for the defendant.

Accordingly on the next day, Dec. 5, about 11 o'clock in the forenoon, Walsh called, when the defendant said he had more money at his bankers than he wished to keep unemployed, and gave him a draft upon Goslings for £22,200, which he directed him to lay out for him in the purchase of exchequer bills, to be delivered on the same day to him, the defendant, or his bankers. The defendant did not authorise Walsh, nor was Walsh in any manner authorised to apply the draft or money to be received for it, to any other purpose, nor had the defendant any reason to expect or apprehend that it would be applied to any other purpose. Walsh went to Goslings, received the amount of the draft from them in 22 Bank of England notes of £1,000 each, and one for £200, but purchased exchequer bills to the amount of £6,500 only, having bought them in the usual course of business, and he lodged them at Goslings on the defendant's account. About four in the afternoon he called on the defendant and told him that he had lodged the £6,500 exchequer bills at Goslings, and that he had agreed for the remainder of the intended purchase of exchequer bills to be delivered at a future day, and had, therefore, left a sum, which he named (being an even sum nearly corresponding with the difference of the £22,200) to his account at Goslings. But the fact was not so; on the contrary, Walsh being ruined in his circumstances, and completely insolvent, had, between the time of the sale of the defendant's stock and the time when he received the price of it, conceived an intention of absconding with the money when it should come to his hands, and with that view, on Dec. 2, had given orders for the purchase of the American shares, stock, and bullion in question, in order to take them with him abroad, having no means of paying for the American shares and stock but out of the money he expected to receive belonging to the defendant, nor any money of his own to pay for the bullion, though he might have acquired money for that, but intending to pay for that also out of the defendant's money. Accordingly, after receiving the draft at Goslings, he went immediately from thence to the American stock brokers in the city, received the certificates, and paid for them with 11 of the identical Bank of England notes of £1,000 each, which he had just received, taking back from the broker to whom he paid them the difference of £540 1s. 6d. The same morning he delivered to his brother-in-law another of the £1,000 bank-notes, and received from his brother-in-law in exchange, a draft, of the firm in which he is a partner, on their bankers for £500, and another draft for £100, leaving the remainder in his brother-in-law's hands, and with the £500 draft he paid for the bullion, receiving the difference from the goldsmith who furnished it.

Walsh had a dwelling-house at Hackney, where he resided with his wife and family, and also a counting-house in London, where he carried on his business. About nine in the morning of Dec. 5 he left his dwelling-house, taking with him clothes and other necessaries for his journey, intending not to return, but to leave London in the evening by the mail-coach, in which he had taken a place on Dec. 3 or 4, and to proceed immediately to Falmouth, and from thence by the first packet to Lisbon, and so to North America. He left London accordingly by the mail-coach, taking with him the securities and bullion in question. He was pursued by the defendant's attorney and a police officer by the defendant's desire, the attorney having a general authority to act for the defendant, but no particular directions, and on the 9th they overtook Walsh while he was waiting at Falmouth for the packet's putting to sea, and he then surrendered up the property in question to the attorney for the purpose of being assigned over to the defendant, and in the course of that day executed a deed, which was prepared by the attorney's order, assigning the property to the defendant in trust to sell and pay himself a debt of £15,500 (being about the difference between the price of the £6,500 exchequer bills and the £22,200), also a bond to the defendant in the penalty of £31,000, conditioned for the payment by him of £15,500, and interest at 5 per cent., and

a warrant of attorney for confessing a judgment upon such bond, which were also prepared by the attorney at the same time, and after being executed, were delivered to him, the attorney and the police officer witnessing the same.

They all returned to London, when Walsh was carried before a magistrate, and afterwards indicted for felony, tried, and found guilty, subject to the opinion of the judges, but was afterwards pardoned without any judgment having been pronounced (4 Taunt. 258).

The Case also stated that the act of bankruptcy was committed on Dec. 5, that Walsh's advice to the defendant to sell out his stock was given bona fide, and no false pretence or imposition was used to obtain the defendant's draft upon Messrs. Goslings, or the possession of the money which he afterwards received and misapplied, and that the property in question, which was surrendered by Walsh to the attorney, was delivered up by the attorney to the defendant, of whom the plaintiffs demanded it, but the defendant refused to deliver any of it, and sold the whole and received the proceeds.

The question for the opinion of the court was whether the plaintiffs were entitled wholly, or in part, to recover; if they were, the verdict was to be entered accordingly; if not, a nonsuit to be entered.

Cur. adv. vult.

Marryat for the plaintiffs.

Abbott for the defendant.

LORD ELLENBOROUGH, C.J., delivered the judgment of the court, in which, after stating the Case, he said: The plaintiff in this case is not entitled to recover if the defendant has succeeded in maintaining these propositions in point of law, viz., that the property of a principal entrusted by him to his factor for any special purpose belongs to the principal, notwithstanding any change which that property may have undergone in point of form, so long as such property is capable of being identified, and distinguished from all other property. Secondly, that all property thus circumstanced is equally recoverable from the assignees of the factor, in the event of his becoming a bankrupt, as it was from the factor himself before his bankruptcy. Indeed, upon a view of the authorities, and consideration of the arguments, it should seem that if the property in its original state and form was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust, or give the factor, or those who represent him in right, any other more valid claim in respect to it, than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him. The argument which has been advanced in favour of the plaintiffs, that the property of the principal continues only so long as the authority of the principal is pursued in respect to the order and disposition of it, and that it ceases when the property is tortiously converted into another form for the use of the factor himself, is mischievous in principle, and supported by no authorities of law. The proposition which was held out in argument on the part of the plaintiffs, as being the untenable result of the arguments on the part of the defendant, is no doubt a result deducible from those arguments: but unless it be a result at variance with the law, the plaintiffs are not on that account entitled to recover.

The contention on the part of the defendant was represented by the plaintiffs' counsel as pushed to what he conceived to be an extravagant length, in the defendant's counsel being obliged to contend, that "if A. is trusted by B. with money to purchase a house for him, and he purchases a carriage with that money, that B. is entitled to the carriage." And, indeed, if he be not so entitled, the case on the part of the defendant appears to be hardly sustainable in argument. It makes no difference in reason or law into what other form, different from the original, the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the

A principal, as in *Scott v. Surman* (1) or into other merchandise, as in *Whitecomb v. Jacob* (2), for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; i.e., as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far ear-marked as to fall within the rule on this subject, which applies to every other description of personal property while it remains (as the property in question did) in the hands of the factor, or his general legal representatives.

That trust property in the possession of a factor empowered to dispose of it for his principal does not pass to his assignees under the statute 21 Jac. 1, c. 19 [Bankruptcy Act, 1623: repealed by the Bankruptcy Act, 1825] upon his becoming a bankrupt, was established in *L'Apostre v. Le Plaistrier* (3), first tried before LORD HOLT at nisi prius in 1708, and afterwards so adjudged upon a Case made for the opinion of the Court of King's Bench. The same point was held by LORD COWPER in *Copeman v. Gallant* (4). In *Whitecomb v. Jacob* (2), in Chancery in 1710, the doctrine was carried further, and to an extent which fully comprehends the present case. There, a factor entrusted with the disposal of merchandise for his principal, sold it, received the money, and instead of paying the money to his principal, vested the produce in other goods, and died indebted in debts of a higher nature. There it was held that those goods should be taken as the merchant's estate, and not the factor's; and though that was not the case of a factor becoming a bankrupt, yet it makes no difference whether the person claiming to represent the factor was his executor or administrator, or his assignee; except only as far as the case might be affected by the Bankruptcy Act, 1623, and which it cannot be, if the factor bankrupt had the order and disposition of the property entrusted to him in the character of factor only, and not as owner: for that point the above-cited cases of *L'Apostre v. Le Plaistrier* (3) and *Copeman v. Gallant* (4), are authorities.

Some doubt was attempted to be thrown upon the authority of *Whitecomb v. Jacob* (2), in the argument by the plaintiffs' counsel; but that case is expressly referred to by WILLES, C.J., as an authority in law, and recognised by him as such in his judgment in *Scott v. Surman* (1) before referred to. In *Ryall v. Rolle* (5), BURNET, J. (who, together with LEE, C.J., and PARKER, C.B., assisted LORD HARDWICKE, L.C., in the judgment upon that occasion), is reported to have cited *Whitecomb v. Jacob* (2) as it is given us in 1 Salk. 160, as well as that of *Scott v. Surman* (1) before WILLES, C.J. (though he cites, or the reporter Atkins represents him as citing, the latter by the mistaken name of *Salmon v. Scott*). LEE, C. J., recognises the general principle that things arising from the sale of other things "follow the nature of the goods themselves," and he adds: "BURNET, J., has cited cases to show that they are so where the thing can be discovered." The cases cited by BURNET, J., were the very cases of *Whitecomb v. Jacob* (2) (in respect to which the doubt has been suggested to us), and *Scott v. Surman* (1) before WILLES, C.J. The cases were cited by BURNET, J., in these terms (1 Atk. at p. 172):

"Suppose goods are consigned to a factor, who sells them and breaks, the merchant for the money must come in as a creditor under the commission; but if the money is laid out in other goods, these goods will not be subject to the bankruptcy, 1 Salk. 160. Suppose, instead of selling the goods for ready money, he sells for money payable at a future day, and breaks before the

day, if the assignees receive the money, it will be for the use of the merchant. Or suppose that the factor had taken notes for the goods, if his assignees receive the money upon these notes, it will be to the merchant's use. This was determined in the Court of Common Pleas. *Salmon v. Scott*, Hil. 16 G. 2.

LEE C.J., adds (*ibid.* at p. 181):

"SWYNBURNE, 506, 6th edition, is upon the same foundation. If a man devises his movable goods to B., and his immovable to C., upon a question how the debts shall go, he says, those debts which did arise by occasion of the things movable, and for recovering whereof there lies an action personal, belong to that person to whom the testator did bequeath his movable goods, which shows that the produce of the goods were of the same nature with the goods themselves."

LORD MANSFIELD, in 3 Burr. 1369, in the case of a bankrupt executor, holds that the specific effects of the testator do not pass under the commission. He says:

"If an executor becomes bankrupt, the commissioners cannot seize the specific effects of the testator, not even in money, which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself."

Specific remittances, as in *Ex parte Chion* (6), and in *Hassall v. Smithers* (7), are governed by the same principle. The representatives, whether deriving their title to the property through the death, or by the bankruptcy of the person possessed of it, can be in no better plight than the person whom they represent would have been, and hold it, if it comes to their hands, in trust for and applicable to the same purposes as he held it, and not as part of the proper estate of the deceased or bankrupt person. As to the following money into land, the Court of Chancery has (as said by LORD HARDWICKE in the case cited of *Lane v. Dighton* (8)), been very cautious of doing it, but has done it in some cases. LORD HARDWICKE says (*Amb.* at p. 413):

"No one will say but the court would [do it], if it was actually proved that the money was laid out in land. The doubt with the court in those cases has been as to the proof. There is difficulty in admitting proof; parol proof might let in perjury; but it has always been done when the fact has been admitted in the answer of the person laying it out."

There is, therefore, according to LORD HARDWICKE, who had on that occasion the principal authorities on the subject brought in review before him, no difficulty but in respect of the proof; which difficulty, particularly as arising from the Statute of Frauds, seems to have weighed with LORD SOMMERS and the Master of the Rolls and POWELL, J., against charging the land in *Kirk v. Webb* (9).

No difficulty, however, of that kind in respect to proof, nor any peculiar rules or habits of courts of equity in respect to the charging of land, stand between the original proprietor and his rights in respect to the ascertained produce of his own funds upon this occasion. He has re-possest himself of that, of which, according to the principles established in the cases I have cited, he never ceased to be the lawful proprietor; and having so done we are of opinion, that the assignees cannot in this action recover that which, if an action were brought against them the assignees by the defendant, they could not have effectually retained against him, inasmuch as it was trust property of the defendant, which, as such, did not pass to them under the commission. If this case had rested on the part of the defendant on any supposed adoption and ratification on his part of the act of converting the produce of the draft or bank-notes of the defendant into these American certificates, we think, it could not have been well supported on that ground, inasmuch as the defendant, by taking a security by bond and judgment to indemnify himself against the pecuniary loss he had sustained by that very act, must be understood to have disapproved and disallowed that act instead of

A adopting and confirming it; but upon the other grounds above stated, we are of opinion that the defendant is entitled to retain the subjects of the present suit, and of course that a nonsuit must be entered.

Judgment for defendant.

B

WILSON v. GREENWOOD

C

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), April 16, 18, July 17, 1818]

[Reported 1 Swan. 471; 1 Wils. Ch. 223; 36 E.R. 469]

Partnership—Bankruptcy—Deed entered into by partners in contemplation of bankruptcy of partner—Validity—Assignees, quoad his interest, tenants in common with solvent partners.

D

Articles of partnership provided that on dissolution by death, notice, or misconduct of a partner the remaining partners should have the option of taking his share at a valuation, payable by yearly instalments in the course of seven years, and that on the bankruptcy or insolvency of a partner the partnership should be immediately void as to him. By a subsequent deed the partners declared (after a recital that such was their intention in the articles), that in the event of bankruptcy or insolvency the same arrangement should be practised as on dissolution by death, notice, or misconduct. One of the partners became bankrupt within a few months after the execution of the deed.

E

Held: the deed was made in contemplation of bankruptcy, and its provisions did not bind the assignees in bankruptcy; the partnership, therefore, was to be dissolved on the bankruptcy as if no special provision had been made, and the assignees of the bankrupt partner became, quoad his interest, tenants in common with the solvent partners; in the circumstances of the case a sale of the partnership property would be ordered, and a receiver appointed.

F

Notes. Considered: *Hall v. Hall* (1850), 3 Mac. & G. 79; *Whitmore v. Mason* (1861), 2 John. & H. 204; *Collins v. Barber*, [1893] 1 Ch. 578. Applied: *Re Johnson, Ex parte Matthews and Wilkinson*, [1904] 1 K.B. 134; *Re Wombwell*, [1921] All E.R. Rep. 483. Referred to: *Francis v. Spittle* (1840), 9 L.J.Ch. 230; *Re Fernandes, Ex parte Hope* (1844), 3 Mont. D. & De G. 720; *Tibbits v. Phillips* (1853), 10 Hare, 355.

G

As to forfeiture of share in partnership in event of bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 418, 419; as to receiver of partnership property, see 28 HALSBURY'S LAWS (3rd Edn.) 554 et seq.; as to sale of partnership property by order of the court, see *ibid.* 573; and for cases see 20 DIGEST (Repl.) 705-710.

H

Case referred to:

(1) *Crawshay v. Maule, Maule v. Crawshay* (1818), 1 Swan. 495; 1 Wils. Ch. 181; 36 E.R. 479; 36 Digest (Repl.) 429, 51.

Also referred to in argument:

I

Dommet v. Bedford (1796), 6 Term Rep. 684; 3 Ves. 149; 101 E.R. 771; 5 Digest (Repl.) 710, 6188.

Re Meaghan (1803), 1 Sch. & Lef. 179; 4 Digest (Repl.) 293, *1160.

Motion for the appointment of a receiver and manager, brought by the assignees in bankruptcy of Ellis against the defendants, Greenwood and Whitaker.

John Greenwood, Jonas Whitaker, and William Ellis, having agreed to become partners in the business of cotton spinners, by indenture dated October 20, 1812, covenanted that the partnership should continue for four years from June 30 preceeding (determinable by death, misconduct, or notice); but if not dissolved by the

death of any of the partners, or for such misconduct as therein after-mentioned, or if none of the partners should give twelve months' notice in writing, of his intention to terminate it at the expiration of that period, the partnership should not then cease, but should continue until one of the partners should give twelve months previous notice in writing, of his intention to dissolve it; and thereupon, at the expiration of such twelve months, the partnership should cease, as to the partner giving such notice. A

The articles of partnership further provided, that immediately after the determination of the partnership, either by the death of any of the partners, or by notice, or for misconduct as thereafter mentioned, a final account should be made and settled of the co-partnership, and the property belonging thereto, and all the debts then owing by or on account thereof; and the excess of capital which any partner, or the executors or administrators of any partner, might then have in the partnership, above the share of the other partners, or their executors, should be discharged out of the partnership effects; and all the effects (including the real estate) of the co-partnership, should be valued by three indifferent persons, one to be named by each of the partners, or by the executors or administrators of a deceased partner. In case any of the partners should refuse to join in such nomination, the three referees should be named by the other or others of the partners interested in the valuation; and the determination of the referees (who were empowered to employ, at the expense of the co-partnership estate, competent persons to estimate the value of the respective properties) should be conclusive as to the value; and upon such valuation being perfected, the surviving or continuing partner or partners, should have the option of purchasing the share of the partner so dying or withdrawing, at the price ascertained by such valuation, and should be allowed two months from the date of the valuation, for making such election. In case of any difference in judgment between the referees, they, or any two of them, should appoint an umpire, whose judgment should be conclusive; and the determination of the referees, or any two of them, should bind the several partners, their respective executors and administrators, to complete the sale and purchase of the share of every partner so dying or withdrawing, by making and accepting a release and assignment thereof, at the price so ascertained; but such partners or partner, continuing to carry on the trade, and becoming the purchasers or purchaser of the share of the partner dying or withdrawing, should be allowed the term of seven years for the payment of the price or purchase-money thereof, by equal yearly instalments, with interest for the purchase-money, or the unpaid part thereof, from the determination of the partnership until payment of the instalments respectively; and the purchase-money and interest should be effectually secured by a mortgage of the share so sold, and such bond or further assurance, as by such retiring partner, or the executors of such deceased partner, should be reasonably required; and in such bond or other assurance, should be inserted a proviso, whereby, if default should be made in payment of any of the instalments for the space of one month, the whole of the purchase-money should become an immediate debt. If the partners so continuing to carry on the trade, should refuse or neglect for two months from the date of the valuation, to declare their intention of becoming the purchasers of the share of the partner so dying or withdrawing, at such valuation, the parties would, within two months after such refusal or neglect, join in a sale of the entirety of the effects of the partnership, by public auction; and it was declared, that the parties were joint and equal partners, as well in the mills and other effects, as in all profits of the trade, and that they would bear equally all losses. B C D E F G H I

It was further declared, that if any of the partners should become bankrupt or insolvent, the partnership, with respect to such partner, should be immediately void; and that upon the ceasing of the partnership, a final account in writing should be taken and entered in the co-partnership books, of the property belonging to or employed in the trade, and also of all debts and engagements due from or

A entered into by the partnership; and true copies of such accounts should be delivered to each of the parties, or their respective heirs, executors, or administrators, the same, and the copies thereof, to be signed by all the partners, testifying their settling and approving thereof; and that thereupon the co-partnership estate and effects should be sold and converted into money; and after payment of the debts and engagements of the partnership, the residue should be equally
B divided between the parties, according to their shares in the co-partnership; but if the moneys arising from such sale should not be sufficient to satisfy the debts and engagements, the partners should sustain such deficiency equally.

The partnership continued till Nov. 9, 1816, when a joint commission of bankruptcy was issued against Ellis, and certain persons with whom he was connected in a business distinct from that in which Greenwood and Whitaker were interested.

C The bill filed by the assignees of Ellis against Greenwood and Whitaker, prayed a declaration, that the partnership under the articles of October, 1812, was determined by the bankruptcy of Ellis, and that the plaintiffs, as his assignees, were entitled to have all the partnership property, as well real as personal, sold; and an account of the particulars of which, at the date of the commission, it consisted
D and of the subsequent application or disposition thereof by the defendants; that the outstanding debts might be collected, and all the partnership accounts liquidated; that the clear surplus of the partnership property, and the proceeds thereof, and of the profits of the concern to the issuing of the commission, might be ascertained, and the share due to the bankrupt's estate paid to the plaintiffs; and that if it should appear that the defendants had, since the issuing of the
E commission, carried on the trade, or used the partnership property for their own benefit, they might be compelled to account to the plaintiffs for a moiety of such profits, or interest on the amount of the bankrupt's share from the date of the commission, at the option of the plaintiffs; and a receiver or manager of the partnership property.

The plaintiffs now moved, on affidavit before answer, for a receiver and manager.

F The affidavit, in opposition to the motion, stated, that by indenture dated July 3, 1816, between Greenwood, Whitaker, and Ellis, after reciting the articles of co-partnership, and that the parties conceived they had not thereby (although their original intention was so to do), in the case of bankruptcy or insolvency of any one of the parties, or in those cases followed by notice amounting to a dissolution of the co-partnership, sufficiently provided for the circumstance of any two solvent
G partners, or any two partners desirous to continue as between themselves the co-partnership, carrying on the same on the terms and conditions annexed to the two cases of a partner dying or withdrawing voluntarily from the co-partnership; and that the parties, being desirous to place every case of a dissolution of the partnership, which should apply to or arise upon the going out, voluntarily or involuntarily, of any one of the partners, on the same footing, should the same happen by death,
H under a notice of withdrawing, from bankruptcy, insolvency, or for any other reason mentioned in the articles of partnership as causes of dissolution, had agreed to execute the present instrument to give effect to their intention, and for carrying into effect their agreement and meaning; the parties covenanted with each other, that in all cases of a partial dissolution of the co-partnership, wherein one only of the parties should withdraw from the co-partnership concern, or cease to
I have any interest therein, whether the same should happen with or without his consent in any manner, the same order and method, and none other, should be adopted and pursued, for ascertaining his interest and property in the partnership effects, as is marked out in the original articles of partnership, in the two cases of a partner dying, or withdrawing under his own notice for that purpose; and the same period of time, to wit, seven years from the time of such dissolution, by seven equal yearly instalments bearing interest, should be allowed to the continuing partner, for the liquidation of the retiring partner's share and interest in the partnership property, as it might then happen to be, anything in the recited articles

to the contrary notwithstanding; and the parties, in all other respects not thereby altered, ratified and confirmed all the clauses, provisoes, and agreements, contained in the original articles of co-partnership. A

The affidavit also stated, that the agreement of July, 1816, was executed without any fraudulent intention; and that in November, 1817, the defendants, by a written notice, required the plaintiffs to join in a settlement of accounts and valuation, according to the provisions of the articles of partnership, the defendants waiving the benefit of the clause entitling them to a delay of seven years for the payment of the bankrupt's share, and offering payment on the settlement of the accounts; and Ellis deposed, that at the time of the execution of the agreement of July, 1816, he had not committed, or contemplated the commission of, an act of bankruptcy, nor entertained any doubt of his own solvency, or of the solvency of any partnership in which he was engaged. B C

The affidavit of one of the assignees of Ellis, in support of the motion, stated his belief that the agreement of July, 1816, was executed when Ellis was insolvent, and in contemplation of bankruptcy; and that Ellis, in his final examination, did not disclose that deed.

Sir Samuel Romilly, Bell and Horne, in support of the motion.

Hart and Shadwell opposed the motion. D

LORD ELDON, L.C.—When a partnership expires, whether by the death of the parties or by effluxion of time, without special provision as to the disposition of the property, in all these cases, to which I may add the bankruptcy of a partner, the partnership is considered, in one sense, as determined, but in a sense also as continued, that is, continued till all the affairs are settled (*Crawshay v. Maule* (1), 1 Swan. at p. 507); and as, in the ordinary course of trade, if any of the partners seek to exclude another from taking that part in the concern which he is entitled to take, the court will grant a receiver; so in the course of winding-up the affairs after the determination of the partnership, the court, if necessary, interposes on the same principle. E

In this case, the first question is whether, supposing the original deed had provided for the dissolution of the partnership by bankruptcy, as it has provided for the dissolution by other means, that provision would be good. I will not say that it would not; but I have heard nothing to convince me that it would. From the original deed it is clear that the intention of the parties was not, as the defendants insist, to apply the special provision to the event of dissolution by bankruptcy. After providing for other cases, it expressly declares, that in case of bankruptcy, the concerns are to be wound-up in the same way as if no special provision was made. On this agreement, the parties proceed till the execution of another deed, which, in one sense, may be justly said to be made in contemplation of bankruptcy, because it is applicable to the event of bankruptcy alone, but I have no doubt, from the face of it, that it was made in a strict sense in contemplation of bankruptcy, for it contains a recital, which cannot be believed by anyone who looks at the original deed, that the parties to that deed intended the same provision in cases of bankruptcy and insolvency as in the case of dissolution from other causes. F G H I
I go further, the inefficacy of the terms of the agreement as applied to bankruptcy, affords another proof that that application was not designed. In the event of dissolution by misconduct, the parties were to name a valuer, and the property was to be divided; if the partnership was dissolved by the death of a partner, what was to be done? His executors or administrators were to name a valuer. The deed then contemplating bankruptcy and insolvency, the provision for insolvency is sufficient, because, while not yet become a bankrupt, the insolvent retains all capacities of acting, but if he becomes bankrupt it is impossible to contend that, under this clause, he is to name the persons who are to value the interests of his assignees, and no such authority is given to his assignees, for the word "assigns" is not to be found in the deed.

A I have no doubt, therefore, whether, on general principle, or on the construction of the deeds, that the law of this case is that the partnership was dissolved by bankruptcy, and the property must be divided as in the ordinary event of dissolution without special provision. The consequence is that the assignees of the bankrupt partner are become, quoad his interest, tenants in common with the solvent partners, and the court must then apply the principle on which it proceeds in all cases where some members of a partnership seek to exclude others from that share to which they are entitled, either in carrying on the concern, or in winding it up, when it becomes necessary to sell the property, with all the advantages relative to goodwill, etc.

B
C With these observations, I shall, for the present, leave the case, considering it one in which some arrangement among the parties is evidently recommended by the interest of all.

D July 17, 1818. The motion being again mentioned, *Hart* objected that in the absence of imputation of misconduct, or suspicion of insolvency, the appointment of a receiver was not a measure of necessity for the sale of partnership property. *Sir Samuel Romilly* contended that a division of the stock (to which, on the dissolution of the partnership by the bankruptcy, the assignees were entitled) having become impracticable by the continuance of the trade during two years, and the consequent change of stock, a sale was necessary, and would be best conducted by a receiver, the plaintiffs not objecting to the appointment of the defendant, Greenwood.

E **LORD ELDON, L.C.**—The property must be sold. Greenwood may be appointed receiver, and let the Master consider the best mode of sale.

*Order accordingly, together with the usual directions
for the taking of the partnership accounts.*

BLACKBURN v. STABLES

[ROLLS COURT (Sir William Grant, M.R.), July 15, 1813, February 17, 19, 1814]

[Reported 2 Ves. & B. 367; 35 E.R. 358]

*Will—Children—Child en ventre sa mère at testator's death—Right to take under will.**Will—Quantity of interest taken—Determination by strict and technical meaning of words of will—"Male heir."*

A testator devised his residuary estate in trust for a son of his nephew at the age of 24 years, with substitutional devises if the nephew had no such son, and he further provided that whoever should take under such disposition "shall not be put into possession of any of my effects till he attains the age of 24 years" nor shall my executors give up their trust till a proper entail be made to the male heir by him." The plaintiff, a son of the nephew, was en ventre sa mère at the time of the death of the testator.

Held: (i) the plaintiff was entitled to take under the will, as a child en ventre sa mère was to be considered to be in existence for his benefit; (ii) the devise being mere bounty, there was no presumption that the testator intended one quantity of interest rather than another, and the extent of that bounty, in the absence of clear intention to the contrary, would be construed according to the words used in their strict and technical sense; there being no indication here that the words "male heir" of the body were not intended to be used in their technical sense as words of limitation and not of purchase, the plaintiff was entitled in tail male.

Notes. The mode of creating an entailed interest is now limited by s. 30 (1), (2), of the Law of Property Act, 1925; see also s. 131 of the Act: 20 HALSBURY'S STATUTES (2nd Edn.) 704, 707, 710.

Applied: *Marshall v. Bousfield* (1817), 2 Madd. 166. Distinguished: *Shelton v. Watson* (1849), 18 L.J.Ch. 223. Considered: *Sackville-West v. Holmesdale* (1870), L.R. 4 H.L. 543. Applied: *Re Wilmer's Trusts*, *Moore v. Wingfield*, [1903] 1 Ch. 874. Referred to: *Parker v. Bolton* (1835), 5 L.J.Ch. 98; *Holloway v. Collier* (1853), 1 W.R. 266; *Silcocks v. Silcocks*, [1916] 2 Ch. 161.

As to a gift to a child en ventre sa mère, see 39 HALSBURY'S LAWS (3rd Edn.) 1075, 1076; and for cases see 44 DIGEST 884-886. As to the quantity of interest taken under a will, see 39 HALSBURY'S LAWS (3rd Edn.) 1080 et seq.; and for cases see 44 DIGEST 908-911.

Cases referred to:

- (1) *Beale v. Beale* (1713), 1 P. Wms. 244; 24 E.R. 373, L.C.; 40 Digest (Repl.) 654, 1473.
- (2) *Northey v. Strange* (1716), 1 P. Wms. 340; 24 E.R. 416; 44 Digest 834, 6864.
- (3) *Archer's Case*, *Baldwin v. Smith* (1597), 1 Co. Rep. 66 b; 2 And. 37; Cro. Eliz. 453; 76 E.R. 146; 24 Digest (Repl.) 926, 9337.
- (4) *Leonard v. Earl of Sussex* (1705), 2 Vern. 526; 23 E.R. 940; 40 Digest (Repl.) 490, 40.
- (5) *Papillon v. Voice* (1731), 2 P. Wms. 471; 1 Eq. Cas. Abr. 185; Kel. W. 27; Fitz-G. 38; 24 E.R. 819, L.C.; 40 Digest (Repl.) 490, 37.
- (6) *Doe d. Hayter v. Joinville* (1802), 3 East, 172; 102 E.R. 563; 44 Digest 889, 7465.
- (7) *Lade v. Holford* (1763), 1 Wm. Bl. 428; Amb. 479; 3 Burr. 1416; 96 E.R. 244; 37 Digest (Repl.) 90, 262.
- (8) *Phipps v. Kelsynge* (1767), 2 Ves. & B. 57, n.; 35 E.R. 240, L.C.; 37 Digest (Repl.) 66, 86.
- (9) *Stephens v. Stephens* (1736), Cas. temp. Talb. 228; 2 Barn. K.B. 375; 25 E.R. 751, L.C.; 37 Digest (Repl.) 55, 1.

- A (10) *Taylor d. Smith v. Biddall* (1677), 2 Mod. Rep. 289; 1 Freem. K.B. 243; 2 Eq. Cas. Abr. 335; 86 E.R. 1078; 44 Digest 1041, 8974.
- (11) *Long v. Blackall* (1797), 3 Ves. 486; 30 E.R. 1119, L.C.; 44 Digest 897, 7562.
- (12) *Thellusson v. Woodford* (1799), 4 Ves. 227; 31 E.R. 117; affirmed (1805), 11 Ves. 112; 1 Bos. & P. N.R. 357; 32 E.R. 1030, H.L.; 37 Digest (Repl.) 64, 71.
- B (13) *Countess of Lincoln v. Duke of Newcastle* (1806), 12 Ves. 218; 33 E.R. 84, H.L.; 40 Digest (Repl.) 523, 342.

Bill praying for an account in respect of the real and personal estate of a testator. Joseph Blackburn by his will, dated May 25, 1787, devised as follows:

C "all the rest or remainder of my real and personal estate I give and bequeath in trust to my executors Joseph Blackburn, my nephew and executor, and Miles Flesher, who married my great niece: that is, for the sole use and benefit of a son of the said Joseph Blackburn an executor at the age of twenty-four years: if he hath no son, to a son of my great nephew Joseph Blackburn, son of my nephew Benjamin Blackburn: but if neither of these have a son, then to a son of my great niece's daughter Elizabeth Flesher," [with a direction to take the name of Blackburn:] "but on whomsoever such my disposition shall take place my will is, that he shall not be put into possession of any of my effects, till he attains the age of twenty-four years: nor shall my executors give up their trust, till a proper entail be made to the male heir by him."

E Joseph Blackburn, the executor, did not have a son born at the death of the testator: but his wife was then enceinte with the plaintiff; who was soon afterwards born, and had attained the age of twenty-four.

The bill prayed an account of the personal estate, and of the rents and profits of the real estate.

F *Sir Samuel Romilly and Johnson* for the plaintiff: Though Joseph Blackburn, the executor, had at the death of the testator no son born, the son, then in ventre sa mère, and afterwards born, may be considered as having been in the testator's contemplation: such child being considered as in existence for his benefit: SWINBURNE, 487, *Beale v. Beale* (1), *Northey v. Strange* (2).

G This is either an estate tail in the plaintiff, or in his first son, if *Archer's Case* (3) is applicable; the intention to entail this estate being declared. In all the cases of executory trust was some indication of an intention, that care should be taken to prevent the first taker from cutting off the entail. That is expressly stated in *Leonard v. Earl of Sussex* (4), upon which all the others proceed; and there is no instance of abridging the first estate without some foundation for the inference of a strict entail, which the first taker should not have the power of determining: in other words, an intention to make the estate unalienable, as long as the rules of law would permit. Here is no foundation for that inference as there was in *Papillon v. Voice* (5) from the express words: "Estate for life without impeachment of waste." The only distinct object of this testator, the perpetuation of his name, would not in some events be answered by an estate for life only.

H *Barber* for the defendants, objected to the devise, as being void: first, for uncertainty: *Doe d. Hayter v. Joinville* (6). Secondly, it was void on being too remote: *Lade v. Holford* (7), *Phipps v. Kelynge* (8), *Stephens v. Stephens* (9), *Taylor d. Smith v. Biddal* (10), *Long v. Blackall* (11).

I July 15, 1813. SIR WILLIAM GRANT, M.R., on making the decree in the first instance in the plaintiff's favour observed: It is perfectly settled, that a child in ventre sa mère is to be considered as in existence for his benefit; and *Thellusson v. Woodford* (12) went further, where it was held that such a child should be so considered to his disadvantage; those, who supported the will, relying upon the distinction that for his advantage he was to be so considered.

Feb. 19, 1814. **SIR WILLIAM GRANT, M.R.**—It seems clear, that this is an executory trust; and I know of no difference between an executory trust in marriage articles and in a will (*Countess of Lincoln v. Duke of Newcastle* (13)), except that the object and purpose of the former furnish an indication of intention, which must be wanting in the latter. When the object is to make a provision by the settlement of an estate for the issue of a marriage, it is not to be presumed, that the parties meant to put it in the power of the father to defeat that purpose, and to appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the court decrees a strict settlement in conformity to the presumable intention: but, if a will directs a limitation for life, with remainder to the heirs of the body, the court has no such ground for decreeing a strict settlement.

A testator gives arbitrarily what estate he thinks fit. There is no presumption, that he means one quantity of interest rather than another, an estate for life rather than in tail or in fee. The subject being mere bounty, the intended extent of that bounty can be known only from the words, in which it is given: but if it is clearly to be ascertained from anything in the will, that the testator did not mean to use the expressions, which he has employed, in their strict, proper, technical, sense, the court in decreeing such settlement as he has directed will depart from his words in order to execute his intention: but the court must necessarily follow his words, unless he has himself shown, that he did not mean to use them in their proper sense; and have never said, that merely because the direction was for an entail, they would execute that by decreeing a strict settlement.

Let us see, then, what estate the plaintiff would have according to the literal import of the direction in this will. Certainly the "male heir by him" cannot be the first taker: there must be some estate limited to the ancestor; and the male heir can only take by way of remainder. Suppose the limitation made to the plaintiff either generally or for life: the remainder will be "to the male heir by him;" that is, to the heirs male of his body; which would make an estate tail in the plaintiff; as it is settled, that the words "heir" or "heir male of his body," in the singular number, are words of limitation, not of purchase; unless words of limitation are superadded (*Archer's Case* (3)), or there is something in the context to show that the testator did not mean to use the words in their technical sense. But there is nothing in the context of this will, from which that can be collected. Here is an absence of every circumstance, that has commonly been relied on as showing such intention. The word is "heir," not "issue:" there is no express estate for life given to the ancestor; no clause, that the estate shall be without impeachment of waste; no limitation to trustees to preserve contingent remainders; no direction so to frame the limitation, that the first taker shall not have the power of barring the entail. Everything is wanting, that has furnished matter for argument in other cases. The words are, therefore, to be taken in their legal acceptance.

The consequence is, that I must declare the plaintiff entitled to have the conveyance made to him in tail male.

Declaration accordingly.

KENNEDY v. LEE

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), August 29, November 12, 17, 1817]

[Reported 3 Mer. 441; 36 E.R. 170]

Business—Sale—Covenant by vendor not to compete—Need for express term.

Goodwill arises from the ownership of a trade or business, and its value is increased by the existence of covenants restricting competition by another person. Such a covenant will not be implied in a contract for the sale of a business. To be effective it must be express.

Contract—Conclusion of contract—Need for agreement by parties on cardinal points—Contract contained in letters.

In order to form a contract by letter nothing more is necessary than that, when one party makes an offer to another to sell for so much and the other closes with the terms of the offer, there must be a fair understanding on the part of each as to what is to be the purchase-money and how it is to be paid, and also a reasonable description of the subject of the bargain. Where there is, on the one hand, a general proposal, and, on the other, an acceptance of that proposal, expressly leaving some particulars essential to the subject-matter of the agreement to be afterwards settled, or where, in a subsequent communication one of the parties introduces a new proposal, there is no evidence before the court of such a contract as the court can enforce on the ground of the cardinal points having been agreed between the parties.

Specific Performance—Contract—Contract contained in letters—Clear evidence of agreement.

Specific performance of an agreement contained in letters passing between the parties will be decreed where the correspondence is of such a nature as, according to the rules of sound legal interpretation, clearly amounts to an agreement, and the contract will be carried into effect in the same manner as if it had been regularly drawn up as a formal contract and signed by the parties as such.

Notes. Considered: *Thomas v. Blackman* (1844), 1 Coll. 301; *Churton v. Douglas* (1859), John. 174; *Baumann v. James* (1867), 16 L.T. 165; *Cayley v. Walpole* (1870), 39 L.J.Ch. 609; *Preston v. Luck* (1884), 27 Ch.D. 497. Referred to: *Thornbury v. Beville* (1842), 1 Y. & C. Ch. Cas. 554; *Chinnock v. Ely* (1865), 4 De G.J. & Sm. 638; *Lewis v. Brass* (1877), 37 L.T. 738; *Rossiter v. Miller* (1878), 3 App. Cas. 1124; *Reynolds v. Bullock* (1878), 47 L.J.Ch. 773; *Ginesi v. Cooper* (1880), 14 Ch.D. 596; *Pearson v. Pearson* (1884), 27 Ch.D. 145; *Hawkesworth v. Chaffey* (1886), 54 L.T. 72; *I.R. Comrs. v. Muller's Margarine* (1901), 84 L.T. 729; *Chillingworth v. Esche* (1923), 129 L.T. 808.

H Case referred to:

(1) *Howard v. Hopkyns* (1742), 2 Atk. 371; 26 E.R. 624, L.C.; 44 Digest (Repl.) 27, 183.

Also referred to in argument:

Marquis of Townshend v. Stangroom, *Stangroom v. Marquis of Townshend* (1801), 6 Ves. 328; 31 E.R. 1076, L.C.; 35 Digest (Repl.) 143, 350.

I Bill praying for specific performance of an agreement contained in letters.

For several years before the year 1816 the plaintiff and the defendant jointly carried on as partners the trade or business of nursery gardeners and seedsmen, and in the course of the said trade or business purchased with their partnership moneys, or otherwise acquired for the benefit of their partnership, divers freehold, copyhold, and leasehold messuages, gardens, lands and tenements, and became possessed of a large stock in trade. Large sums of money became due to them as partners, and large sums out of the partnership property were expended in building

walls, hothouses, greenhouses, and other buildings and improvements on the premises. The parties were entitled to these partnership effects, and interested in the losses and profits of the said business, in equal shares. The accounts of the partnership were usually taken and settled about Midsummer in every year. A

On April, 1816 the plaintiff gave to the defendant a verbal notice of his (the plaintiff's) intention to dissolve the partnership at Midsummer then next ensuing. The defendant verbally accepted such notice, whereupon some discussion took place between the plaintiff's solicitor and the defendant as to the mode of dissolving the partnership, and, in October, 1816, the defendant delivered to the plaintiff a valuation made by him (the defendant) of the messuages and effects belonging to the partnership, whereby the partnership property, exclusive of bonds and book debts, appeared to be under the value of £16,000. At the same time the plaintiff caused an estimate of the partnership property to be delivered to the defendant on his behalf, by which last-mentioned estimate the same property appeared to be of the value of £32,000 or thereabouts. The defendant proposed to give to the plaintiff the sum of £8,000 for the plaintiff's moiety, and the plaintiff thereupon wrote and sent to the defendant a letter, dated Oct. 21, 1816, as follows: B C

"I did not wish to part with my concern in the nursery altogether, until I had seen my son Lewis. As I received a portion of the property in hereditary succession, I considered I ought to consult the rightful successor to the business, although the whole right may rest with me in the disposal of it. We yesterday morning canvassed the matter, and he has no objection to the sale of it, but from the low estimation you seem to form of the concern, which certainly has attained its apex in this line of business from the very large sums and sacrifices which have been expended and made to promote this end. Now, although the business of the last year did not realise as much as the antecedent ones, yet, upon a calculation of the amounts for the last twelve years, the average of receipt has been upwards of £1,500 per annum each, and, upon an average of six years last, £1,800 per annum, besides the rent of houses, taxes, coals, etc., which have been paid from the joint stock, making the sum in the last six years equal to £2,000 per annum, each, besides the very great accumulations to the book debts, and the large sums added to the aggrandisement of the nursery. Now, the £2,000 per annum alone, at 5 per cent., is £40,000; but, put it as acquired by business, and consequently attention and labour required, say £10 per cent. clear, this makes the value of such a business so producing worth at least £20,000 upon the lowest average. . . . I must own, I wish you to have it in preference. As to taking any securities for part of the money, I have no sort of objection, and that the book debts may be either divided or collected by either of us, as we may choose, or taken at a sum certain. If you will have the goodness to put your ideas upon paper to me, I shall be obliged; as, although unwillingly, yet I come prepared to say that if you are willing, and think so poorly of the affair, I will certainly, against my inclination, still continue in business, by offering you in cash any sum in reason you shall propose for its value, as my son thinks we perhaps may be able to manage it together." D E F G

In reply, the defendant wrote and sent to the plaintiff a letter bearing date Oct. 23, 1816, as follows: H

"As you think the just value of the nursery is £20,000, and add that you and your son can carry it on without much difficulty, I will readily sell you my inheritance of it for £10,000, and, that no opposition may stand in the way of your wishes, I will also sell you Butterwick at its fair value. I will also sell you my garden for what it has cost me, the best cultivated spot in England for its size, and the most productive." I

The bill proceeded to state that Butterwick and the garden mentioned in the defendant's letter were the sole property of the defendant; that the plaintiff did

A not desire to purchase them, but accepted the defendant's offer to sell his share in the partnership property at the price of £10,000; and that, on receipt of the defendant's letter, the plaintiff, on Oct. 26, wrote to the defendant as follows:

"Allow me to ask you in what time and manner you would propose to have the whole £10,000 paid, as offered in your last letter."

B In reply the defendant wrote and sent to the plaintiff another letter, as follows:

"You know I have a large family, I, therefore, cannot be idle. As I mean to carry on business, I shall want the cash, either to go into partnership, or to raise a nursery by myself. There is no doing this without money. In regard to the book debts, they may be divided as collected half-yearly, or annually, or as fixed upon. The bonds may be divided."

C On Oct. 28, 1816 the plaintiff wrote again to the defendant as follows:

"I agree to give you £10,000 as you mention, for your moiety of all your partnership premises, stock, business, and concern, excepting our bonds and book debts, comprising, therefore, our copyhold called Swansfield, our freehold at Feltham, our leasehold at Stanwell, our various leaseholds and nurseries in the parish of Hammersmith and Fulham, with all the erections, buildings, and all greenhouses and plants and improvements made thereon, and all our stock in trade, instruments and utensils, and all other our partnership property, except the bonds and book debts as above mentioned. I am prepared to pay the sum as soon as the proper conveyances and deeds can be made out, and I would, therefore, beg you to let me have the title deeds and papers concerning the premises that my solicitor may prepare the necessary papers without delay. I will divide the bonds, and arrange the book debts with you, as you mentioned."

Another letter of the defendant's without date, but supposed to be of the same date as the preceding letter of the plaintiff's was also in evidence between the parties. It was as follows:

F "I propose the following conditions, which I mean to lay before my friends, with your proposal, before I put my name to anything, as I have not consulted anyone yet. The partnership to cease Midsummer, 1817. The stock of Butterwick to be taken by Mr. Lee, according to Mr. Kennedy's valuation given in. Mr. Lee to remain in his house until he can conveniently remove after Midsummer, etc. When I have consulted my friends, you shall hear further."

G The plaintiff alleged that by the aforesaid letters a binding contract had been made between him and the defendant for the plaintiff to purchase and the defendant to sell the defendant's moiety of the partnership property, exclusive of bonds and book debts, at the price of £10,000, and prayed that the defendant might be decreed specifically to perform the contract and to convey and assign to the plaintiff all the partnership property, exclusive of the bond debts, and book debts due thereto, the plaintiff being thereupon ready and willing to pay the sum of £10,000 to the defendant, and that the bond debts and book debts might either be collected and the produce thereof divided between the plaintiff and the defendant or that the same might be divided and one moiety thereof assigned to the plaintiff, and the other moiety to the defendant. If the court should be of opinion that the contract ought not to be performed, the plaintiff asked that the partnership might be dissolved, the accounts taken, and the property sold and divided between the plaintiff and defendant, and that in the meantime the defendant might be restrained from carrying on the business of the partnership and acting as the partner of the plaintiff, and that some proper person or persons might be appointed to manage the business and to collect the debts due to the partnership.

The defendant, by his answer, denied that the plaintiff ever gave him notice of his intention to dissolve the partnership at Midsummer, or that anything passed

between them relative to a dissolution until Aug. 22, 1816, when the plaintiff's solicitor wrote to the defendant a letter, reminding him of a conversation which had taken place between the parties in the previous April and pressing an immediate and final settlement. He said that, after receiving this letter, he had some further conversation with the plaintiff on the subject, when the latter gave his reasons for wishing a dissolution. He admitted the valuations made on each side, and the correspondence, alleging that he never conceived himself to be bound thereby, but only considered the proposals made in the light of a treaty. He submitted that no binding contract or agreement had been made between them and that the plaintiff had given him no notice which amounted to a dissolution of the partnership, and he resisted the appointment of a receiver and the claim for an injunction.

The questions in the cause were first brought before the court upon a motion by the plaintiff for a receiver and an injunction according to the prayer of the bill. His LORDSHIP, after hearing counsel on both sides, requested to be informed if the parties were willing that the cause should be considered as having come on to be heard on bill and answer, and, the parties having intimated their consent that it should be so considered, the motion stood over till the last day of the sittings after Trinity Term, when His LORDSHIP, after stating the terms of the correspondence between the parties, expressed his opinion on the case, as follows:

LORD ELDON, L.C.—The question is whether this correspondence, closing thus with an offer, has formed a binding contract. In order to form a contract by letter, I apprehend nothing more is necessary than that, when one man makes an offer to another to sell for so much and the other closes with the terms of his offer, there must be a fair understanding on the part of each as to what is to be the purchase-money and how it is to be paid, and also a reasonable description of the subject of the bargain. The defendant, I am satisfied, was not aware of the precise effect of this correspondence, but, be that as it may, if the letters amount to a contract, so considered, the plaintiff has a right to have the contract specifically executed. After the letter of Oct. 28 the defendant writes a letter, in which he says he will sign nothing until he has consulted his attorney or friend. Then the question is whether this letter, being actually signed by the defendant, can be taken to be a contract already entered into with the plaintiff. With regard to that, it appears to me, when the defendant makes an offer of selling his share in the nursery for £10,000, and also Butterwick and the garden at the sum which they cost him, that £10,000 was the sum which was asked for the nursery independent of any proposal for Butterwick. Whether the plaintiff took Butterwick or not, it was the same thing; he might take it if he pleased at the sum it had cost the defendant. The plaintiff then writes to know in what time and manner the defendant would have the money paid, and he makes the offer of £10,000, if the time and manner of the stipulated payments should be convenient. The defendant writes back that the time and manner would be as soon as the title deeds were made out. This then was an agreement on one side, and, if accepted by the other, was binding on both, although it should turn out to be a surprise on the one or the other. It is binding on the defendant unless the plaintiff in his subsequent letter of Oct. 28, has gone beyond the fact in the description of the articles which are comprised under the denomination of the nursery concern. If the description of the property is correct in what it points out as being the nursery concern, it appears to me that this is a binding agreement between these parties, but, if it goes beyond that, it must so far be considered as a new proposition, and must be treated as such, and then it would be exceedingly difficult to say it was binding. In other words, if the detail of the subject in the last letter truly describes it as the nursery concern, I think the bargain is completed, but, if that is not an accurate view of the property, I am not prepared to say the contract is complete.

I do not mean to conclude you, however, by what I now say. I think it a hard

A case on the defendant, but you may understand that this is my judgment upon it unless the parties wish to have it re-argued at the next seal.

Nov. 12, 1817. In consequence of the intimation at the close of the preceding observations, the case was argued afresh before the LORD CHANCELLOR.

B *Leach* and *Horne* for the defendant: The plaintiff's letter, of Oct. 28, 1816, was manifestly not a simple acceptance of the defendant's offer contained in his letters of Oct. 23 and 26 because the plaintiff there expresses his agreement to give £10,000 for the defendant's moiety of the partnership premises, stock, "business and concern," by which last word it was contended that the goodwill of the business must be meant, which the defendant had never offered and had never for a moment intended to part with. This is manifest from the whole tenor of the correspondence, in which the defendant invariably spoke of his continuing in business. The goodwill of such a business was of very considerable value, and no price had been specifically set upon it in either of the estimates. It was according to frequent practice for one partner to sell to another the partnership stock and effects, without including the goodwill, which was always considered as a distinct property, and capable of separate assignment. In this case the insertion of it in the plaintiff's letter must be viewed as a surprise on the defendant, of which a court of equity would not allow any advantage to be taken, or, if otherwise meant, as forming the basis of a new treaty of which the letter in question was only the commencement. If it were to depend on the original offer and its acceptance, the offer itself, viz., "to sell the inheritance of the nursery for £10,000," did not contain any expression of those matters which it was necessary to have expressed in order to form a binding contract. It said nothing as to time, manner, possession of the property, or dissolution of the partnership, mentioned nothing but price, and left everything else to future arrangement. This offer, properly construed, was an offer to sell the share of the nursery at £10,000, and Butterwick also, at a price to be ascertained, and an acceptance as to one part only could not be considered as forming any contract since there was no offer to sell the one without the other.

F *Sir Samuel Romilly, Bell, and Shadwell* for the plaintiff.

Nov. 17, 1817. LORD ELDON, L.C.—Whether it might be better or not that this court had never entertained such suits for the specific performance of agreements which are left to be made out by the terms of a correspondence between the parties, as the present, it cannot, however, be disputed that it has been long since settled, as the doctrine of the court, that such agreements, when clearly made out, will be established, and that, if a correspondence is of such a nature as, according to the rules of sound legal interpretation, would amount to an agreement, the agreement so constituted will be carried into effect in the same manner as if it had been regularly drawn up in the form of articles of agreement and signed by the parties as such—that, in fact, the court will, in all such cases, regard, not the form of the agreement, but the substance, whether or not, in point of fact, such an agreement has been entered into in the same manner as, where the agreement contains a proviso in the nature of a penalty in case of breach of the agreement, a specific performance will nevertheless be denied as if no such proviso had been inserted: *Howard v. Hopkyns* (1).

I It must be understood, however, that the party seeking the specific performance of such an agreement is bound to find in the correspondence, not merely a treaty—still less, a proposal—for an agreement, but a treaty with reference to which mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance which makes it no longer the act of one party, but of both. It follows that he is bound to point out to the court, upon the face of the correspondence, a clear description of the subject-matter, relative to which the contract was in fact made and entered into. I do not mean (because the cases which have been decided would not bear me out in going so far) that I am to see that both parties really meant the

same precise thing, but only that both actually gave their assent to that proposition which, be it what it may, *de facto* arises out of the terms of the correspondence. The same construction must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument—the only difference between them being that a letter, or a correspondence, is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion. A

It must also be understood, that, in a case where there has been, on one hand, a general proposal, and, on the other, an acceptance of that proposal, expressly leaving some particulars essential to the subject-matter of the agreement to be afterwards settled, there is no evidence before the court of such a contract as the court can enforce upon the ground of the cardinal points having been agreed to between the parties. B

Where two persons are jointly interested in trade and one by purchase becomes sole owner of the partnership property, the very circumstance of sole ownership gives him an advantage beyond the actual value of the property, which may be pointed out as a distinct benefit essentially connected with the sole ownership. In the case of the trade of a nurseryman, for instance, the mere knowledge of the fact that he is sole owner of the property and in the sole and exclusive management of the concern gives him an advantage which the other partner, supposing him to carry on the same trade with other property not the partnership property would not possess. In that sense, therefore, the goodwill of a trade follows from, and is connected with, the fact of sole ownership. There is another way in which the goodwill of a trade may be rendered still more valuable, as by certain stipulations entered into between the parties at the time of the one relinquishing his share in the business, for instance, by inserting a condition that the withdrawing partner shall not carry on the same trade any longer, or that he shall not carry it on within a certain distance of the place where the partnership trade was carried on, and where the continuing partner is to carry it on upon his own sole and separate account. It is evident that, in neither sense, was the goodwill of this trade at all considered as among the subjects of the valuation to be made by either party. It was not so considered by the plaintiff when he wrote his letter of Oct. 21. The words “concern” and “inheritance” are used inartificially, and cannot be construed as having any reference but to the actual subjects of valuation. When the plaintiff offers to take the business himself, he could not have forgotten that the defendant’s own estate of Butterwick lay contiguous to the partnership property, and, therefore, his introducing no stipulation with reference to the fact of its contiguity is a clear intimation that, when he wrote this letter, he had no intention, in offering to take the partnership property, to purchase with it the goodwill in the sense of restricting the defendant from carrying on trade in its vicinity. In that sense, at least, therefore, the goodwill of the trade was not the subject of contract, or treaty even, between the parties. C D E F G

Then comes the defendant’s letter of Oct. 23 which shows that the defendant had then so far departed from his original determination as to make an offer to the plaintiff of his estate of Butterwick and the garden, besides taking his share of the partnership property. He considers the plaintiff by his letter of Oct. 21 as having made him an offer to purchase his share of the partnership property for £10,000, and he accepts that offer, and at the same time tenders to the plaintiff the purchase of Butterwick and the garden upon certain terms therein referred to, if he will have them. The acceptance and this offer are not necessarily connected. On the contrary, I cannot look at this letter, with reference to the offer of Butterwick, as anything more than a new and distinct proposal on the part of the defendant, which the plaintiff might, or might not, close with, but which, in either event, could have no bearing upon the cardinal points of the agreement, which must now be considered as settled. Where one man writes to another a letter containing an offer which the other accepts, that acceptance gives to the person making the offer an immediate right to say to the other: “As soon as I can show that I have the means of carrying H I

A my offer into execution, I am entitled to claim the benefit of your acceptance in the completion of the agreement."

If, then, the bargain had been struck on Oct. 23 by an immediate answer from the plaintiff, no question could possibly have arisen about what was intended as the subject-matter of the contract between the parties with reference to the goodwill, since it is plain that nothing was understood or agreed to be sold but the goodwill, necessarily arising from the mere fact of accidental ownership. However, instead of a direct immediate acceptance on the part of the plaintiff, there passes some further correspondence as to the time and manner of payment, after which comes the plaintiff's concluding letter of Oct. 28, and, upon that letter, the true question is whether it amounts to a final acceptance of the defendant's offer, regard being had to what had passed in the intermediate time. If by the words "business and concern" the plaintiff can be fairly taken as having meant anything more than the property which was the original subject of valuation between the parties—i.e., than the specific articles constituting the property of the partnership, together with that sort of goodwill which arises from, and is inseparably attached to, the sole ownership, I am of opinion that he must be considered as having introduced a new term into the subject-matter of the agreement, and, therefore, not to be entitled to a specific performance of any part of that agreement.

Upon the whole correspondence, and the facts of the case, taken together, I cannot but think that this letter is a virtual acceptance of the agreement made by the defendant to close with the plaintiff's original offer, and that, if more was meant, it is not so expressed as to vitiate the agreement or to constitute the terms of a new and additional proposal. I have always understood the law of the court to be, with reference to this sort of contract, that, if a person communicates his acceptance of an offer within a reasonable time after the offer being made, and if, within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the court will execute. I apprehend, therefore, that it is not competent to the defendant to say: "I made my proposal on Oct. 23, you propose terms of arrangement on Oct. 26 and do not finally agree to my proposal before Oct. 28, therefore, there is no binding agreement between us, and I will not now carry into effect my proposal such as you have agreed to accept it." It is not in the defendant's power, after this, to add terms in modification of that agreement.

Upon the whole, my opinion is that the terms of the contract and its subject-matter are sufficiently stated, but that the plaintiff has no right, according to the contract, to claim any goodwill in the trade in addition to the partnership property which is the subject of it except what is the necessary effect of his acquiring the sole ownership in the property—certainly not such as to preclude the defendant from carrying on the same trade, where, and when, and with whom he pleases.

Order accordingly.

ATTORNEY-GENERAL *v.* BRISTOL CORPORATION

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), April 20, 25, November 13, 15, 17, 18, 20, 21, 28, December 11, 1820]

[Reported 2 Jac. & W. 294; 37 E.R. 640]

Charity—Surplus arising from increase in value of trust property—Right of charity to surplus—Intention of donor—Ascertainment—Power of court to alter objects of charity.

Where money is paid to a trustee to purchase land and apply the resultant rent to the purposes of a charity, there is no express gift of any surplus arising from an increase in the value of the land, and there is a clear intention to attach a charitable trust to the whole property, the charity is entitled to a surplus so arising.

The matter depends on the intention of the donor, and one way of ascertaining that intention is to inquire whether the whole of the annual value of the property was, at the time of the foundation of the charity, distributed among the objects of the charity. If it was, that circumstance is evidence of the donor's intention to give the whole of the increased value to the same objects.

In distributing increased rents the court has authority to alter, not only the proportions in which the objects of the charity would take under the original instruments, but also the objects themselves.

Notes. Distinguished: *A.-G. v. Skinners' Co.* (1827), 2 Russ. 407. Considered: *Mercers, Mystery of v. A.-G.* (1828), 2 Bli. N.S. 165; *A.-G. v. Ward* (1829), 7 L.J.O.S.Ch. 114; *A.-G. v. Smithies* (1833), Coop. temp. Brough. 5; *A.-G. v. Skinners' Co.* (1833), 5 Sim. 596; *Jack v. Burnett* (1846), 12 Cl. & Fin. 812; *A.-G. v. Merchant Venturers' Co. Bristol* (1848), 17 L.J.Ch. 137; *Beverley Corpn. v. A.-G.* (1857), 6 H.L. Cas. 310. Referred to: *A.-G. v. Catherine Hall, Cambridge* (1820), Jac. 381; *A.-G. v. Brazen Nose College* (1834), 8 Bli. N.S. 377; *A.-G. v. St. John's College* (1834), Coop. temp. Brough. 394; *A.-G. v. Fishmongers' Co.* (1841), 5 My. & Cr. 11; *A.-G. v. Newark-upon-Trent Corpn.* (1842), 1 Hare, 395; *A.-G. v. Boston Corpn.* (1847), 1 De G. & Sm. 519; *Southmolton Corpn. v. A.-G.* (1854), 5 H.L. Cas. 1; *A.-G. v. Sidney Sussex College* (1869), 4 Ch. App. 722; *Merchant Taylors' Co. v. A.-G.* (1871), 6 Ch. App. 512; *A.-G. v. War Chandlers' Co.* (1873), L.R. 6 H.L. 1; *Re Slevin, Slevin v. Hepburn*, [1891-4] All E.R. Rep. 200; *Bourne v. Keane*, [1918-19] All E.R. Rep. 167.

As to the application of surplus income of a charity, see 4 HALSBURY'S LAWS (3rd Edn.) 303-306; and for cases see 8 DIGEST (Repl.) 443-446.

Cases referred to :

- (1) *A.-G. v. Coventry Corpn.* (1700), 2 Vern. 397; reversed (1702), Colles, 280; 1 E.R. 286, H.L.; 8 Digest (Repl.) 444, 1330.
- (2) *Inhabitants of Eltham v. Warreyn* (1634), Duke, 67; 8 Digest (Repl.) 481, 1868.
- (3) *Sutton Colefield Case* (1635), Duke, 68; 8 Digest (Repl.) 444, 1342.
- (4) *Hynshaw v. Morpeth Corpn.* (1629), Duke, 69; 8 Digest (Repl.) 444, 1341.
- (5) *Kennington Hastings Case* (1612), Duke, 71; 8 Digest (Repl.) 444, 1340.
- (6) *Thetford School Case* (1609), 8 Co. Rep. 130 b; 77 E.R. 671; 8 Digest (Repl.) 443, 1328.
- (7) *A.-G. v. Johnson* (1753), Amb. 190; 27 E.R. 128, L.C.; 8 Digest (Repl.) 444, 1343.
- (8) *Arnold v. A.-G.* (1698), Show. Parl. Cas. 22; 1 E.R. 15, H.L.; 8 Digest (Repl.) 445, 1358.
- (9) *A.-G. v. Sparks* (1753), Amb. 201; 27 E.R. 134; 8 Digest (Repl.) 444, 1332.
- (10) *A.-G. v. Herrick* (1772), Amb. 712; 27 E.R. 461, L.C.; 8 Digest (Repl.) 408, 998.

- A (11) *A.-G. v. Haberdashers' Co.* (1792), 4 Bro. C.C. 103; 29 E.R. 800, L.C.; 8 Digest (Repl.) 444, 1345.

Appeal from an order of SIR JOHN LEACH, V.-C., overruling a demurrer to an information and bill filed by the Attorney-General, reported 3 Madd. 319.

- B The object of the information and bill was to obtain a decree declaring that the increased rents of certain estates, out of which, in 1566, annual sums of a given amount were covenanted to be paid by the corporation of Bristol to certain charities in rotation, ought to be applied for the benefit of those charities. To this information and bill the mayor, burgesses, and commonalty of Bristol and their chamberlain put in a general demurrer, which was overruled by the vice-chancellor.

- C *Hart, Wingfield and Garratt* for the appellants, supported the demurrer.

Trower, Wetherell, Taunton and Phillimore for the respondents, supported the information.

- Dec. 11, 1820. **LORD ELDON, L.C.**—This comes before me on an appeal from an order of the vice-chancellor overruling a demurrer to an information and bill filed by the Attorney-General. The information states that Sir Thomas White, being desirous of benefiting the inhabitants of the towns and corporations after-mentioned, about the year 1566 paid to the mayor and corporation of the city of Bristol £2,000, upon trust to purchase messuages, lands, etc., of the then clear yearly value of £120 and upwards, to be settled as mentioned in the indenture thereinafter stated, and, after reciting that part of the £2,000 had been laid out in the purchase of lands of the then yearly value of £76, it states the effect of that indenture which it is not necessary to detail. It is an instrument of great length, and it appears to me absolutely necessary not only to look at the whole contents of that instrument, but to consider the effect of almost every word that occurs in the different parts of it. The information goes on to represent (this deed having been executed in the year 1566) that the manner in which the corporation of Bristol dealt with the property was by paying and advancing the several sums mentioned in the indenture in the manner and form in which they were to be paid, and that the property has increased very considerably in value, and the Attorney-General contends that the increased value ought, somehow or other, to be applied for the benefit of the various corporations benefited, and that the surplus above the particular sums specified and directed to be paid to each respective corporation, ought not to be retained by the corporation of Bristol, but that these respective sums should be increased in certain proportions, formed upon the ratio which the sums specified bear to what was the value of the land at the time, and that all these corporations, to the amount of twenty-three, besides the corporation of Bristol, ought to partake in the surplus beyond the sum of £104, which was the sum directed to be paid to each corporation in rotation.

- H The Solicitor-General is made a party to this information merely on the ground of a suggestion that Sir Thomas White left no heir-at-law, and he insists that there is some interest in the Crown as standing in the place of the heir. As I understand this information, the Solicitor-General is brought forward, not for the purpose of insisting upon any right which the Crown has by its sign manual to direct the application of this surplus fund as one devoted to charitable purposes—not upon the notion, supposing this surplus fund is to be applied to charitable purposes, that the Crown, although all the purposes are not expressed, has, where there is a general expression of charitable purpose in a deed, a right, by its sign manual, to direct the application of the surplus—not upon the notion that the Attorney-General could not, at the hearing (which in the case of charity, he would be at liberty to do), supposing he was of opinion that the surplus ought not to go as claimed by the information, insist upon some other application of it. But I understand the Solicitor-General is made a party merely upon the notion that, there being a defect of heirs, the Crown would be entitled, for its own benefit,

to the surplus. I mention these circumstances, because I wish it to be understood that I conceive in this situation with respect to this case that my opinion is asked whether this information for the purpose merely of applying this surplus in some proportions, not defined, for the benefit of these respective corporations can be supported. The information introduces no question as to what the corporation of Bristol, if entitled to the surplus, is to do with it, or whether they have a right to retain it, or if not, whether they are to apply it to charitable purposes among their own body or to any others than those expressed in the information.

There is another fact which I shall take notice of, before I comment on the deed. There was a suit, as I am informed from the Bar, in 1713, with respect to this very property. It appears, as I am informed, from what is to be found in the records of that suit that the £2,000 would in all probability have purchased a great deal more than £120 a year. It further appears from that suit, and what is more material, it appears from the indenture under which the present question arises, that property, part of that which is now in question, had been purchased by the corporation of Bristol, not in 1566, but many years before, to the amount of £76 per annum, and I do not find that the Attorney-General or the relators have thought it worth their while to introduce into this information any charge whatever with respect to what had been the application of the £76 a year, purchased long before the date of this indenture. For aught I know to the contrary and for anything that appears, the corporation of Bristol, from the reign of Henry VIII to 1566, the date of this deed, might have applied the whole of the £76 a year to their own use and benefit. If, by tracing the history of this property, it could be found, that this £76, between these periods, had been applied to charitable purposes, it might have been very important to have charged it in the information, and to have brought that fact before the court and established it for the purpose of showing how this property had been dealt with from the beginning. If, between the periods I have mentioned the £76 was applied by the corporation to their own use, the construction of this deed, by which it is contended that no more was meant by it than that these particular disbursements and payments should be distributed to these respective corporations, would receive consistence from the prior enjoyment. If that was not the nature of the prior enjoyment, that fact might in some measure affect the construction of the deed. I mention these circumstances because I desire to have it understood that any opinion given by me is not to be applied to any question whatever, but that question, and that alone which is now stated for my decision, viz., whether, upon the mere construction of this deed unassisted by the mention of any one fact either as having happened before or after it was executed, the prayer of this information, and that prayer only, can be granted. I do not mean to say that these pleadings are not such that the Attorney-General might address other questions to the court, but they have not been addressed to it, and it would, therefore, be premature to give any opinion upon them.

I have made these prefatory remarks that it may be understood whatever may be the case upon this information, should it be amended, that in the opinion I now give, I am governed simply by the view I take of what is the construction of this instrument and by that alone, because, supposing the vice-chancellor's judgment to be that in which I concur, it would be absolutely necessary that some words should be introduced into the judgment, as where there is a demurrer it allows everything alleged that is material to be true, and if, therefore, the allegations in this bill, if taken to be true, would make it impossible to overrule or allow the demurrer, supposing the question is to be decided on the deed alone, it should be recorded in the judgment of the court itself that that was the view the court had taken of it by the consent of parties, and so I understand the vice-chancellor to have taken it. Any opinion I now give, therefore, is to be understood to be without prejudice to any new or amended information that the Attorney-General may file, should he, upon looking into the matter, think it right to do so. Regard being

A had to the fact that from the year 1566 down to this time the enjoyment of this property has, as it appears to me, been as adverse as it could be to the prayer of this information, and regard being had to the fact that *A.-G. v. Coventry Corpn.* (1) occurred in 1700 and that there was a proceeding as to this property in 1713 (and I should be inclined to think, if I were at liberty to form a conjecture, that if the proceedings at that time had been carefully look into, something

B might have arisen material to be considered in this case), the question is whether, according to the true intent and meaning of this deed, the corporation of Bristol are trustees of the surplus rents and profits, or any and what part of them, for these other corporations.

The principles of the court on this subject, as deducible from the text writers and authors, will take no great time to mention. They are not open to much

C controversy, and I think they may be found in *DUKE'S LAW OF CHARITABLE USES*. In c. 7, s. 2, p. 112, it is laid down that

"if one deviseth the rent of his land to a charitable use, this shall be taken largely for a devise of the rent then reserved, or afterward to be reserved, upon an improved value."

D The cases in chapter 6, which are referred to in illustration of this doctrine, and some others to be found in the same chapter, it is material to attend to. In *Inhabitants of Eltham v. Warreyn* (2), it is laid down that if land of the value of £3 per annum be given to repair highways and it afterwards increases in value to £11, the whole of it must be applied in the same manner. By the second

E resolution in the *Sutton Colefield Case* (3) it was resolved

"that if lands of the value of £3 per annum be given to maintain a school-master; and, in the deed, it is expressed, that the said £3 shall be only employed to maintain that use, and no other use is expressed in the deed; and afterwards the land increaseth to a greater value, all the increased rent shall be employed for maintenance of that charitable use."

F The reasons assigned are

"because it doth not appear that the donor had any intention that the profits of his land should be employed to any other use, and at the first he gave so much as the land was worth."

The next cases are *Hynshaw v. Morpeth Corpn.* (4), the *Kennington Hastings*

G *Case* (5), which are to the same effect, and then comes the *Thetford School Case* (6), in which lands of the value of £35 by the year were devised for the maintenance of a preacher, schoolmaster, and poor people, and certain proportions, amounting together to £35, were given to each. The lands afterwards increased in value, and it was decided that the whole revenue must go to charitable purposes. The reasons given for this decision are :

H "for that it appeareth by the distribution of the devisor, that he intended that all the profits of his lands shall be employed in the charitable works by him founded, and left nothing to his heirs or executors of the profits of his lands, as they were in value at his death, and as if the value of the lands had decreased, the poor should have lost in their stipends, so when the revenue of the lands increase, they shall gain."

I Then the following passage occurs, and, with reference to many public bodies, it is one of great consequence :

"and the LORD COKE said, that this resolution did concern all the colleges in the universities and elsewhere; for when the lands were first given for their maintenance, and that every scholar should have a penny half-penny a-day; this was then a competent allowance for a scholar, in respect of the price of victuals then, and yearly value of the land; and now the price of victuals being increased, the first maintenance for scholars is not competent for them;

and as the value of the lands increase, so ought the allowance for the scholars to increase."

If the text is to be understood thus, that where property has been given for the foundation of a college, and a distribution has been at the same time made of all the rents to given members of that college, there must be an increase, as the times require, for all those persons, of that there can be no doubt, but, unless I am mistaken, there are many cases to be found in both the universities where land has been given of a greater value than the amount of the charges (which have been for scholars, exhibitioners, and so on) upon that land, and where in point of fact the enjoyment has been this, the charges have been made good from time to time, and the surplus has been taken by the college itself, and, I believe, if this were considered an improper application of their funds, it would have the effect of disturbing the distribution of the revenues of many of the colleges in both universities.

The construction in these cases, I take it, must be considered to go upon intention, and the different rules furnished by the cases I have mentioned, are to be considered as indicia of the intention. Was it then the intention of the donor that Bristol should be a trustee, bound from time to time, not merely to make the payments mentioned in the deed to these different corporations, but liable, de anno in annum, to be called upon, and from the first year in which it was trustee to apply the whole increased value, in proportions similar to those in which the property was distributed according to its value in 1566, or that it was to be entitled, after payment of the charges, to retain the surplus in the way in which several colleges retain it under grants to them. As far as I have read these ancient cases, they state it to depend upon the intention of the donor, and that one way of finding out that intention is to inquire whether the whole of the annual value of the property was, at the time of the foundation of the charity, distributed among the objects of the charity. If it was, they say that that circumstance is evidence of the donor's intention to give the whole of the increased value to the same objects. Whether that be a rule of evidence, which good and sound reasoning would have led one to adopt originally, I do not trouble myself with inquiring, but I cannot help feeling the force of what LORD HARDWICKE says in *A.-G. v. Johnson* (7), that when the *Thetford School Case* (6) was decided, the doctrine of resulting trusts was but little understood, and, if the object of the gift had not been charity, I feel considerable difficulty in believing that this doctrine of the court would have prevailed. Settled rules of construction, however, must not be disturbed, and this principle is of so much importance in administering the justice of the country that according to my notion, if there has been not merely a variety of cases, but even only one ancient case, and there has been practice and experience in favour of it, it ought to be adhered to. Another rule to be found in these ancient cases is, that as the charity would lose if the fund decreased in value, it ought to gain in case it increased. I should have doubted whether that was a sound rule of construction, but I take it to be one as settled as the other, and that, therefore, it would not be right to disturb it. In applying the two rules which I have mentioned to the present case, it will be necessary to recollect that the whole annual value of the lands is not exhausted by the payments directed to be made, and that the donor, contemplating and providing for a decrease, directs that a subsequent increase is not to go entirely to those who had lost by the decrease, but that only a compensation is to be made to them.

Some of the most material cases which have happened since (except *A.-G. v. Coventry Corpn.* (1), to which I shall have occasion to advert more at length), are to be found in AMBLER. In *A.-G. v. Johnson* (7), not only the value of the tithes was distributed in charity, but the whole profits of the tithes were given, and this circumstance assimilates the case to that of *Arnold v. A.-G.* (8) where the whole value of the property was not distributed, but the court fastened upon

A a declaration in the testator's will that he meant the whole to be given to charity, and said that where a general charitable purpose is expressed, the court, or the Crown, will find out what charity shall take. In *A.-G. v. Johnson* (7) LORD HARDWICKE observed that he did not intend that all the charitable uses should be proportionally augmented. There can be no doubt that this court has authority to alter the trust in the distribution of the increased revenues if it thinks it expedient so to do. A remarkable case of this kind occurred before LORD
B HARDWICKE. A person had founded a charity by giving an alms-house for five poor men. The charity establishment was greatly abused, and, upon a proposal being laid before the Master, he reported that the number of poor men should be increased to ten and that five poor women should be added. LORD HARDWICKE was of opinion that it ought to be so, upon the notion that he had power, not
C only to increase the objects of the charity, but to make an alteration in them. It is not reported, but I have taken it from a manuscript book in my possession, which belonged to Mr. BROWN who was at that time an eminent practitioner in this court.

A.-G. v. Sparks (9) is very ill reported. The Master of the Rolls, it is stated, observed that the testator could not have had any idea that the estate would
D increase in value, but it is clear the testator must have known that there would be an increase because he gave life annuities out of the fund, which, of course, would in time fall in. He, however, states that the intention of the testator was to dispose of the whole estate to charity, and, if that were the case, it is so far right. There is another case, *A.-G. v. Herrick* (10), which proceeds on the principle already stated, and authorises us to say that, if a testator gives all his lands to
E charitable uses and then mentions some, but not so many as to exhaust the whole value of the land, yet the gift will carry all the rents and profits, in point of application to charitable purposes. *A.-G. v. Haberdashers' Co.* (11), does not carry the doctrine further. The judgment of LORD COMMISSIONER EYRE goes upon this, that, the first deed having devoted the whole to charitable purposes and the second reserving certain powers to the author of the charity which enabled him to limit
F the application of the rents to charitable purposes to £175, as soon as that provision and the objects of it ceased to have effect, the increased rents must go according to the first instrument, and that, it having given the whole to the school, and other pious and charitable purposes, the court must so apply it.

The next material case is *A.-G. v. Coventry Corpn.* (1). It does not appear to me that the statement in any of the reports is exactly conformable to the case
G which must have been under consideration when you look to the deed itself, with a copy of which I have been furnished by the Merchant Tailors' Co., and to which I shall presently refer. [His LORDSHIP read the report of the case from 2 Vern. 397, and on coming to that part of the judgment in which it is stated that a charity is not barred by length of time, proceeded as follows:] The Statute of Limitations undoubtedly does not apply, but length of time (although it
H must be admitted that the charity is not barred by it) is a very material consideration when the question is what is the effect and true construction of the instrument. Is it according to the practice and enjoyment which has obtained for more than two centuries, or has that practice and enjoyment been a breach of trust? If it has, we must not scruple to disturb it, but still regard must be had to that
I circumstance, and the more so because, admitting that in the *Coventry* case (1) there had been a century of abuse, we must recollect that that case was determined about the year 1700, and, if it was understood to afford a rule which was applicable to the present or similar cases, it is difficult to suppose that the persons interested in the Bristol charity could be ignorant of it, as some of the corporations and parties to that suit were the same persons as are interested in the distribution of the Bristol fund. In fact, it does appear to have provoked inquiry, for in 1713 a suit was instituted for the same purpose as the present, but it has never been prosecuted since.

It has been attempted to account for this by suggesting, that the surplus rents at that time might have been so inconsiderable as not to have made it worth while to prosecute it, but, however that may have been, these circumstances led me to make the observations which I have before made and to state distinctly the grounds of my present judgment. I think I am bound to consider that in the *Coventry* case (1), the property was bought with the money of Sir Thomas White, and, in truth, it is so stated in one of the reports and in the deed itself. The copy which I before mentioned bears date in 1551, and states that the purchase was made by the city of Coventry, and that what was so purchased was of the clear yearly value or rent (considering value as rent and rent as value) of £60 10s. or thereabouts, and, after mentioning that White was minded to relieve and prefer the commonwealth of the city of Coventry, then in great ruin and decay (certainly not stating, as in the Bristol deed, that it was for the commodity of the other cities), it states that he of his goodness has given the sum of £1,400, so that the deed expresses the purchase-money to have been wholly supplied by him, and not only that, but it states that the thing purchased with the £1,400 was of the clear yearly rent and value of £60 10s., and that is the sum which in different proportions was distributed among the different objects of the charity.

With respect to the form of the deed, which is by way of covenant, I take it that in deeds of that date a covenant, in cases of this kind, may be looked upon as a declaration of trust, but there is no passage in this deed under which it could be held that the corporation of Coventry was to pay any of these sums except out of the rents, save only in case of wilful default. There would be no wilful default if the lands fell in value, and non-payment would not be a breach of the covenant if they were obliged to incur great expense in recovering the rents. Many circumstances, however, might happen, which would amount to wilful default, and, being trustees, they must be answerable for it whether expressed in the instrument or not. But these engagements, as I read this instrument, are engagements to pay out of the rents and profits, they being estimated at the clear yearly value there mentioned, that clear yearly value at the time being distributed among objects which exhausted the whole of it. It, therefore, falls within the principle of the former cases; there is evidence of that intention which they have determined to be sufficient to carry the increased rents to charity. But no one can read the judgment of Lord Holt (3 Madd. 353) without seeing in it proofs of the great knowledge of law which distinguished that illustrious man, nor without satisfying himself that, if these older cases had not existed, such a principle would not have been introduced.

In the opinion which I give upon the *Coventry* case (1), I found myself upon the deed itself, and that deed, I apprehend, amounts to an acknowledgment that the money was wholly supplied by Sir Thomas White and that the clear yearly value of the property was exactly the sum which was distributed in different proportions among the objects of the charity. If the corporation thought proper to sign the instrument containing these admissions, they must be bound, but, upon the construction of that instrument alone, it appears to me the House of Lords was perfectly right in its decision.

The doctrine in the *Coventry* case (1) was shortly afterwards attempted to be applied to this case, and an information was filed for that purpose. It, however, was not followed up, and the present information has been filed. It prays a different distribution from that which has hitherto obtained of more or less of this surplus beyond the £104. I say more or less because, with respect to the difference between £104 and £120 and more, no use is expressed in this instrument, and the difference might have been more than £16, for, if the corporation of Bristol was bound to lay out £2,000, as the vice-chancellor thought, and as I think they were, it would either have produced £120 (they were bound to get that) or it would have produced that and more in the language of this deed. When we are considering what is the effect of words in one part of a deed and are stating that they can

A apply to no other uses than those expressed in the deed, I ask where there is any use expressed in the deed with respect to the £16 surplus, or where there is any use, if the purchase should produce more than £120 per annum, expressed as to the difference between £104 and that sum. There is no such use, intent, or purpose, and the question is whether these general words, which have been so strongly alluded to, do or do not shut out the fair effect, inference, and conclusion to be
B drawn from all other parts of the deed, taking the whole together.

Sir Thomas White ought to be considered as a party to the deed, for, though not named as one, he executed it. The deed mentions, as far as I have read, that Bristol had received £2,000 of Sir Thomas White (whether the fact was so or not, it must be taken to have been so) for the purpose of applying it for the benefit and welfare of the city of Bristol, and upon the uses, etc., thereafter mentioned,
C and this deed, which was executed in 1566, mentions that of that sum they had laid out in 1542 so much as had purchased the land of the clear yearly value of £76, but neither this deed, nor any charge in the information, inform me how that £76 had been applied between 1542 and 1566, and whether during this period Bristol had taken all those rents to its own use, or whether all or any of them
D had been applied to any other uses, does not appear. I mention it for this reason, the corporation of Bristol, in 1566 are in possession of an estate of the yearly value of £76, purchased, as this deed must be taken to express on all sides, with money which was part of the money advanced by White. Their being in possession of that property, in what manner it was enjoyed might be a very material circumstance to learn and to know in an information case, because, if, for instance, in 1542
E White had advanced the whole £2,000, and in that year it had been laid out in the purchase of lands of the value of £120 a-year and more instead of £76 only, and if, between that time and 1566 they had had the ownership, and the beneficial ownership too, you must consider what is to be the effect of a deed when they were declaring a trust of property which they had enjoyed prior to that declaration of trust, and what is to be the effect of an instrument containing these words,
F "uses aftermentioned," and no other, where you are obliged to admit that part of the surplus beyond the £104 is to be applied to uses not declared at all. It would be material to consider what is to be the effect of a declaration of trust made by persons in the actual possession of property to which the declaration of trust applies, as capable, or not capable, of being contradistinguished from a declaration of trust made by a person who is receiving the estate under the grant and gift of
G another at the time he makes the declaration of trust. In the one case, the property being in the individual at the time, the uses to which it is to be applied must be regulated in some measure by that fact, and in the other (being a case where, putting charity out of the question, it is taken by grant at the time, and the use does not comprehend the whole beneficial interest), he who is taking could not take what the other would retain in the case I before put.

H The deed goes on to state that the mayor and corporation of Bristol, within the space of four years, were to purchase lands, which, together with those purchased, were to amount to the clear yearly value of £120 and more, over and above all yearly charges to be applied to the uses aftermentioned (I apprehend uses here merely mean the same as intents and purposes), and that the rents of both are to be employed in manner therein specified, and then follow these words:
I "and to no other uses, intents or purposes." But though these words are here inserted, the question upon the whole deed will be what you are to do, or what was the intention of the author of this deed to do, with rents and profits not given to the uses after-mentioned. To get at that question, see what they are to do. They have four years to purchase land; a particular distribution is directed during eight years; a particular payment is directed in the ninth year. I doubt whether there is to be any payment at all in the tenth year, and then when you come to look at all the clauses following the enumeration of the different cities mentioned in the deed, and to consider their effect, the question is whether it is not the fair

construction of this deed to say that, although you ought to give effect to the construction which arises out of those plain words, "to no other use," yet, if you find, from the whole frame of the instrument, you cannot give that effect to them which they might have in other cases, it becomes a question of intention which you must collect from the whole deed, and, if the intention is that they should not have that large effect now contended for, is it not the true rule of construction to give them the effect which they ought to have by considering all the parts of this deed taken together? A B

When the first payment of £100 was to be made, lands were purchased producing £76 per annum, and no more. That being the case, there are four years, within which they are to make up the purchase to £120, and more. Four years' time is given, during which, however, they are to pay to these young men £100 per annum. If you are to consider in a court of equity that the £120 per annum, and more, had been bought immediately after the execution of this deed, and the question had arisen, not in the year 1820, but in the year 1567, what was to be done with that £20 ultra the £100 which was to be thus paid, or with the excess if it was more than £120 as in all probability would be the case, if you could take notice of what passed in the former suit the question would have been the same in 1567 as in 1820. You cannot look at this deed and say, from any expression in it, what is to become of this sum if you look to no other use, intent and purpose, than what is there expressed. There is none expressed with respect to that £20. In the whole of the argument on the other side, you are driven to admit this, and, in any way of putting it, it can only be contended that the corporation of Bristol were to be trustees in the sense that they were to retain £16 for repairs and charges, and to distribute the other £104. One observation on that is that during eight years it was not £104 that was to be distributed; another is that during the time that Bristol is to take anything there is nothing about £104. Then it is said they are to take £16 for repairs, and, in the latter case, it is not unfit that they should have £4, like the other corporations, for their pains. But that argument fails again, because, if that is the sum which is to pay the other corporations for their pains and trouble of distribution among their own bodies, we are to remember that Bristol has trouble with respect to all these corporations, and if £4 is a proper remuneration for what is done by York or Canterbury it cannot be a proper one for Bristol which is to be at much more pains and trouble besides being subject to pains and penalties. At the end of eight years they are to find a fund to the amount of £200 for the purchase of corn, to be afterwards sold, and it would seem, according to the expressions, that the ninth year only was given them for that purpose. It may, however, I think, be argued, that it was to be supplied to the ninth and tenth year, or that it might be divided between them, but then, in point of construction, it must be recollected, that, in the first ten years, they were not to distribute £104, and that, with respect to the first four years, £100 was to be paid, although £120 a year had not been then purchased. C D E F G H

The next part of this instrument is that which devotes a sum of £104 to York, and the other cities and towns aftermentioned. Here it certainly expresses that it is to be paid out of the rents, issues, and profits. With respect to almost every one of the other corporations it is not expressed that it is to be out of the rents, issues, and profits, but I think that the passage at first ought (subject to an observation which has been made upon the subsequent covenant, which does not mention rents) to be considered as governing the payments afterwards to be made and as settling the fund out of which they are to come, and I will take it so. Then come the different corporations in rotation until you come back to Bristol, and there the £4 is merged in the surplus as well as the £16. In this clause relating to Bristol, I observe the word assigns is used. I think that it would be too much to say it meant assignees of the property. I

The next clause begins the rotation again, and then follows this clause, which I think is very material, and, if I am mistaken in my judgment, it is fit it should

- A be known that I think it material. Upon comparing this deed with the clauses in the Coventry deed I find that the latter contains only the common indemnity-clause which every conveyancer puts into these deeds. The clause I have alluded to is that which relates to the penalty. If the land was to be worth £120 a year only, it is a little difficult to see how the corporation, in some instances, could find so much money; if, on the other hand, the land was to be their own, with the
- B improvements upon it, there would not be any reason why they should not forfeit at least to the extent of the increased value. But the more material observation is that these fines are to be paid not to the persons who receive the £104, but to St. John's College, and the college are to hand over the £104, and to take the residue of the fines for their own use and benefit. It is very singular, if it was at all in the contemplation of the author of this gift (who does not exhaust all
- C the £120 or more at the time he makes it) that the increased revenue was to go to the charities that he should have gone on to say: "You shall pay these fines to St. John's College," so that, although the estate produces more than £150, this sum only is to be paid to St. John's, and the other cities and towns, instead of taking an increase, must be content with receiving the £104, the college retaining the difference between that sum and £150. This can hardly be contended, but
- D you must either go that length or say that the true intent and meaning of the deed was that if the sum to be paid to York or Canterbury was £200 (which by the increase of the rents might be the case) and there was a default in payment, St. John's was to hand over the whole to them, but would be entitled, if it was only £120, £130, £140, or £150 a year, to retain all above £104, and, if a proportionable
- E increase is to be provided for by the court, you must somehow or other get at the means of giving St. John's a proportion of that increase, regard being had to what York and Canterbury took under this deed and what they would take by virtue of that increase.

- Another very material clause is that of indemnity, and although this deed does furnish the argument which has been so strongly pressed, as arising out of the
- F covenants which it is said are to pay out of the rents only, and although it must be admitted, if there was no clause of this nature, the corporation would have a right to be indemnified in the same manner as all other trustees, yet the question here is, regard being had to the fact that the estate is stated by the author of this deed to be worth £120 and more, when not more than £104 is to be distributed, and regard being had to the clause in which it is specially provided for what species
- G of loss they shall be indemnified, whether it was not meant that it was that species of loss, and that only, that they should be able to state, as a ground for not making the specified payments, or, in other words, whether it was not considered and agreed that they would have revenue enough—rents, issues, and profits enough—to make the payments, and whether it was not at the time agreed that it should be understood that they would have enough unless deprived of some of the rents
- H in consequence of the events mentioned in this special clause, and were not to be indemnified against insolvency of tenants, low rents, the expenses of recovering them, or other events not expressed in the deed, which from the beginning says nothing about the £16 going for repairs. The clause in question says that, if the estates should be notoriously decayed by any sudden misfortune, by reason of fire or other like occasion, from such time of such decay, etc., the payments should
- I cease, etc., and then comes the clause which says that when the rents again increase the deficiency arising from that particular species of decay is when the rents admit of it to be made good. Then you see they are not treated as trustees to all intents and purposes, and they have not, as it appears to me, a right to claim all such allowances as general trustees would have a right to claim, and this clause furnishes an observation upon one of those indicia of intention which is alluded to in all the cases, namely, that the testator must mean, that those who lose by the fall shall gain by the rise, because here they are not to bear the losses unless they arise from these particular causes, and, if a deficiency does arise

from them, they are not to have all the future rents, but the charge only is to be made good. It is the most difficult thing in the world, when considering this clause, to suppose that, if the rents amounted only to £120 only £104 was to be made good, but that, if they exceeded that sum, the increased rents, whatever might be their amount, were to be divided in the proportions of £104 to £120.

The question comes to this at last, taking the whole deed together, seeing that it is a case in which the value at the time was more than was distributed at the time and in which the increase and decrease in value is regulated by a special provision, and recollecting that there is not one single case—at least I have not been able to find one—where the doctrine to be found in the *Thetford School Case* (6) has been applied except where the value, or what was represented to be the value at the time, has been distributed at the time, and recollecting that Bristol was a material and prominent object of the bounty of the author of this gift, is this not a case which falls within the range of those cases in which property given to a corporate body is given to it subject only to the charges imposed and not as a mere trustee entitled to no other benefit than what is expressly given to it in distribution, and entitled to all the indemnities of trustees ultra those expressed and pointed out in the clause in which they are given? Upon the best judgment I can form, and laying out of view everything but the question whether this deed appropriates the surplus rents to these charities, I am of opinion that they cannot, under the effect of this instrument merely, call for a distribution of the surplus. My judgment may be set right elsewhere, or the case may be re-heard, but that is my opinion upon the effect of this deed, and the consequence is that by putting some special words into the order, it does appear to me, this demurrer ought to be allowed.

Demurrer allowed.

KNATCHBULL AND OTHERS v. GRUEBER

[VICE-CHANCELLOR'S COURT (Sir Thomas Plumer, V.-C.), November 8, 12, 27, 1815]

[Reported 1 Madd. 153; 56 E.R. 58]

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), July 28, 1817]

[Reported 3 Mer. 124; 36 E.R. 48]

Specific Performance—Compensation—Acquirement by purchaser of substantially what he contracted for—Substantial compliance—Consideration of future probabilities.

Per LORD ELDON, L.C.: If the title to part of an estate which is the subject of a contract of sale is defective there is no principle of equity more artificial than that which calls on the court to decide whether the purchaser shall be bound to take with any and what compensation.

Per SIR THOMAS PLUMER, V.-C.: Specific performance of a contract of sale may be granted to a vendor, subject to the payment of compensation, where the purchaser will on completion get substantially what he contracted for. What that it must always be a difficult question, and there is great difficulty in applying the doctrine of compensation to a reluctant purchaser. There is no standard by which to ascertain what is essential to a purchaser. The motives for purchasing real property are very different in different persons, and tastes, opinions, and ages create different views. What is desirable to one is not so to another. Is the court to look at the land which is said not to comply with the contract of sale in its present state or to consider in what state it may be in future? Difficulties must not be founded on speculative conjectures of what

A may never take place and nuisances which may never be created, but regard should be paid to the most profitable and probable use of the land by another purchaser.

B The title to a small piece of land, part of a large estate, was found to be defective, and the purchaser refused to complete the purchase of the whole. The vendors sought specific performance of the contract with compensation to the purchaser in respect of the small area without title. There was evidence that, as that land contained loam and brick-earth, another person buying it might build on it brick-kilns and houses which would prove a nuisance to the purchaser.

Held: the bill filed by the vendors for specific performance would be dismissed.

C *Sale of Land—Contract—Breach—Breach by vendor—Failure to make good title to part of estate—Purchaser let into immediate possession—Refusal to complete—Right of vendor to turn purchaser out.*

On a contract for the sale of an estate where by the terms of the contract the purchaser was to be let into immediate possession, and a question afterwards arose as to a part of the estate to which no title could be made,

D **Held:** on the refusal by the purchaser to complete the vendor could not turn the purchaser out of possession and retain to himself the benefit of the contract.

Notes. Considered: *Casamajor v. Strode* (1834), 2 My. & K. 706. Distinguished: *Croome v. Lediard* (1834), 2 My. & K. 251; *Colby v. Gadsden* (1865), 34 Beav. 416. Considered: *Re Arnold*, *Arnold v. Arnold* (1880), 14 Ch.D. 270; *Jacobs v. Revell*, [1900] 2 Ch. 858; *Lee v. Rayson*, [1917] 1 Ch. 613. Referred to: *Bowyer v. Bright* (1824), M'Cle. 479; *Ridley v. Oster*, [1939] 1 All E.R. 618.

E As to specific performance with compensation, see 36 HALSBURY'S LAWS (3rd Edn.) 345-350; and for cases see 44 DIGEST (Repl.) 158 et seq.

Cases referred to:

- F (1) *Dyer v. Hargrave*, *Hargrave v. Dyer* (1805), 10 Ves. 505; 32 E.R. 941; 44 Digest (Repl.) 70, 556.
 (2) *Fordyce v. Ford* (1794), 4 Bro. C.C. 494; 29 E.R. 1007; 44 Digest (Repl.) 162, 1411.
 (3) *Drewe v. Hanson* (1802), 6 Ves. 675; 31 E.R. 1253, L.C.; 44 Digest (Repl.) 158, 1377.
 G (4) *Halsey v. Grant* (1806), 13 Ves. 73; 33 E.R. 222, L.C.; 44 Digest (Repl.) 159, 1382.
 (5) *Drewe v. Corp* (1804), 9 Ves. 368; 32 E.R. 644; 44 Digest (Repl.) 162, 1412.
 (6) *Stapylton v. Scott*, *Nicholson v. Stapylton* (1807), 13 Ves. 425; 33 E.R. 353, L.C.; 35 Digest (Repl.) 109, 95.

H **Appeal** by the plaintiffs from a decision of SIR THOMAS PLUMER, V.-C., on a bill filed by the plaintiffs for the specific performance of a purchase agreement, and an order that, if the defendant was not bound to take a part of the purchased estate, called Cole Nash, it might be ascertained how much ought to be allowed the defendant by way of deduction out of the purchase-money in respect of those premises.

I In October, 1811, the plaintiffs, who were seised of a certain estate of some 700 acres proposed to sell it by auction, in lots as described in the printed particulars, and under certain conditions. The property was distinguished into three lots, the first of which was represented as a valuable freehold estate containing a spacious mansion-house and several pieces of land, some of them forming a part of the estate called Cole Nash, the extent of which was twelve acres. The second lot was described under the name of the Manor Farm, but in the proceedings was denominated the Stone-Stile Farm, and was part of the premises afterwards sold to one Wildman. The third was called Marsh Land, and was described as distinct from all the rest of the property and constituting the third lot entirely by itself.

An agreement was entered into on Oct. 15, 1811, between the plaintiffs and the

defendant for a sale of the estate to the defendant at a price of £52,000. Immediate possession was to be given to the defendant, and the plaintiffs undertook forthwith to furnish to the defendant an abstract of the title to the estate, and make out a good and marketable title to the same, free from encumbrances. Completion was to take place on Feb. 1, 1812. It was then agreed that the sale of the estates should take place as advertised, but the same should be bought in on the part of the vendors; if any part were sold, such sale should be on the account and at the risk of the defendant, as well in respect of the auction duty (if any should be incurred) as in all other respects except with regard to expenses already incurred. The deposit stipulated by the agreement was paid by the defendant. The sale by auction took place, and Mr. Wildman became the purchaser of the Stone-Stile Farm at a price which, together with the value of the timber, amounted to £11,900. The defendant concurred in this purchase. He never made any objection to the title of the property except in the case of Cole Nash which the plaintiffs said was separate and detached from the rest of the estate, or might be separated from it without any material inconvenience or injury, being a plot of ground on which there was no building whatever lying without the gates or enclosure of Nash Court, the principal mansion-house and estate, consisting of about 320 acres, from which it was entirely divided by a road.

After considerable negotiation, the defendant still refusing to complete the purchase because of the faulty title to Cole Nash, the plaintiffs filed a bill for specific performance of the agreement, an account, and payment of what remained due for principal and interest or the purchase-money, and, if the court should be of opinion that the defendant was not bound to take the twelve acres called Cole Nash, that it might be ascertained how much ought to be allowed him by way of deduction out of his purchase-money in respect of those premises in taking the account. To this bill the defendant put in an answer, contending that the plaintiffs were not entitled to the relief claimed.

Sir Samuel Romilly, Bell and Roupell for the plaintiffs: the defendant professes a readiness to complete his purchase if a good title can be made. It is admitted that a good title cannot be made to Cole Nash, but we contend that this is a case for compensation, the evidence showing, that these twelve acres, which are a very inconsiderable part of the estate, are not essential to the purchase. Supposing them to be essential, the defendant has, by his conduct, precluded himself from making the objection. The doctrine as to compensation is laid down by SIR WILLIAM GRANT, M.R., in *Dyer v. Hargrave* (1). The ancestors of the plaintiffs lived 300 years upon the estate without feeling any inconvenience from the want of these twelve acres, which were only purchased in 1788, by the late owner, Hawkins. It was the duty of the defendant, when he found the title irremediable, to give up the estate: *Fordyce v. Ford* (2). After the defendant knew no good title could be made he suffers the furniture of the mansion-house to be sold to the injury of the plaintiffs, he buys stock, and does other acts, showing that, though no title could be made to Cole Nash, he yet adhered to the purchase and did not consider Cole Nash as essential. It cannot be seen from the mansion-house, being sheltered by a wood. Three months after the abstract was delivered he mediated the sale of Cole Nash, employed an auctioneer for that purpose, and would have put it up to sale had he not been dissuaded from doing so by his solicitor. It was clear, therefore, he did not consider Cole Nash as essential to the enjoyment of his purchase. He never affects to say, during the treaty, it is essential, but asks only, if no good title can be made, for absolute covenants and a compensation. He never considered Cole Nash as essential until he put in his answer. The objection as to the locality of Cole Nash is obviated by the witnesses who clearly ascertain its situation.

Hart, Wetherall, Horne and Garratt for the defendant: The court will not enforce this agreement. This estate was purchased for the residence of the defendant and not with a view to make a profit of it, and Cole Nash, situated as it is

A represented to be, on the south side of the mansion-house and opposite the park gate is essential to the enjoyment of the estate, but the locality of Cole Nash is not clearly ascertained. Suppose it to be where it is stated by the witnesses, opposite the mansion-house, it might become a great nuisance if a brick-kiln were erected upon it, as would probably be the case from the brick-earth it contains, if it came into the hands of a stranger. The conduct of the defendant cannot be
B considered as a waiver of his objections, he having all along asked for a title. Besides, the plaintiffs have themselves put an end to the contract by turning the defendant out of possession.

SIR THOMAS PLUMER, V.-C.—The first objection to the prayer of this bill is that no title can be made to that part of the estate called Cole Nash. This is
C admitted, and that no reference to the Master is necessary on that point. Degrees of title, the probability, more or less, of any claimant of the estate appearing, are not considered in these cases. In answer to this objection of want of title, it is said that Cole Nash, consisting of not quite twelve acres, bears so small a proportion to the rest of the purchased estate, amounting to 700 acres, that it is a case for compensation, but then, it is replied, that the situation and nature of Cole Nash
D is such as not to bring it within the doctrine as to compensation, it being essential to the enjoyment of the purchase.

At law, it is clear, the plaintiff could not enforce the contract. The law knows nothing of compensation, but in equity a different rule has prevailed (whether wisely or not it is now too late to consider) and the court will relieve where compensation can be made. [Law and equity are now administered concurrently
E in accordance with ss. 36-44 of the Supreme Court of Judicature (Consolidation) Act, 1925: 18 HALSBURY'S STATUTES (2nd Edn.) 474-481]. Is this a case falling within that doctrine? Many witnesses produced on the part of the plaintiffs, long acquainted with the estate, consider the possession of Cole Nash as not essential to the enjoyment of this estate. On the other hand, witnesses on the part of the defendant swear that the possession of Cole Nash is essential, and that the land,
F instead of being ornamental to the premises, as it is at present, may in other hands become a nuisance, it containing loam and brick-earth, and that any person buying these twelve acres with a view to profit might render them worth £5,000. Brick-kilns, and a row of houses might be built on the land, which would prove a nuisance. Under these circumstances the defendant insists this is not a case for compensation. There is no denial that Cole Nash contains brick-earth.

There is great difficulty in applying the doctrine of compensation to a reluctant purchaser. There is no standard by which to ascertain what is essential to a purchaser. The motives for purchasing real property are very different in different persons. Tastes, opinions, ages, create different views. Some particularity, some whim, may have induced a purchaser to purchase. What is desirable to one is not so
G to another. One wants a wood for game—another desires it only as a beautiful object; one looks only to agriculture—another dislikes tithes. It, therefore, seems a little arbitrary to insist on a party taking compensation. "Why am I bound to take what I did not mean to buy? You say you will give me compensation, but who is to judge of the compensation? Can you be sure it is a compensation?" It is a difficult thing for a Master to ascertain what is essential to the enjoyment of
H the estate, and what is a proper compensation. It is as difficult for the court to decide, if, having all the data before it, it decides, as it is then proper to do, without sending it to the Master. Are you to look at the land in its present state or to consider in what state it may be in future? If the latter, some possible nuisance may, in every case, be suggested. In these cases, I admit, difficulties must not be founded on speculative conjectures of what may never take place, but in the present case, the most profitable and most probable use of this land by a purchaser who was not the owner of this estate would be to apply it to building
I purposes. It is a purpose best adapted to the land, and a purchaser must forego

his interest who did not so apply it. The nuisance here apprehended is not distant, fanciful and conjectural, but strongly probable; not merely what may happen, but what will probably happen. A

It is said that a purchaser should communicate his motives for purchasing; if so, the vendor might enhance the price. It is also said that the defendant's objection that these twelve acres are essential was an afterthought. Suppose it was, is a court of equity to say that no advantage can be taken of the objection? Though a purchaser may not at first be aware of the essentiality of the land to which no title can be made, yet if he afterwards finds it essential, is a court of equity to say that he shall not avail himself of the objection? B

It is then said that, if the twelve acres be essential to the enjoyment of this estate, yet the defendant must by his conduct be considered as having waived the objection, and *Fordyce v. Ford* (2) is cited. In that case as soon as the abstract was delivered the objection appeared, and no further inquiry was necessary, and, therefore, the conduct of the parties afterwards was considered as a waiver of the objection. LORD ELDON observes upon that case in *Drewe v. Hanson* (3) (6 Ves. at pp. 679, 680): C

"Upon the conduct of the party this may differ materially from *Fordyce v. Ford* (2). In that case, only seven acres were freehold, and all the rest leasehold; but the abstract distinctly stated what was freehold, and what was leasehold. From the delivery of the abstract, it was perfectly understood beyond dispute, without any ground for inquiry, that it was leasehold unquestionably and irrevocably. The purchaser receives the abstract; treats upon it with full knowledge up to, and long after, the day on which the contract was to be performed, not upon the nature of the property, but upon the title; and the Master of the Rolls thought there was a clear waiver. I doubt extremely whether that will turn out to be the case here. Taking the representation in the conversation to be that they believe it to be a modus, and supposing the purchaser could have been off the bargain at that moment, which is very questionable, can it be said, from what passed afterwards, that he cannot now; having contracted under this representation, and learning no more afterwards than that they conceive it to be a modus? That is not like the representation as to the leasehold property, but one requiring a reasonable time for inquiry." D E F

In *Halsey v. Grant* (4), LORD ERSKINE, L.C., reviewing the authorities, notices *Fordyce v. Ford* (2), and, adopting the doctrine in that case, and in *Drewe v. Corp* (5), and *Drewe v. Hanson* (3), says (13 Ves. at p. 79) that G

"where one party would be foiled at law, but the other may have the reasonable, substantial effect of his contract, compensation shall be admitted; not, where the effect will be to put upon him something constitutionally different from that for which he contracted." H

In *Stapylton v. Scott* (6), he expresses a similar opinion.

The received doctrine of the court, therefore, appears to be, as SIR WILLIAM GRANT, M.R., expresses it in *Drewe v. Corp* (5) (9 Ves. 368),

"that where the party gets substantially that for which he contracts, any small difference may be remedied by compensation; but not when it extends to the whole estate." I

What is substantially that for which a man contracts, must always be a very difficult question.

One objection made by the defendant here is as to the locality of Cole Nash, but that objection appears to me untenable, and, if the defendant's case stood upon that objection only it would be very weak, for the evidence clearly fixes the situation of Cole Nash.

The next question is whether the defendant has by his conduct precluded himself

A from insisting on a good title to Cole Nash. It is said that by meditating a sale of Cole Nash he showed that he did not look upon it as essential to the enjoyment of the estate, but the defendant by his answer, which, as to this, has been read as evidence, says that, though he put it up to sale, he did it only to ascertain its value, and not with a view of really selling it. The ratifying of the sale to Wildman, purchasing the stock, and agreeing as to the employment of his deposit, after
 B he was fairly informed by the plaintiffs' solicitor that the title to Cole Nash could not be bettered by further inquiry are not conclusive circumstances to show he did not consider Cole Nash as essential to his purchase because he is constantly asking for the title to Cole Nash, and never appears to have lost sight of a good title, but from first to last insists upon it. The title was not, as in *Fordyce v. Ford* (2), incurable, but it might have been rendered good if certain inquiries
 C were satisfactorily answered. It was not absolutely, but contingently, bad. A man by going on to treat does not waive an objection he is continually insisting upon. If nothing had been said of Cole Nash after the title to it was found defective, the objection might have been considered as waived, but here he is perpetually desiring to have a good title. This case, therefore, is like *Drewe v. Hanson* (3), where, further inquiries being insisted on, the objection was not
 D considered as waived. A treaty cannot waive that which it treats about. There is nothing, therefore, in the conduct of the defendant which precludes him from insisting on a title to Cole Nash. If a man goes on treating, and then finds a particular piece of land to which no title can be made is essential to his purchase, may he not, notwithstanding such treaty, insist on the materiality of the land?
 E Surely, in justice and common sense, he may.

There is another part of this case to which no satisfactory answer has been given. I mean the conduct of the parties in turning the defendant out of possession. The vendors wanting the purchase-money, and the defendant refusing to give up the estate, but insisting on a good title, the vendors take the law into their own hands. They tender the deposit of £5,000 with interest; insist on the mansion-house being delivered up; and finally authorise Rutton (who is indemnified) to
 F turn out the defendant. They drive him to the necessity of selling the live and dead stock he had purchased in July for £5,500 on the faith of the contract being performed. It is said that this was done to enable Rutton to give up possession to the plaintiffs, but that could not be, for the time when it was to be given up, Michaelmas was past. It was not Rutton, but the vendors, who turned out the defendant and indemnified Rutton. This was done to force the defendant to
 G give up or complete his contract. They afterwards offer him possession again, but they were not to put him in and out of possession as they thought proper. Having thus rescinded the contract, are the vendors, who can have no relief at law, to come to a court of equity to enforce it? If this contract were enforced who is to be at the loss occasioned by the sale of the stock, and the neglect of the land?
 H Much of the benefit which Grueber looked forward to in his agreement was destroyed by this conduct in turning him out. The vendors themselves put an end to the contract; nor was there anything in the subsequent transactions to revive it.

Vendors ought always to examine their title before they bring their estate to market. It is owing to their neglect in this respect that so many suits are occasioned. The fact that no complete title could be made to Cole Nash should
 I have been stated on the sale of the estate, and all this controversy would then have been prevented.

Bill dismissed.

The plaintiffs appealed to the Lord Chancellor.

July 28, 1817. **LORD ELDON, L.C.**, stated the facts in detail and continued: Here, then, are three alternatives, but, whatever may be my opinion as an individual, I am bound as a judge to say that where a man makes a purchase of an estate to which the vendor represents that he has a good title, the purchaser

has a right to insist that the question whether he have or have not a good title shall be sifted to the bottom before he can be called upon to adopt any course, and before the vendor can be let off from his original contract. Accordingly, the defendant had a right to say, if he chose: "I will have these inquiries made before I determine whether to take the property at all, or in the qualified mode in which you now propose that I shall take it." It appears that several arrangements were proposed as to Mr. Wildman's purchase, and on this subject I shall say nothing but that, I having read the papers over and over again with great attention, the result is that the defendant has a right to see that that purchase is made good by the vendors without prejudice to his right to dispute the title to the other parts of the estate. A B

The answer, after stating so much of the transactions as leads to this result, goes on with the correspondence and states a letter from the solicitor for the plaintiffs to the defendant's solicitors, dated July 31, 1812, referring to a proposal from them C

"that the purchase shall be suspended for twelve months in order to make inquiries respecting the title to the twelve acres,"

and, if nothing should be found, the defendant to take the title on absolute D
covenants. This letter goes on :

"I can hardly form a judgment upon these proposals, as you don't say how much of the purchase money Mr. G. proposes to pay, and how the remainder is to be secured. I see no good that can arise from the search. . . . It is too much to say that a purchase of such magnitude should be stopped for such a trifle, when we offer to take the twelve acres off your client's hands, or give him an absolute covenant respecting them. There hardly ever was a large estate without some corner of it being in a similar situation, and it is the first time I ever saw such an objection persisted in by a gentleman who professes to be a willing purchaser. . . ."

On Aug. 7 the defendant's solicitors write an answer as follows : F

"We saw Mr. G. yesterday, and communicated to him your letters, in answer to which he can do little more than refer to what has been before stated. He has no objection to the Stone-Stile purchase being completed, without prejudice to the title to the other estates, and he is willing to consent to his £5,000 deposit being appropriated in any way that suits best the convenience of the proprietors. He is also quite willing to advance part of his purchase-money, notwithstanding no pains, or next to none, have been yet taken to clear the difficulties in the title. He also confirms what Mr. Preston [one of the defendant's solicitors] stated, in answer to the obvious apprehension of the proprietors that he wished to relinquish the purchase, that he has no such intention, nor ever had. If, after diligent inquiries have been made in order to perfect the title, the result should not be favourable, he will then be willing to take such title to Cole Nash as the proprietors will be able to give him, upon having absolute covenants and a compensation." With respect to the time necessary to prosecute the inquiries with effect, we mentioned twelve months to Col. De Billinghamurst [one of the plaintiffs], because he desired us to name some period. You must be perfectly satisfied that that time is little enough for such an inquiry as the title requires." G H I

On Aug. 10 the solicitor for the plaintiffs acquaints the defendant's solicitor with some inquiries made respecting the title to Cole Nash of a Mr. Tappenden, whose answer to those inquiries was enclosed. It contains one passage which I think material, first, because it shows what was Mr. Hawkins's opinion when he was owner of the estate as to the nature and materiality of the property, and next, because it does not quite come up to what is here represented.

"Mr. Hawkins was a willing purchaser of Cole Nash. He was informed that

A the title was only under a mortgage in fee, and his reply (I well remember) was that it was good enough for him, and he would not miss the purchase, as the land was close to his property, on any account whatever."

B Taking this, then, to be an accurate statement as to Hawkins's feelings on the subject of this property, it shows that it was thought material for him to become the owner of it. Then follow statements as to other considerable purchases made under the same title, but as to those it is enough to say that this court does not sit to determine that men shall be willing purchasers whether they will or not, but to judge whether they have got a title, and, if they have not got a title to part of the premises, there is no principle of equity more artificial than that which goes to determine whether the part to which no title can be made is material and whether the purchaser, willing or not willing, shall be bound to take the remainder, with any and what compensation for the want of title to the defective part.

C On Aug. 19 the solicitor for the plaintiffs writes again to urge the completion of the purchase upon the strength of Mr. Tappenden's representations, and referring to the alternatives formerly offered. Here, a circumstance occurs which is extremely material in my view of the case, namely, that, if this is to be represented as the case of a purchase of an estate consisting of a large number of acres with a defect of title to a very small proportion of it—to the extent of twelve acres only—it must at the same time be recollected that it is a purchase, of which, according to the terms of the contract, possession was to be given immediately, and, possession having been taken under the contract, the effect of it is to enable the vendor to say: "You having taken possession under the contract, I am entitled to enforce the contract." If, then, it should happen that there turns out to be a defect of title as to a part which is immaterial both in quantity and situation, yet the vendor is not at liberty to disturb the possession, but he must come here, and, leaving the possession as it is, must lay his case before the court to decide whether there shall or shall not be a specific performance.

F Some further correspondence afterwards passed, leaving the question in the same state, and then follows the letter of Oct. 5, 1812, where commences the transaction which I think is the most important of any that passed between the parties, for, by his letter of that day, instead of representing to the defendant (who was in possession under the contract, which, if it were in any way to be performed, gave him a title to the possession) that, if he had taken possession with a knowledge of the title being defective to that part of the estate, he had fallen within many of the decided authorities, instead of insisting (as they now insist) that the twelve acres are so immaterial that he is bound to take the property at the price stipulated, only with a reasonable compensation for the value of those twelve acres, the solicitor for the plaintiffs writes thus to the defendant's solicitor:

H "Without entering again into the motives of Mr. G.'s conduct, I will thank you to inform him that I am directed to tender his deposit money with interest, and to demand from him that part of the estate of which the vendors have given him possession; and, for these purposes, I shall, on behalf of my clients, attend at Mr. G.'s house in Coleman Street, on Wednesday next, at twelve o'clock."

I If the plaintiffs had a right to insist on the performance of the contract, what right could they have to turn the defendant out of possession which was taken under that very contract? The defendant had a right to retain possession under the contract till a conveyance should be executed, provided the difficulty about the title should be set right, which was still a point in question. But the plaintiffs, by this act, destroy the contract, and how can they now pretend to have reserved a right to its performance when by their own act it has been rendered incapable of being performed? On Oct. 12 the stock which Rutton had sold to the defendant for £5,500 in order that the defendant might have the benefit of immediate possession intended by the contract (which immediate possession was certainly

meant to be a continuing possession)—that very stock so sold to the defendant was driven off the premises by order of the vendors, who had given notice to the tenants not to pay their rents to the defendant. A

If the case rested here, the question would be simply whether the vendors can insist that the purchaser shall specifically execute the contract when, if he were specifically to execute the contract, it is rendered impossible for him to have the full benefit intended him by the contract, and that, through the act of the vendors themselves. Their difficulty on this part of the case is this—it was incumbent on them, if they meant to have the contract carried into execution upon the principle of compensation adopted in this court in the case of a defective title as to an immaterial part of the purchase, to have left the property in the enjoyment of the purchaser so that he should not be deprived of any part of the benefit intended him by that contract, and I cannot see how it would be possible for the vendors, if nothing more had passed subsequently, to say: The title shall be good as far as we choose, and bad as far as we choose. You shall not have the benefit of the original contract, but you shall be bound to take the estate with a compensation for so much of it to which we are unable to make a title, and to say this after they have by their own act placed him in a situation different from that in which he was entitled to stand by the terms of that very contract. There is a great deal more correspondence which I can represent only as a negotiation between the parties as to the management of the farms, the plaintiffs struggling to show that the defendant ought to be considered as still in possession while the defendant is fencing against such a possession. I have looked very minutely into this correspondence, but cannot come to the conclusion that the parties have, by the effect of it, been restored to that state in which they were before the turning out of possession. B C D E

It only remains to be seen how the materiality of these twelve acres is put in issue—and that is represented by the answer to depend, not only on the nature and quality of the land, but on the use to be made of it with regard to the rest of the purchase. I do not, however, think it necessary to go into the cases on the subject, for, if the parties are not restored by the subsequent correspondence to the state in which they stood prior to Oct. 5 [when the plaintiffs' agent tendered to the defendant the deposit which he had paid]—and I have expressed my opinion that the subsequent correspondence does not restore them to that condition—the plaintiffs cannot make a case to enable them to say: "If we did wrong upon that occasion, we are nevertheless entitled to the same relief as if we had acted otherwise." Where parties enter into a contract for the sale and purchase of an estate and the vendor is unwise enough to make it part of the contract that the purchaser shall take immediate possession, and the question afterwards arises whether it is a case for compensation as to a part to which he is unable to make a title, the vendor cannot in such a case (to use the language of this defendant) turn the purchaser in and out of possession just as and when he thinks proper. F G H

I should hesitate long before I could determine (regard being had to all the circumstances as the question of materiality is here put in issue) that these twelve acres of land do not form a material part of the purchase, as to which there is the evidence of what was Hawkins's opinion at the time when he became the purchaser, and there is also the material fact that a considerable part of the estate is intersected by these twelve acres. I have looked into *Drewe v. Hanson* (3), and *Dyer v. Hargrave* (1), where, the representation being that the house was in good repair and the land in a state of high cultivation and in a ring fence, SIR WILLIAM GRANT, M.R., thought that, as to the house not being in repair, that might be compensated by its being put into repair unless it could be shown that the purchaser wanted possession of the house to live in within a certain time, and so also as to the marsh land not being in so good a state of cultivation as had been represented. But, as to the estate not being in a ring fence, it was not quite I

A so certain that a pecuniary value could be set upon the difference between a farm so situated and one which was scattered and dispersed with other lands. I know by experience that a small piece of land running through one person's ground to another's may occasion as sensible an inconvenience as a landlord is capable of sustaining. Still, I agree that a mere speculative objection as to the mischief likely to result is not that which the court will proceed upon, and I must ask:

B What is the nature of this land? In answer to this question, I do not find that the nature of the land is so put in issue as to enable the court to determine as to its materiality. But, considering that all the witnesses for the defendant speak as to its being material and that nothing is said with regard to the question on the part of the plaintiffs, and regard being had to the decided cases and to the circumstance that this court is from time to time approaching nearer to the

C doctrine that a purchaser shall have that which he contracted for or not be compelled to take that which he did not mean to have, I should be going much too far in saying that the twelve acres are not material, and that he shall be compelled to take the estate without them.

In *Fordyce v. Ford* (2), the case of an estate sold as freehold with leasehold adjoining which turned out to be almost all leasehold, the abstract having been delivered upon which no objection was made by the purchaser, the Master of the Rolls held that, if the purchaser had made the objection, he could not have been bound to perform the contract, but that, having known the fact as it appeared by the abstract and yet made no such objection, it became a question whether the quality of the land at all entered into the intention with which he made the purchase. So, in *Dyer v. Hargrave* (1), where the contract was for land lying within a ring fence and the defendant purchased knowing that it was not within a ring fence, SIR WILLIAM GRANT, M.R., held that he could not be admitted to say afterwards that he would not perform the contract for want of a ring fence, when he probably bought the land for less money on that very account.

But, without entering into those cases, the ground upon which I rest the present

F case is that nothing was done previous to Oct. 5, 1812, amounting to a waiver on the part of the defendant of his right to the possession, and that the turning him out of possession at that time was an act, however meant, which has rendered it impossible for the vendors specifically to perform their part of the contract, even if they would otherwise have been entitled to a specific performance with a compensation to be made for the defect of title to Cole Nash. On this ground

G I am of opinion that the decree of the vice-chancellor should be affirmed.

Decree affirmed.

WOLFF AND OTHERS v. OXHOLM

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Bayley, Abbott and Holroyd, JJ.), Michaelmas Term, 1816, February 6, 1817]

[Reported 6 M. & S. 92; 105 E.R. 1177]

Conflict of Laws—Foreign law—Recognition—Penal law—Ordinance not conformable to usage of nations—Confiscation of property of subject of enemy State.

The penal laws of foreign countries are strictly local and affect nothing more than they can reach and what can be seized by virtue of their authority. Accordingly, an English court will not recognise and enforce any law of a foreign country which is penal.

Nor will an English court regard as valid and give effect to any law of a foreign country which is not conformable to the usage of nations, e.g., an ordinance providing for the confiscation in time of war of personal property (a debt) due from a subject of one belligerent State to subjects of the other.

Notes. Applied: *Re Fried Krupp Act.*, [1917] 2 Ch. 188. Considered: *Hugh Stevenson & Sons, Ltd. v. Akt. für Cartonagen-Industrie*, [1918-19] All E.R. Rep. 600. Distinguished: *Re Ferdinand (Ex-Tsar of Bulgaria)*, [1921] 1 Ch. 107. Considered: *Ledeboer and Van Der Helds' Textielhandel v. Hibbert* (1947), 63 T.L.R. 334. Referred to: *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K.B. 391; *Porter v. Freudenberg, Kreglinger v. Samuel and Rosenfeld, Re Merten's Patents*, [1914-15] All E.R. Rep. 918; *Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.*, [1921] 1 K.B. 456; *The Berwickshire*, [1950] 1 All E.R. 699; *Anglo-Iranian Oil Co. v. Jaffrate* (1953), 97 Sol. Jo. 81; *Re Helbert Wagg & Co., Re Prudential Assurance Co.*, [1956] 1 All E.R. 129.

As to exceptions to recognition of foreign law, see 7 HALSBURY'S LAWS (3rd Edn.) 8-14; and for cases see 11 DIGEST (Repl.) 324-326.

Cases referred to:

- (1) *Folliott v. Ogden* (1789), 1 Hy. Bl. 123; 126 E.R. 75; affirmed sub nom. *Ogden v. Folliott* (1790), 3 Term Rep. 726; (1792), 4 Bro. Parl. Cas. 111, H.L.; 11 Digest (Repl.) 537, 1471.
- (2) *Touteng v. Hubbard* (1802), 3 Bos. & P. 291; 127 E.R. 161; 41 Digest (Repl.) 565, 3435.
- (3) *Conway v. Gray* (1809), 10 East, 536; 103 E.R. 879; 29 Digest (Repl.) 322, 2444.
- (4) *Bazett v. Meyer* (1814), 5 Taunt. 824; 128 E.R. 917; 29 Digest (Repl.) 263, 1997.

Action by G. Wolff and others, the assignees in the bankruptcies of J. Wolff and J. Dorville, to recover from the defendant a debt due from him to the plaintiffs.

The plaintiff, G. Wolff, was a native and subject of the King of Denmark, but many years previously was naturalised in Great Britain by Act of Parliament and had resided here ever since. He and the bankrupts (who were British subjects) carried on trade here in partnership, under the firm name of Wolffs and Dorville. On Feb. 7, 1800, the defendant, who was a Danish born subject resident in Denmark, was indebted to the partnership in the sum of £2,101 7s. 5d. sterling for moneys paid and advanced by them for the defendant in this country, and bearing interest at 5 per cent. For the recovery of this sum Wolffs and Dorville directed their proctor at Copenhagen to institute proceedings against the defendants, and, accordingly, a suit was instituted in the proper court at Copenhagen. In answer to this suit the defendant set up some unliquidated claims of himself and one Frederick Hage against Wolffs and Dorville, who were advised by their proctor to assign the debt and interest to some friend in this country in order that the

A same might be sued for and recovered in the Danish courts in his name, by which means they would remove the difficulty arising from the counterclaim of the defendant and Hage, but the defendant never had any notice of such advice. Conformably thereto, an indenture, under the hands and seals of the partners, dated Jan. 28, 1806, was executed in London, whereby, for the consideration of £2,500 therein expressed to have been paid to them by Wm. Mountford of B Whitechapel, they assigned the debt and interest, then amounting together to £2,861 14s., to Mountford, with power to him and his substitute to demand, sue for, recover the debt, and to give discharges for the same.

By the laws of Denmark an assignment of a debt vested the legal right in the assignee to recover the debt in his own name, as his own property, as well as the beneficial interest in the debt. Immediately after the execution of the assignment, C Mountford signed and delivered to Wolffs and Dorville a memorandum bearing even date, whereby it was declared that the assignment was made to him only as a trustee for Wolffs and Dorville, but the defendant never had any notice of this declaration of trust or that the consideration money for the assignment was not really and bona fide paid. Mountford also, at the request of Wolffs and Dorville, D executed a letter of attorney of the same date, whereby he appointed their proctor to be his attorney, to demand, sue for, and recover the debt, and to give discharges for the same. This assignment and letter of attorney were shortly afterwards transmitted by Wolffs and Dorville to their proctor at Copenhagen, with directions to commence legal proceedings against the defendant for the recovery of the debt. In pursuance of these directions the proctor commenced a suit in the Royal Superior Justiciary Court there, against the defendant, at the suit of Mountford, E but the defendant never had any notice of the assignment and letter of attorney having been transmitted by Wolffs and Dorville or of their having given any directions to the proctor relative thereto. In September, 1806, the defendant instituted a cross-suit in the court against Mountford. to which Wolffs and Dorville were made parties and were served with a citation to appear, and, accordingly, F executed a proxy to enter an appearance.

In 1807 while these suits were depending, a war between Great Britain and Denmark commenced and a law or ordinance was thereupon made by the government of Denmark, dated Aug. 16, 1807, by which all ships, goods, money, and moneys worth, of or belonging to English subjects, were declared to be sequestrated and detained; and by another law or ordinance of the government of Denmark, G dated Sept. 9, 1807, all persons were commanded within three days after the publication thereof (wherever it was not then already done) to transmit an account of the debts due to English subjects, the whole of which were directed to be paid into the Danish treasury. In case of concealment the person so offending was to be proceeded against by the officers of the exchequer. Commissioners were appointed to receive the debts declared to be sequestrated, and, as a consequence of H the ordinance, the suit of Mountford against the defendant was not further prosecuted. In 1807 the proctor gave information to the commissioners of the debt. The commissioners were authorised and directed to receive payment of the debts due to British subjects from Danish debtors at the rate of six Danish dollars to the pound sterling, being the then current rate of exchange. The defendant at the date of this ordinance, was resident and domiciled in Copenhagen, and so I continued till 1814, and on Nov. 27, 1812, in obedience to the ordinance, but without the knowledge or consent of Wolffs and Dorville or of Mountford, he bona fide paid to the commissioners in Danish dollars, at the rate specified, the debt of £2,861 14s. assigned to Mountford, and a further sum of £1,244 16s. 6d. for interest to that time, and took their receipt for the same, upon the production of which the court quashed the cause depending between Mountford and the defendant.

On Nov. 2, 1812, a commission of bankruptcy issued against J. Wolff and Dorville, under which they were declared bankrupts, and the plaintiffs Norman,

Martin, and Meyer were chosen assignees. In 1814 the defendant arrived in this country, and was arrested and held to bail by the plaintiffs for the debt. A

At the trial before LORD ELLENBOROUGH, C.J., in 1816, a verdict was found for the plaintiffs for £4,106 10s. 6d., subject to the opinion of the court on a Case which stated the facts set out above. The question for the opinion of the court was whether the plaintiffs were entitled to recover. The case was argued at Serjeants' Inn before Michaelmas Term, 1816, by *Carr* for the plaintiffs, and *Gifford* for the defendant. B

Carr for the plaintiffs: The Danish confiscatory ordinance was void, being contrary to the acknowledged practice and law of nations, and, therefore, affording no just ground of defence to this action. Secondly, supposing the ordinance to be valid so as to cover and protect all acts done under it, yet the payment made by the defendant appeared from the facts stated not to have been a compulsory payment under the ordinance, but made by the defendant in order to avail himself of the advantage of the then existing state of exchange which reduced the real value of the payment almost to nothing. Thirdly, supposing the payment to have been made under the ordinance, yet as the defendant was a Danish subject, it must be considered as payment made to himself, because every subject of a State is to be deemed a party to the ordinances of his own government. The following authorities were cited: viz., *Folliott v. Ogden* (1) on the first point, and on the last GROTIUS lib. 2, c. 14, s. 1; PUFFENDORF, lib. 2, c. 6, s. 10; VATTEL, lib. 1, c. 4, s. 40; 1 Bl. Com. 53; *Touteng v. Hubbard* (2), *Conway v. Gray* (3). C

Gifford for the defendant: A payment such as this, which is stated to have been made in obedience to the ordinance at the rate specified and to the persons appointed by the ordinance to receive it, and to have been bona fide, could not with propriety be called voluntary. If not voluntary, but made in satisfaction of a suit then depending under the compulsion of the ordinance, it must afford a defence to this action unless the ordinance itself were of none effect. As to which there is no difference, so far as regards the right of confiscation, between debts and movables, the latter of which are, by the constant practice between hostile States, subject to reprisals: VATTEL, lib. 2, c. 18, s. 344; *ibid.*, lib. 3, c. 5, ss. 73, 77; GROTIUS, lib. 3, c. 8, s. 4. As to the third point, the doctrine laid down in *Conway v. Gray* (3) was not applicable to a case like the present, and moreover, it had been much shaken by *Bazett v. Meyer* (4), but, admitting it, had the plaintiff furnished an answer to this action, for he was a natural born Dane, and, notwithstanding that he might also sustain the character of a British subject, the maxim was *nemo potest exuere patriam*. D

Cur. adv. vult. E

Feb. 6, 1817. LORD ELLENBOROUGH, C.J., delivered the following judgment of the court.—Upon the facts stated, it appears that the action was brought for the recovery of a debt contracted in England by a Danish subject resident in Denmark with a house of trade established here and in a time of peace between the two countries. Although one of the partners in that house is a Dane, yet, as his naturalisation and residence in England entitle him to the benefit of the English laws, we think the case is the same in effect as if all the partners in the house had been natural born British subjects. It further appears that with a view to deprive the defendant of some supposed claim of set-off which he was expected to make in the Danish courts against the suit of the original creditors, they had assigned the debt to a third person in trust for themselves, and that their assignee commenced a suit in his own name in one of the courts of Denmark against the defendant who, in order to avoid the effect of this assignment, instituted a cross-suit in the same court against them and their assignee to which they appeared. In this state of things a war broke out between the two countries, and no further proceedings were had in either of the suits for several years, nor until they were quashed upon the application of the defendant on the production of the commissioners' receipt. One of the F

A points insisted upon in the argument for the defendant was that this assignment and the suit instituted upon it were a bar to the plaintiffs' demand, but we think that they cannot have that effect. The assignee could not sue in the courts of this country in his own name. The action must have been brought here in the names of the original creditors even if they had assigned the debt for a valuable consideration, and, although the assignment gave the assignee a right to sue in his own name in Denmark, yet the defendant does not appear to have been prejudiced by that measure even there, nor has any material consequence resulted therefrom.

B We consider the case to stand now just as it would have done if no assignment had been made and if the suit in Denmark had been brought by the plaintiffs themselves instead of being instituted by their trustees. This brings us to the consideration of what is the material question in the cause, viz., the legal effect of the Danish ordinance of confiscation promulgated on Aug. 16, 1807, and the facts that took place after it which constituted the main ground of the defence. If this ordinance is to be considered merely as a penal law, it is clear that the courts of this country ought not to take notice of it, because no country regards the penal laws of another: *Folliott v. Ogden* (1) (1 Hy. Bl. at p. 135). The penal laws of foreign countries are strictly local and affect nothing more than they can reach and what can be seized by virtue of their authority: LORD LOUGHBOROUGH's judgment in *Folliott v. Ogden* (1) (1 Hy. Bl. at p. 135).

C D But it was contended that this ordinance was a proceeding founded upon and conformable to the law of nations, and that, as the defendant paid the debt to the persons appointed by the ordinance to receive the confiscated debts, he has a good discharge as to the debt itself according to the law of nations to which the municipal courts of this country, as well as of all others, ought to give effect. To prove that this ordinance was grounded upon and conformable to the law of nations, two passages were cited from VATTTEL's treatise, the first from lib. 2, c. 18, s. 344, where, speaking on the subject of reprisals, the author says:

E F "Between State and State whatever is the property of the members is considered as belonging to the body, and is answerable for the debts of the body; whence it follows, that in reprisals they seize the goods of the subject, in the same manner as those of the State or the Sovereign. Everything that belongs to the nation is subject to reprisals wherever it can be found, provided it be not a deposit entrusted to the public faith."

G The other passage is in lib. 3, c. 5, s. 77:

H I "Among the rights belonging to the enemy, are likewise incorporeal things, all his rights, titles, and debts, excepting, however, those kind of rights granted by a third person, and in which the grantor is so far concerned that it is not a matter of indifference to him in what hands they are vested. Such, for instance, are the rights of commerce. But as debts are not of this number, war gives us the same rights over any sums of money due by neutral nations to our enemy, as it can give over his other property. When Alexander by conquest became absolute master of Thebes, he remitted to the Thessalians a hundred talents which they owed to the Thebans. The Sovereign has naturally the same right over what his subjects may owe to enemies. He may, therefore, confiscate debts of this nature, if the term of payment happen in the time of war, or at least he may prohibit his subjects from paying while the war continues."

To the proviso at the end of the first of these passages, the author himself immediately subjoins the following words:

"As it is only in consequence of that confidence which the proprietor has placed in our good faith that we happen to have such deposit in our hands, it ought to be respected even in case of open war. Such is the conduct observed in France, England, and elsewhere, with respect to the money which foreigners have placed in the public funds."

It is obvious that this reason will apply with equal force to a debt owing to an individual in the course of commerce. That individual trusted to the good faith of the individual with whom he dealt and to the justice of the State of which that individual was a subject, and, if it be contrary to good faith for a State to confiscate and convert to its own use debts owing by the State itself in its aggregate capacity, it cannot be less contrary to good faith to sequester and convert to the use of the State debts owing by its own subjects in their individual capacities. The concluding sentence of the second passage quoted by the defendant's counsel, which was the main support of his argument, is expressed in such a manner as to show that the author himself doubted of the right of confiscating debts due from individuals to individuals. He says:

"At least the Sovereign may prohibit his subjects from paying while the war continues."

Indeed, this is the actual limit of his right, viz., as it operates in personam upon the subject of the State or upon his property within the reach and control of such State. In the very next sentence the author further qualifies his doctrine, and adds:

"But, at present, a regard to the advantage and safety of commerce has induced all the Sovereigns of Europe to act with less rigour in this point. And as this custom has been generally received, he who should act contrary to it would violate the public faith; for strangers trusted his subjects only from a firm persuasion that the general custom would be observed."

We have not, however, been able to discover that there ever was a time when greater rigour generally prevailed on this subject, as Vattel appears to have supposed. Some instances, indeed, of similar confiscations in the sixteenth and seventeenth centuries are mentioned by BYNKERSHOEK in his *QUESTIONES JURIS PUBLICI ET PRIVATI*, c. 7, and appear to be considered by that writer as warranted by the law of nations and available to the debtor where payment has been actually enforced from him by the authority of his own government. There was a decision about the middle of the sixteenth century by a court at Paris in favour of a Frenchman against the claim of a Fleming to recover a debt paid by the Frenchman to the treasury of his own country in obedience to a French decree of this kind during a war between the two nations*. It could not be expected that a French court should decide otherwise with reference to a decree of its own government. SIR MATTHEW HALE, also in his *PLEAS OF THE CROWN*, vol. i, p. 95, says:

"by the law of England debts and goods found in this realm belonging to alien enemies belong to the King, and may be seized by him"

but the books referred to do not furnish an instance of the seizure of debts or a decided case in support of the legality of such a seizure. By the statute of Magna Carta, c. 30, merchant strangers are, upon the breaking out of a war, to be attached and kept without harm to body or goods until it shall be known how the English merchants are treated by the Sovereign of their State, and if the latter are safe there, the former are to be safe here. So foreign merchants could suffer nothing in England unless by way of retaliation and reprisal.

As early as the time of GROTIUS opinions had been entertained against the right of confiscating incorporeal things, and there is nothing to be found in the great work of that very learned author which can give countenance to such a right. On the contrary, in lib. 3, c. 7, s. 4, of the *TREATISE DE JURE GENTIUM*, there is an allusion to the opinion of some "*qui dicunt incorporalia, belli jure, non acquiri*", and GROTIUS himself does not controvert this opinion in general, but supposes it to admit of qualification in the case of a captive slave and alludes to it in that way, after having remarked that "*res omnes quæ captæ fuerant, cum persona acquiruntur*"

* *Recueil d' Arrêts Notables des Cours Souveraines de France, etc.* par Johan Pepon, Norw. W. Paris, 1601, 4to.

domino." But the proposition last mentioned does not, in truth, furnish any qualification of the opinion to which GROTIUS alludes, for incorporeal things cannot be taken and the dominion of corporeal things actually taken is in general acquired by the capture of them, and the title of the captor to them is not less valid where their owner is not taken than where he is, as is observed by PUFFENDORFF, at the end of s. 22, lib. 8, c. 6, of the *TREATISE DE JURE NATURALI ET GENTIUM*.

At the beginning of that section this learned author gives the rule as follows :

"Circa acquisitionem incorporalium in bello peculiariter observandum, ista non adquiri, nisi cum subiecto, cui inherent."

He then proceeds to notice that incorporeal rights may be annexed to corporeal things conquered, as to farms, rivers, harbours, towers, and countries (but even as to these he observes that the nature of the original annexation must be regarded), or to persons, and as to the latter he distinguishes between those who live "*extra civitatem in statu mere naturali*" (all whose things he says are taken with the person, or may be, because there is no one to oppose it), and those who live in civitate, as to whom he says :

"unde si civis ab hoste captus fuerit, bona istius, quæ simul capta non fuerunt, non adquiruntur capienti; sed ad eum perveniunt, quem leges civiles ad successionem vocabant si iste naturali morte functus esset."

If things belonging to a captive enemy, but not actually taken, do not pass to the conquering enemy, how can things belonging to a person not made captive be legally acquired by an enemy who is not a conqueror either as to the person or the things, which is the case of the creditors and of the debt in question?

This doctrine of PUFFENDORFF, that "*incorporalia bello non adquiruntur*," is fortified by some of the arguments suggested in QUINTILIAN, lib. 5, c. 10, as proper to have been urged before the Amphictyons on occasion of the claim made by the Thebans upon the Thessalians for the payment of a hundred talents lent to them by the Thebans and secured by some written instrument which Alexander had found and seized at the conquest of Thebes and had given to the Thessalians, who were then serving with his army. This is the transaction referred to by VATTTEL in the passage before quoted, from which he seems to have deduced the proposition as to the right of confiscation upon which the defendant has placed so much reliance in the present case. In favour of the claim of the Thebans, QUINTILIAN suggests :

"non potuisse donari a victore jus, quia id demum sit ejus, quod ipse teneat; jus quod sit incorporale, apprehendi manu non posse."

And again : "Non in tabulis esse jus." QUINTILIAN suggests arguments in favour of the Thebans only; PUFFENDORFF, at s. 23 of the book before quoted, takes upon himself to suggest an answer. But it will be found that he puts the argument upon the ground of the absolute conquest and subjection of the city and state of Thebes and the Thebans. GROTIUS, also in lib. 3, c. 8, s. 4, controverts the reasoning of QUINTILIAN on this transaction, but he does so upon the ground afterwards taken by PUFFENDORFF, namely, the entire conquest of the Theban State :

"Nam qui dominus est personarum, idem et rerum est, et juris omnis quod personis competit. Qui possidetur, non possidet sibi, nec in potestate habet, qui non est suæ potestatis."

Although GROTIUS mentions this transaction as an instance of his proposition "*Incorporalia jura, quæ universatis fuerant, fiunt victoris, quatenus velit*", he does not draw from it any conclusion as to the right of confiscating private and individual debts as VATTTEL has done.

It was admitted that, notwithstanding all the violent measures to which recourse has been had during the extraordinary warfare that we have witnessed in our own times, this ordinance of the court of Denmark stands single and alone, not supported by any precedent, nor adopted as an example in any other State. The ordinance

itself, however, so far as we can learn from this case, was not followed up by any practical measure of compulsion upon the subjects of Denmark. Nothing in the nature of process against the defendant to enforce the payment of this particular debt, nothing analogous to the seizure or condemnation of corporeal things taken in the time of war occurred on this occasion, and, although the commissioners appointed under the ordinance to receive the sequestrated moneys were informed of this debt as early as the year 1807, yet the defendant did not pay the money until 1812. An allusion was made in the course of the argument to a statute of our own country, the 34 Geo. 3, c. 79 [relating to the effects of residents in France: 1794]. This, however, was not an act of confiscation to the benefit of the State, but a measure of policy, not less generous than lawful, by which at the same time as the transmission of money to the enemies of the State was prevented, the money itself was called in, secured, and kept for those to whom it was due until the return of peace should enable them to receive it. Considering, therefore, that the right of confiscating debts contended for on the authority of these citations from Vattel is not recognised by Grotius and is impugned by Puffendorf and others, that such confiscation was not general at any period of time, and that no instance of it, except the ordinance in question, is to be found for something more than a century, we think our judgment would be pregnant of mischief to future times if we did not declare that, in our opinion, this ordinance and the payment to the commissioners appointed under it do not furnish a defence to the present action. If they cannot do this of themselves, neither can they do so by the aid of the proceedings in the Danish court. The parties went into that court expecting justice according to the then existing laws of the country, and are not bound by the quashing of their suit in consequence of a subsequent ordinance, not conformable to the usage of nations, which, therefore, they could not expect, nor are they or we bound to regard.

Judgment for plaintiffs.

ATTORNEY-GENERAL v. WARREN

[ROLLS COURT (Sir Thomas Plumer, M.R.), July 14, 16, 1818]

[Reported 2 Swan. 291; 1 Wils. Ch. 387; 36 E.R. 627]

B *Charity—Trustee—Duty—Provident administration of charity property—Sale of property—Leasing—Long lease—Power of trustees—Benefit to charity—Acquiescence in terms of lease alleged to be improvident.*

C Trustees of a charity are bound to a provident administration of the property for the benefit of the charity. Where it is beneficial to the charity the trustees may alien the property of the charity either absolutely or for a long term. It is not fitting for the trustees to divest themselves of the power of profiting by a change in the value of the property of the charity. Acquiescence over a long period in the operation of the provisions of a lease will be, though not a bar, an obstacle to the court setting aside the lease as having been improvident. In examining the conduct of the trustees and deciding whether or not their administration of the property of the charity has been provident the court must have regard to all the circumstances. The court will be careful not to injure defendants by overlooking defects in form.

D *Attorney-General—Charity—Duty to secure due administration—Need to be party to actions relating to charity.*

E The duty of the Attorney-General with relation to a charity is to see that the trustees duly administer the property. He is not necessarily a party to all actions relating to the charity. He is not a necessary party where third parties are suing the trustees of a charity for specific performance of an agreement.

F **Notes.** Referred to: *A.-G. v. Hungerford* (1834), 8 Bli. N.S. 437; *A.-G. v. Newark-upon-Trent Corpn.* (1842), 1 Hare, 395; *Re Clergy Orphan Corpn.*, [1894] 3 Ch. 145.

As to the management of the property of a charitable trust and the duty of the Attorney-General, see 4 HALSBURY'S LAWS (3rd Edn.) 334 et seq., 446-449. For cases see 8 DIGEST (Repl.) 474 et seq., 517-519.

Cases referred to:

- (1) *A.-G. v. Cross* (1817), 3 Mer. 524; 36 E.R. 201; 8 Digest (Repl.) 480, 1834.
- G** (2) *A.-G. v. Smith* (1716), 2 Vern. 746; 23 E.R. 1087, L.C.; 8 Digest (Repl.) 480, 1847.
- (3) *A.-G. v. Green* (1801), 6 Ves. 452; 31 E.R. 1140, L.C.; 8 Digest (Repl.) 480, 1836.
- (4) *A.-G. v. Owen* (1805), 10 Ves. 555; 32 E.R. 960, L.C.; 8 Digest (Repl.) 480, 1841.
- H** (5) *Blackston v. Hemsworth Hospital* (1636), Duke, 49; 8 Digest (Repl.) 474, 1768.
- (6) *Watson v. Hemsworth Hospital (Master, etc.)* (1807), 14 Ves. 234; 33 E.R. 546; 8 Digest (Repl.) 480, 1848.
- I** (7) *A.-G. v. Cholmley* (1765), Amb. 510, L.C.; affirmed sub nom. *Cholmley v. A.-G.* (1768), 7 Bro. Parl. Cas. 34; 3 E.R. 23, H.L.; 19 Digest (Repl.) 513, 3544.

Also referred to in argument:

A.-G. v. Griffith (1807), 13 Ves. 565; 33 E.R. 406, L.C.; 8 Digest (Repl.) 479, 1829.

A.-G. v. Backhouse (1810), 17 Ves. 283; 34 E.R. 110, L.C.; 8 Digest (Repl.) 479, 1833.

Wright v. Newport Pond School (1664), Duke, 46; 8 Digest (Repl.) 481, 1865.

Eltham (Inhabitants) v. Warreyn (1634), Duke, 67; 8 Digest (Repl.) 481, 1868.

Sellers v. Dawson (1790), 2 Dick. 738; 2 Anst. 458, n.

- A.-G. v. Parker* (1747), 3 Atk. 576; 1 Ves. Sen. 43; 27 E.R. 879, L.C.; 8 Digest (Repl.) 521, 2543.
- A.-G. v. Scott* (1750), 1 Ves. Sen. 413; 27 E.R. 1113; sub nom. *Wilson v. Dennison*, Amb. 82; 19 Digest (Repl.) 424, 2368.
- A.-G. v. Breton* (1752), 2 Ves. Sen. 425.
- A.-G. v. Whiteloy* (1805), 11 Ves. 241; 32 E.R. 1080, L.C.; 8 Digest (Repl.) 453, 1510.
- A.-G. v. Brooke* (1811), 18 Ves. 319; 34 E.R. 338, L.C.; 8 Digest (Repl.) 480, 1849.
- Wall v. Bushby* (1785), 1 Bro. C.C. 484; 28 E.R. 1254, L.C.; 24 Digest (Repl.) 759, 7483.
- Boddy v. Kent* (1816), 1 Mer. 361.
- Monill v. Lawson* (1719), 2 Eq. Cas. Abr. 167, pl. 13; 22 E.R. 142, L.C.; 8 Digest (Repl.) 520, 2519.

Information, filed at the relation of the trustees of a charity, praying that a lease of tithes belonging to the charity might be declared illegal and void.

The information, which was filed on Nov. 21, 1815, at the relation of the trustees of "Foljambe's Charity," stated that Godfrey Foljambe, by his will dated Feb. 24, 1594, devised to Isabel Foljambe, his wife, and her heirs, the rectory and parsonage of Adenborough, in the county of Nottingham, together with the glebe lands, upon trust (after the expiration of a term of years which George Foljambe had therein) to pay certain annuities to the preacher and schoolmaster at Chesterfield and to the masters and fellows of Jesus and Magdalene Colleges, Cambridge, and to apply the residue of the rents and profits towards the relief of the poor of the parish of Chesterfield at the view and oversight of his executors and the survivor, and after their decease of such person as should be owner of his mansion house of Walton. The information further stated that, by a conveyance dated August 27, 1584, Isabel Foljambe granted the rectory to William Ireton and Mary, his wife, and their heirs, to pay the sums of money and accomplish the purposes expressed in the will. The succession of trustees had been regularly continued, and the rectory was vested in the relators on the trusts of the will. They, as improper rectors, were entitled to the tithes of corn, grain, and hay in the parish of Adenborough, and the defendant, Sir John Borlase Warren, since 1809 had been, the owner of lands within the parish.

The information stated a lease dated Sept. 12, 1763, by which the trustees of that time granted to Arthur Warren, an ancestor of the defendant, the tithes of the lands then belonging to him within the parish for 980 years, and alleged that the compensation made by the pretended lease to the trustees for the tithes was grossly inadequate and fraudulent, that the lease was illegal and wholly void, and that the trustees were not enabled to enter into or grant any such lease, tending in the highest degree to injure the interest of the charity. The relators submitted that the lease was fraudulent and void, and could only be binding on the parties thereto, and asked that it might be declared to be illegal and void and ordered to be delivered up and cancelled; that an account might be taken of the single value of all the tithable matters which had arisen on or from the farms and lands occupied by the defendant; and that he might pay to the relators what should appear to be due from him.

By his answer the defendant stated that the rectory being in the possession of Henry Foljambe under a lease from the trustees, and Arthur Warren being possessed of the manor of Toton (a part of the parish of Adenborough) and of some arable lands in the parish for the remainder of a term of a thousand years (the reversion in fee being vested in Benjamin Weston and Hopton Shuter, in trust for him), and having entered into the agreement aftermentioned in 1662, Arthur Warren, in conjunction with his trustees Weston and Shuter, exhibited a bill in Chancery against Henry Pierpoint and the other trustees of the charity, Henry

A Foljambe, the tenant of the rectory, the masters and fellows of Jesus and Magdalene Colleges, W.B., the preacher, and R.S., the schoolmaster, of the parish of Chesterfield, and the churchwardens and overseers of the poor of the parish, stating the foundation of the charity and that, there being tithes payable by Arthur Warren out of his manor and lands to the impropiators of Adenborough, about September, 1661, he treated with Henry Foljambe for the payment of a
B certain sum of money in lieu of such tithes and for laying the lands belonging to the rectory, which were intermixed with Arthur Warren's lands, into several closes by themselves, and that it was agreed between Warren and Henry Foljambe that the former should pay to Foljambe, during his term in the rectory, £60 per annum for the tithes, that the taxes should be equally borne between them, and that the glebe lands, which were arable lands lying in the fields of Toton, should be
C all laid together in one place of the fields at the choice of Foljambe, and that Warren was to fence them out and the defendants were to maintain the fence afterwards, and such lands were to continue tithe-free for ever to the rectory. In 1670 a decree was pronounced directing that the agreement should be performed, and that the plaintiffs, according to their several interests, should hold and enjoy the manor and all the lands in Toton in which they had any interest, and also the
D lands allotted to the plaintiffs by the agreement discharged of tithes for ever and of the yearly payments to the minister and schoolmaster of Chesterfield, and to the colleges, and of all fee-farm rents chargeable on the rectory, and, that in lieu thereof, Warren should convey and settle the lands offered for security of the £60 per annum to the trustees. The answer further stated that conveyances were afterwards executed, dated Sept. 12 and 13, 1673, by which Arthur Warren and his
E surviving trustee Shuter conveyed to the trustees of the charity the lands set out for them, according to the agreement, together with the other premises intended as a security for the payment of the £60 per annum, and the trustees of the charity assigned to Warren, for a term of nine hundred and eighty years (being the residue of his term of one thousand years), the glebe lands of the rectory lying in Toton, together with the tithes of the lands belonging to Warren, and the inheritance
F of the glebe lands and tithes was conveyed by the trustees to Shuter and his heirs in trust for Warren and his heirs, the trustees covenanting for quiet enjoyment of the lands and tithes. Arthur Warren, and those claiming under or in trust for him, had ever since retained possession of the lands and tithes, and had regularly paid the £60 per annum in lieu of tithes, and the trustees had possession
G of the lands conveyed to them. The manor and estates of Arthur Warren had become vested in the defendant, Sir John Borlase Warren. The sum of £60 per annum was accepted by the trustees in lieu of tithes down to October 11, 1814, but a tender on April 6, 1815, of the sum then due was refused. The answer submitted that the trustees were bound by the agreement and decree, and that the compensation for the tithes was not inadequate.

H *Wetherell, Horne and Dowdeswell* for the information.
Hart, Bell and Blenman for the defendant.

SIR THOMAS PLUMER, M.R.—Without finally disposing of this case, I will state my present view of the two questions into which it resolves itself—(i) the validity of the transaction independently on the form of the pleadings; (ii) the
I fitness of this record for the purpose of impeaching it.

On both these questions a principal feature of the case is the decree pronounced in 1670 as affecting as well the validity of the contract as the form of the suit which seeks to impeach it. In that respect there is a novelty in this case, not found in any one of those cited at the Bar. If the information sought to impeach a recent agreement in these terms by trustees of a charity, admitting that the legal estate is absolutely theirs and that they can convey it for ever and conclude a contract binding their interest and the charity at law, the question in this court always is: How far alienation absolute, or for a long term, shall prevail when

accompanied with circumstances which amount to a breach of trust, that is, alienation not consistent with that provident administration which is incumbent on trustees of a charity? The principle that governs all the cases is that trustees are bound to a provident administration of the fund for the benefit of the charity. There is no positive law which says that in no instance shall there be an absolute alienation. If so, even in the case of an inquiry under an order of the court whether alienation would be beneficial to the charity, being contrary to law it could not be good, but on many occasions by the authority of the court alienation has taken place as in the case mentioned of a decayed house in which, after a reference to the Master to inquire whether it was for the interest of the charity, the court directed it to be disposed of. If, contrary to law, the court could not authorise the disposition, alienation under the authority of the court would be as invalid as without it. These decisions, therefore, afford a conclusive proof that alienation not improvident, but beneficial to the charity and conformable to the rule which ought to guide the trustees, may be good, and disclose the principle on which any bill to rescind that alienation must proceed. So, in *A.-G. v. Cross* (1), an information against the corporation of Exeter, SIR WILLIAM GRANT, M.R., was of opinion that leases for three lives are not necessarily an unlawful alienation of charity estates, and, being satisfied that the value had been rightly estimated in the fine and rent, the duration of the leases did not, in his judgment, constitute an objection when it appeared that the trustees had not de novo introduced that mode of alienation, but merely followed the custom of the country. But that custom could not have authorised the alienation if contrary to law.

In *A.-G. v. Smith* (2), the court sanctioned alienation, under a principle which it would be a little difficult to recognise at present. It appearing, on a reference to the Master, that the property of a charity had been recovered in a great degree by the activity of the party who sought a permanent interest in it, he was declared entitled to a lease renewable for ever. It cannot be taken in contradiction to these examples as an inflexible rule that in no circumstance whatever are trustees of estates devoted to charitable purposes authorised to alien, either absolutely or for long terms. The question, therefore, is whether, under all the circumstances, the alienation is a breach of trust, or whether the contract was not for the benefit of the charity.

It appears here, that Henry Foljambe, the tenant of the rectory, having an interest, the extent of which we know not, had entered into an agreement, not confined to the subject of tithes, but by which he undertook to demise all the tithes of the manor, containing, as I understand, about 1,200 acres, for the remainder of Warren's term of 1,000 years, accompanied by a further agreement relative to the glebe (which seems designed to place the glebe lands together, according to the choice of the tenant of the rectory), and for seven acres in lieu of right of common. The exact nature of the rector's right of common, or his interest in the tithes is not in evidence, or whether the owner of the lands might have claimed any exemption. It appears only that in future the rector was to receive £60 a year for tithes, that stipulation being accompanied by an exchange of lands relative to the glebe. Stopping here and considering this agreement with modern impressions, an alienation of charity estates for 1,000 years at a stationary rent, it is impossible to deny that it is a decisive breach of trust, not permitting the rector to avail himself of any change of times, but keeping his interest fixed in amount. The compensation which he received might be adequate at the date of the contract, but he was precluded, during 1,000 years from any advantage of increased value. It is true that he was secured from diminution, and in some instances to guard against fluctuation may be as much the interest of one party as of the other, but that would be an answer to all cases in which trustees have made an alienation at a fixed rent. It is not fitting for trustees to divest themselves of the power of profiting by change of value. The progress of events, and the depreciation of money have shown the improvidence of this agreement. At the

A same time it is just to say that these principles do not seem to have been acted on at that early period, in 1670.

B There is no case produced in which mere improvidence, inferred solely from the extent of the term, was held sufficient to rescind the alienation. In many cases in Duke's collection, the court had acted on inadequacy of value; in none on mere extent of term. Where the alienation appeared at the time to be a provident
C administration, an alienation for a value then adequate, the prospective possibility that it might become inadequate does not appear at that period to have had the effect which it has at present. LORD ELDON, in *A.-G. v. Green* (3) in 1801, says that he can find no precedent for regulation of the judgment of the court having before it the case of a long lease of a charity estate, and in *A.-G. v. Owen* (4), although he states, that during the last twenty-five years no doubt had been entertained on that point, yet no express decision was produced that a long term without reference to value is an improvident alienation.

I mention the fact to show that these trustees might not know that, in the judgment of the law, they were guilty of a breach of trust, but it is a different thing to say whether the court can retrospectively give validity to such a contract, and, with reference to modern principles, permit it to remain. That is a question
D of considerable difficulty, but whenever it can properly be considered, the point will not be merely whether a demise of tithes for a thousand years at a fixed rent is a good administration of a charity, for it never can be just to consider a part of a contract and not the whole. In examining the conduct of the trustees and deciding whether this was a provident administration of the property of the charity
E the court must advert not only to the tithes, but to the glebe, and, as far as it can, to all the circumstances.

Length of time, though not a bar, is certainly an obstacle in the way of setting aside a contract made near a hundred and fifty years ago and acted upon ever since to the filing of this information. It creates a difficulty in ascertaining all the circumstances under which the agreement was made, and a strong case is
F required to justify the interposition of equity after such a lapse of time at the instance of one of the parties who may have enjoyed all the benefit of the contract for perhaps the whole, or a great part, of the interval, and who never could have been compelled, at the instance of the other party, to relinquish it, when, from an alteration in the relative value of money, the agreement has become disadvantageous to him. It is additionally difficult, in such a case, partially to set
G aside the contract, leaving the charity still to enjoy all the benefits of the other part of the transaction, and yet the information neither seeks, nor is properly framed, nor has the necessary parties, for a complete rescission of the whole agreement, and a restitution of both parties to their original rights, as they stood antecedent to the formation of it. But I am not now required to decide these questions, and must not overlook the main feature of the case, that the contract was
H brought under the view of a court of justice, before it was executed. It is necessary to consider that proceeding.

The suit was instituted by Warren against the persons who entered into the contract, with the addition of the overseers of the poor and all other parties interested. Was there any omission fairly to disclose to the court the nature of the contract? Was the court fully possessed of what constituted the objection,
I namely, the length of time and the fixed rent? These are prominently stated in the pleadings, and there needed no reference to the Master to ascertain the fact of the agreement to let the tithes belonging to the charity at £60 a year for a thousand years. The trustees submit to act under the authority of the court. It was stated that such an agreement had been made by their tenant, but was not binding on them, and intended to be binding or not as they approved. By their answer they submit to the judgment of the court how far the agreement should be performed. The court, on debate and hearing what could be alleged, declared that it ought to be performed, and that the trustees should be protected

in the performance. What could the trustees do after this decree was pronounced? A
Could they refuse to execute the deeds in conformity to the decree, when ordered
by the court to execute and convey, and protected by it? Am I to assume, that
the court lent itself as ancillary to a fraud and breach of trust? If there were a
breach of trust, it was committed by the court, which, with perfect knowledge of
what constitutes the alleged breach of trust, the length of term, and fixed amount
of rent, ordered the agreement to be carried into execution. In considering the
propriety of this contract, am I not bound, in deference to the court to suppose
that it was satisfied that there was not a breach of trust, that the agreement and
the decree were proper? I must presume omnia rite acta. It is said that the court
did not direct a reference to the Master to see whether the contract was for the
benefit of the charity. Was such a reference according to the course of practice
at that time? If the contract were void by reason of its duration, no circumstance
could give validity to it. I am bound to suppose that the court was satisfied on
these points before it pronounced the decree. Three years after the decree the
trustees executed the agreement. The question here will be not a mere abstract
question whether trustees can, in any case, alien or demise for a long term, but
whether alienation with the knowledge and under the decree of the court can by
a succeeding court be pronounced a breach of trust. That is quite a new feature
in the case, and if, in modern times, trustees constantly alien when proper means
have been employed to ascertain that it is beneficial to the charity, why are we
to presume here that the court did not take measures to inquire whether this
alienation was for the benefit of the objects of the trust? Admitting that the court
was mistaken, was there a breach of trust in the trustees? When the court orders
a conveyance, is that a mere nullity? E

It is said, that the proceeding on the face of it is a fraud. Fraud is aliud actum
aliud simulatum, concealment, pretended hostility. Here the parties state openly
that they approve the contract, specify its terms, and submit it to the court.
This is an agreement for a long term, and at a fixed rent, but executed under the
sanction of the court, and it must always be considered with reference to that
circumstance, a most important circumstance whenever the question comes to be
decided. Without anticipating the decision, I think that there will be great
difficulty. It must be remembered that this is not the case of mere alienation,
but of trustees calling for the aid and sanction of a court to guide them, and
what they do is the act of the court. It seems difficult to give to such a transaction
the character of a fraud or breach of trust, and it is on that ground only that the
legal right can be qualified in equity. F

Whether the rule is so imperative that to alienation for so extensive a term
no circumstance can give validity, no length of time, no acquiescence, no sanction
of a court, but that it is a manifest breach of trust in the court and all parties
concerned is a question on which I express no opinion, because it seems to
me that the case is not now in a shape in which it is possible to form a decision.
The proceedings in the former suit are wholly omitted in the information. Is
the court to investigate this transaction without having put in issue that which
constitutes the most important circumstance for establishing its validity? This
information attempts to set aside a decree without putting it in issue, praying
that the lease may be cancelled without naming a decree under which it was
executed. It is said that the suit was fraudulent. Those who impeach it must
put it in issue, and state from what its invalidity arises. Is the court to annul a
decree for fraud without the statement of a single circumstance of fraud? Was
any case ever heard of in which, after a solemn decree directly on the very subject
with jurisdiction to bind the inheritance, with parties to be bound and binding
it in express terms to the full extent of the interest, another court, at the distance
of a century and a half, determined the contrary? One judgment confirming, the
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A other annulling, the same contract; two inconsistent determinations on the records of the same court; the first decree commanding the trustees to execute the contract and the subsequent decree, without the least notice of the former, declaring the contract void? Whether the decree in this case can be impeached for fraud is a distinct question, but this suit does not seek to impeach it.

B *Blackston v. Hemsworth Hospital* (5) cannot assist the present information. The history of the proceedings in that case is given in *Watson v. Hemsworth Hospital* (6), and it appears that the hospital was restrained by its constitution from granting leases for more than twenty-one years. All the decrees proceeded on that foundation.

C It is then said that the Attorney-General was not a party, and that an information in behalf of a charity is not to be dismissed for defect of form. To a certain extent that doctrine is well founded. The court will grant relief according to the case made, as it appears on the whole record, but what appears on this record? That there was a decree in 1670 approving the agreement and directing its execution, but no suggestion of fraud. That allegation is extrinsic to the record. All the cases show that the court is careful not to do injury to defendants by overlooking error in form. Would no injury be done here? The information denotes no intention to attack the decree, and can the court permit the Attorney-General to raise a question in argument not put in issue in the pleadings? The record presents nothing to impeach the decree, the information not touching or affecting to touch it. There is, therefore, a subsisting decree on the very point. How can the court overrule it without at least putting it in issue? Counsel for the information insist that this was done in *A.-G. v. Cholmley* (7), and other instances. Certainly,

D decrees in cases of ecclesiastical rectors have not prevailed against objections in modern times, but an ecclesiastical rector cannot, since the disabling statutes, even with the consent of the patron and ordinary, grant a lease for more than three lives. Such leases, and all judgments intended to support them, are expressly declared void [by the statute 43 Eliz., c. 9, s. 8: repealed by S.L.R. Act, 1863]. That is not the case with trustees of a charity. They have the legal fee, not an estate

E for life like an ecclesiastical rector. Whether beneficial or not beneficial, whether for the interest of the church or not, his contract, exceeding twenty-one years, is void by statute, as against his successors. No decree, therefore, could give validity to it beyond the interest of the parties. In *A.-G. v. Cholmley* (7) the agreement and the decree bound the party, but not his successors, and, with respect to them, was void on every principle of law. In that case the information impeached the validity of the

G decree, and prayed that it might be set aside. The whole merits of that decree were in issue, and the defendant was apprised that the plaintiff sought to impeach it, but the case fails in application to the present because it is impossible for any court to give validity to a contract contrary to an Act of Parliament while a contract like this may be established by judicial authority. A lease for 150 years by an ecclesiastical rector would be as void after the decree as without it. In the present

H case the decree was not made, like the decree in *A.-G. v. Cholmley* (7), in confirmation of the agreement, but expressly directed the performance of it by the trustees who were not previously bound by it after the trustees and the other parties had transferred to the court the responsibility, and had prayed, what they obtained, the sanction and indemnity of the court.

I As to the Attorney-General not being a party, he has no interest. His office is to see that those who have the legal estate duly administer the property, but he would be no party to a conveyance, the legal fee being in the trustees who are competent to convey. It is not necessary that the Attorney-General should be a party to a contract on this subject. It would, indeed, have been more fit had he been a party to the suit, but if not, is the decree a nullity, and to be totally laid aside, the information not seeking to impeach it on that ground? If the information impeached the decree for want of proper parties to represent those interested, such

a charge might require an answer from the defendant and inquiries how the decree could be sustained, but the difficulty here is, supposing every fact in favour of the trustees, to overthrow a positive decree, not impeached by the record, and pronounced directly on the contract. It seems impossible to sustain the information as at present framed.

Bill dismissed.

JERVOISE AND OTHERS v. DUKE OF NORTHUMBERLAND

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), July 4, 8, 11, 1820]

[Reported 1 Jac. & W. 559; 37 E.R. 481]

Trust—Executory trust—Defined—Provisions of trust ineffectual to carry out intention—Effect to intention given by court.

There is an executory trust where the creator of the trust has directed something to be done and has not himself completed what is to be done under the trust, e.g., by settling estates on a named person "to be entailed upon his male heirs." If what he has done is not effectual to carry out his intention the court will mould what remains to be done to carry that intention into execution.

Specific Performance—Contract—Sale of land—Doubtful title—Refusal of decree.

Specific performance of a contract for the sale of land may not be decreed if the court considers that the title to the property is so doubtful that it should not be forced on a purchaser.

Notes. Applied: *Lincoln v. Arcedeckne* (1844), 1 Coll. 98. Considered: *Pryke v. Waddingham* (1852), 10 Hare, 1. Referred to: *Stonor v. Curwen* (1832), 5 Sim. 264; *Parker v. Bolton* (1835), 5 L.J.Ch. 98; *Jones v. Price* (1841), 11 Sim. 557; *Collard v. Sampson* (1853), 4 De G. M. & G. 224; *Egerton v. Earl Brownlow*, [1843-60] All E.R. Rep. 970; *Shelley v. Shelley* (1868), L.R. 6 Eq. 540; *Duncan v. Bluett* (1870), 19 W.R. 41.

As to refusal of specific performance where title to land doubtful, see 36 HALSBURY'S LAWS (3rd Edn.) 311-314; and for cases see 44 DIGEST (Repl.) 74 et seq. As to executed and executory trusts, see *ibid.*, vol. 38, pp. 822, 823; and for cases see 47 DIGEST (Repl.) 78-82.

Cases referred to :

- (1) *Shapland v. Smith* (1780), 1 Bro. C.C. 75; 28 E.R. 994, L.C.; 44 Digest (Repl.) 74, 593.
- (2) *Duke of Newcastle v. Countess of Lincoln* (1797), 3 Ves. 387, L.C.; on appeal sub nom. *Countess of Lincoln v. Duke of Newcastle* (1806), 12 Ves. 218; 33 E.R. 84, H.L.; 47 Digest (Repl.) 95, 682.
- (3) *Austen v. Taylor* (1759), 1 Eden, 361; Amb. 376; 28 E.R. 725; 47 Digest (Repl.) 79, 559.
- (4) *Papillon v. Voice* (1728), 2 P. Wms. 471; Kel. W. 27; 1 Eq. Cas. Abr. 185, n.; 24 E.R. 819, L.C.; 47 Digest (Repl.) 78, 555.
- (5) *Jones v. Morgan* (1783), 1 Bro. C.C. 206; 28 E.R. 1086, L.C.; 44 Digest 932, 7878.
- (6) *Bagshaw v. Spencer* (1748), 1 Wils. 238; 1 Ves. Sen. 142; 95 E.R. 594; 47 Digest (Repl.) 78, 557.
- (7) *Garth v. Baldwin* (1755), 2 Ves. Sen. 646; 28 E.R. 412, L.C.; 44 Digest 537, 3544.
- (8) *Wright v. Pearson* (1758), 1 Eden, 119; Amb. 358; 2 Keny. 361; 28 E.R. 629; 47 Digest (Repl.) 94, 672.

A Also referred to in argument :

Leonard v. Sussex (1705), 2 Vern. 526; 23 E.R. 940; 40 Digest (Repl.) 490, 40.

Lord Glenorchy v. Bosville (1733), Cas. temp. Talb. 3; 25 E.R. 628, L.C.; 40 Digest (Repl.) 492, 60.

Blackburn v. Stables (1814), 2 Ves. & B. 367; 35 E.R. 385; 40 Digest (Repl.) 520, 318.

B *Stratford v. Powell* (1807), 1 Ball & B. 25; 44 Digest 926, l.

Humberston v. Humberston (1716), 1 P. Wms. 332; 2 Vern. 737; 24 E.R. 412; sub nom. *Humerston v. Humerston*, Prec. Ch. 455; Gilb. Ch. 128, L.C.; 44 Digest 553; 3708.

Seaward v. Willock (1804), 5 East, 198; 1 Smith, K.B. 390; 102 E.R. 1046; 40 Digest (Repl.) 224, 1833.

C *Gretton v. Haward* (1819), 1 Swan. 409; 36 E.R. 443; 20 Digest (Repl.) 444, 1582.

Doe d. Wright v. Jesson (1816), 5 M. & S. 95; reversed sub nom. *Jesson v. Wright* (1820), 2 Bli. 1; 4 E.R. 230, H.L.; 44 Digest 553, 3703.

D **Motion** for an order for the payment into court by the defendant of the purchase-price of property which the defendant had agreed to buy from the plaintiffs.

R. W. Grey, being entitled to certain copyhold estates, which had been surrendered to trustees in trust as he should by will appoint and in default of appointment in trust for himself, his heirs and assigns, subscribed a paper writing, dated Aug. 24, 1811, in which, after augmenting the portions of his younger sons, and bequeathing certain legacies to his wife and daughters, who had been provided for by a previous will, he expresses himself as follows :

F "To my son Ralph William Grey, I leave all my estates at Backworth, Hollywell, Earsdon, and Benton and Shire Moor, to be entailed upon his male heirs, and failing such to pass to his next brother, and so on from brother to brother, allowing £2,500 to be raised upon the estates for female children each; the above-named estates are to be liable to all my debts at my decease, and to the fortunes left to my younger children, unless otherwise discharged. I direct my estates at Preston, and the Rake in Monck Seaton, and my shares of coals at Gillsfield, Fawden, and Redingfield, and lease of Eighton Banks, to be sold in order to raise money for the above named legacies, &c., and what falls short to be raised or charged on the other property before named at Backworth, Hollywell, Earsdon, Benton Moor, and Shire Moor."

G The testator died, leaving his son Ralph Grey, his heir-at-law according to the custom of the manor of which the estates devised to him, which were all copyhold, were held. The above instrument, which was not executed in the presence of or attested by any witness, was afterwards declared to be his will by the Consistory Court of Durham. In 1816 a bill was filed by Ralph Grey, the son, against the trustees in whom the legal estate in the copyholds was vested and others for the purpose of having the rights of all parties declared, and on Aug. 17, 1816, the vice-chancellor decreed that under the above instrument, Ralph Grey was entitled to an estate in tail male in the copyhold estates. The estates were afterwards settled by Ralph Grey on his marriage, and the present bill, stating the above facts, and also other instruments relating to the title, was filed by him and the trustees of his settlement, which contained a power of sale, to compel the specific performance of an agreement for the sale of part of the estates. The defendant, by his answer, submitted to perform the contract if a good title could be made. A motion was now made for the payment of the purchase money, £95,000 into court, with the view of obtaining the opinion of the court on the effect of the above instrument.

Shadwell, Ellison and Clayton for the plaintiffs, in support of the motion.
Sugden for the defendant.

July 11, 1820. **LORD ELDON, L.C.**—This was a motion that the defendant, a purchaser, might pay into court a sum of £95,000. The parties probably shaped the application to the court in this form upon the ground, if the court should be of opinion that it ought to be paid into court, that that opinion, expressed in judgment, would operate as satisfactorily as a decree for a specific performance. The question is whether the court could order a specific performance of this contract which the Duke of Northumberland has entered into for the purchase of this estate, and would so order it upon the ground of the strength of its own opinion being such that it ought to compel him to take the title. As I understand counsel for the duke, the duke will not take it unless the court will compel him.

The law of this court in that respect has altered within my time. When I first began to practise the rule was that when the court had once determined that a party was tenant in tail, or tenant for life with an absolute power of appointment, or anything else that would enable him to convey a fee-simple free from all charges and encumbrances whatsoever, it would act upon that opinion as incontrovertibly right. The old course used to be, when a party was dissatisfied with the judgment of the court, to compel him either to do as the court required or to appeal to the House of Lords; not that that opinion was decisive, but it gave a sanction to the title which would probably operate to the security of the purchaser. I believe that the first case in which that rule was departed from was *Shapland v. Smith* (1), and that the last case which went to the House of Lords was one in which Mr. Morris, a King's Counsel, was plaintiff. The court, since that time, has almost gone the length of saying that, unless it was so confident that, if it had £95,000 to lay out on such an occasion, it would not hesitate to trust its own money on the title, it will not compel a purchaser to take it.

I take it these are copyhold estates which go according to the common law descent, and, that being so, any passing over the other wills and settlements stated in the bill as not material in the present view of the case, it appears that the person who was equitable owner of the fee made a will on Aug. 24, 1811, by which he augments the portions of his sons, and gives certain legacies to his wife and daughters, and, with respect to certain copyhold estates, he devises them in the terms stated in the will. This being a devise of copyhold estates, if it is a good will of personal estate, it will be a good will of copyhold estates. I do not know whether it has been proved, as this court requires, but it is admitted. I say so because I do not take it according to the old course of the court, that the fact of the probate of a will in the ecclesiastical court was evidence that copyhold estates would pass by it, but here the heir-at-law admits it.

Mr. Grey was equitable tenant in fee of these estates, but, in my judgment, it makes no difference that the legal estate was not in him, and the question depends on these principles. Where there is an executory trust and the testator has directed something to be done, and has not himself, according to the sense in which the court uses these words, completed the devise in question, the court has been in the habit of looking to see what was his intention, and, if what he has done amounts to an imperfection with respect to the execution of that intention, the court inquires what it is itself to do and it will mould what remains to be done so as to carry that intention into execution. I repeat, where there is a trust executory, because one is a good deal confused by the inaccuracy of the expressions trust executory and executed. The latter, no doubt, in one sense of the word, is a trust executory—that is, if A.B. is a trustee for C.D., or for C.D. and others, that is executory in the sense that C.D., or C.D. and the other persons, may call upon A.B. to make a conveyance, and execute the trust, but these are cases where the testator has clearly decided what the trust is to be, and, as equity follows the law, where the testator has left nothing to be done, but has himself expressed it, there the effect must be the same whether the estate is equitable or legal.

I make these observations with reference particularly to *Duke of Newcastle v. Countess of Lincoln* (2). If it is supposed that I ever stated that there was no

A difference between marriage articles and trusts in wills, I must say I never stated any such thing if it is understood in the sense that there is no difference between marriage articles which are to be carried into execution according to the intention and trusts executed. I never made use of such an expression, nor does the report, I think, seem to import it. I then intended to allude to the distinction in those cases in which a party takes upon himself to be his own conveyancer, and I certainly
 B feel that it was this last species of observation I meant to make, and throughout, it appears to me, I asserted most anxiously, what I now repeat I wish to do, that I entirely agree with this proposition (and it is what is the result of all the cases), that where a trust is executed, in the sense in which I have stated, this court will follow the law. I do not mean to say whether the court has acted right or wrong in particular cases, but that is the result of them.

C To show the distinction to which I have adverted take *Austen v. Taylor* (3), and *Papillon v. Voice* (4). In the latter case it was held that the party took an estate tail where there was no direction to settle, but LORD KING, L.C., who decided that case, was of opinion (notwithstanding the similarity of language) that, with respect to the land to be purchased, where the trust was an executory trust and something
 D was to be done according to what he conceived to be the intention of the testator, there must be a difference, and he so distinguished between a devise of the land and an executory trust, as to hold that in one case the party was tenant in tail, and in the other, tenant for life. In *Austen v. Taylor* (3), whether it was rightly decided or not is another point, the distinction is kept up. (MR. AMBLER, in a note, states it was contrary to the opinion of the profession, though MR. EDEN, in his valuable reports from LORD NORTHINGTON'S own notes, shows that MR. AMBLER
 E was not quite correct.) LORD NORTHINGTON, admitting the different law in cases of trusts executory, held that, the land to be purchased being to be conveyed to the same uses, the testator had left nothing to be done, and he considered it as an executed trust. Whether he was right is another matter, but when he had made up his mind to consider it as such, he said this party is tenant in tail.

F Whether other judges would have said the same thing is not material, but both cases prove that the Chancellors admitted the same principle, differing only about its application. Without going through all the cases which are well known, I may refer to MR. FEARNE'S work [ON CONTINGENT REMAINDERS], where he has shown that the distinction has not only been pointed out by every Chancellor who has had anything to do with these questions, and, after pointing it out in case
 G after case, and in every decision from first to last, and after observing on what fell from LORD THURLOW in *Jones v. Morgan* (5), and on the cases of *Bagshaw v. Spencer* (6), *Garth v. Baldwin* (7), and another case before LORD HARDWICKE, and on the difficulty of reconciling them, particularly *Bagshaw v. Spencer* (6), with *Wright v. Pearson* (8), he sums up, most ably, what may be said to be the text law on this subject, to which, as there laid down, I, for one, am ready to give my
 H full assent.

The question, therefore, is whether this is so clearly an executed trust that I will take upon myself to say, at the hazard of the improbability of a contrary judicial construction, that this is clearly an estate tail in Mr. Grey. The words are: "To my son Ralph William Grey I leave all my estates . . ." and I repeat that it can make no difference that this testator had not the legal estate because the
 I question would be, if he had had it, whether it was or was not a direction for him to make some conveyance, and whether, containing such direction, this court would hold upon his selling the estate that it was so clear upon this short instrument taken altogether that he is tenant in tail and not tenant for life that it could compel a purchaser to take the title. Supposing this had been a legal estate, the first words are: "To my son R. W. Grey." If the testator had had the legal estate, this would have given him the legal fee, and I apprehend these words will give him the equitable fee, the testator having it. Having got that, the question is, what is to be done, and here I must admit that in this will there are wanting

a great many of those indications of this gentleman being only a tenant for life which are to be found in many of the cases. Without stating them more particularly I may observe that, in some of them, there was an indication of intention, arising from the circumstance that the estate for life was to be without impeachment of waste and preceded the limitation to the heirs of the body—an indication which, one must observe, if the trust was executed, would nevertheless not make him tenant for life or prevent him from being tenant in tail. In other cases the circumstance that, although the words under which the estate could be claimed would make a party tenant in tail, contrary words have immediately followed as that he was not to alienate or bar the estate, and, though I do not say what the construction in such a case would be in a will, yet this has been taken to be a manifestation that the sense in which the testator used the words was different from their legal one, and that, although the party would have a tenancy in tail at law, yet in equity, where something was to be done, he would not, because of that proviso showing it could not be according to the intention.

So, again, that I may not be misunderstood, if it is supposed that I said there was no difference between marriage articles and executory trusts, and that they stood precisely upon the same grounds, I never meant to say so. In marriage articles, the object of the settlement, the issue to be provided for, the intention to provide for such issue, and, in short, all the considerations that belong peculiarly to them, afford *prima facie* evidence of intent which does not belong to executory trusts under wills. But I take it according to all the decisions, allowing for that, an executory trust in a will is to be executed in the same way. Then follow these words in Mr. Grey's will: "to be entailed upon his male heirs." The first question here is whether, if he had had the legal fee, this would be considered as a devise to him cutting down this fee, if I may so express it, to an estate tail, or whether, on the other hand, these words must be taken to be directory to do some act to diminish the estate which, by the first part of the devise, would be an estate in fee. If anybody is so bold as to say that these words operate to cut down this equitable fee without any act to be done by him who had taken the fee, whether, without quarrelling with his fortitude, I should put on it that construction is very different from undertaking to say that in judicial construction the purchaser is quite safe in considering this as a trust executed by creating an estate tail. The obvious meaning is that it is a thing to be done. In some cases the words "to be settled" have been strongly relied on, and the words "to be entailed" render it doubtful, first, whether the words of this devise create an estate tail unless it be created by something to be done, and the next thing is: Is it clear what is the meaning of it, if it be directory? The words are "to be entailed" not upon him, but his male heirs, and the question then will be whether I can take upon myself to say that it is clear that the testator, who gives the fee to his eldest son (meaning to entail his property, and to carry it on from brother to brother, and I admit it is the same as if heirs male had been attached to each brother), meant to convert it into an estate tail, enabling him immediately to destroy it and convert it into a fee—whether I can say that it is so clear that I shall compel a purchaser, against such advice as he may receive, to take the title?

There are other symptoms in the subsequent clauses in favour of limiting it to an estate for life, but I think it right to say that, unless it were for the ambiguity in the words "to be entailed," one might get over the grounds of argument that he was not to be tenant for life which arise from the subsequent expressions, because it cannot be doubted, either upon principle or authority, that such powers as these may be given, and usefully given, to a tenant in tail, and that in many cases powers are given (which in one sense may be said to be given unnecessarily) to a tenant in tail, but which, enabling him to do certain acts more expeditiously, more certainly, and in a less expensive way, and to do these acts, though he does not think it proper to destroy the estate tail, may be quite consistent with his having an estate tail. But, thinking on the safety of a purchaser,

A it cannot be doubted that such circumstances may have considerable weight with many judicial minds, and a greater weight than they have with me. The question, therefore, is whether I can take upon myself to say that this is not an executory trust. If I can do that, but it must be upon the clearest ground when I am to compel a purchaser to take the title, I agree it is an estate tail. Secondly, if something is to be done, if the trust is to be executed in this court, the question is in what manner it is to be executed. The last question is whether it is so clear, the whole taken together, that this gentleman was himself to be tenant in tail that I can compel the Duke of Northumberland to take the title. I am of opinion that I cannot compel him to take it.

MURRAY v. EAST INDIA CO.

D [COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), Michaelmas Term, 1821]

[Reported 5 B. & Ald. 204; 106 E.R. 1167]

Bill of Exchange—Company—Authorisation by Act of Parliament to draw and accept bills of exchange—Rights of holder of bills against company.

E Where an Act of Parliament authorises a corporation to draw and accept bills of exchange, it must be taken to give the holder of those bills the same remedy against the body corporate as the law gives in other cases against any partner to a bill.

Bill of Exchange—Endorsement—Agent—Power of attorney—Power to agent to act for principal—Right of agent to endorse bills of exchange.

F A power of attorney authorising an agent to demand, sue for, recover and receive, by all lawful ways and means whatsoever all moneys, debts, dues, effects and things whatsoever, and to give sufficient discharges, does not authorise him to endorse bills of exchange for his principal.

Limitation of Action—Bill of exchange—Action by administrator on bill payable to testator, but accepted after his death—Time beginning to run from date of grant of letters of administration.

G In an action by an administrator on a bill of exchange payable to the testator but accepted after his death the Statute of Limitations begins to run from the time of granting the letters of administration and not from the time the bills became due, there being no cause of action until there is a party capable of suing.

H *Administration of Estates—Bill of exchange—Agent purchasing bill and endorsing it specially to principal—Death of principal before endorsement unknown to agent—Right of administrator to sue on bill—Interest.*

I An agent, having money in his hands belonging to his principal, purchased with it a bill of exchange which he endorsed specially to his principal. The latter was dead at the time of the endorsement, but the agent did not know that fact.

Held: (i) the property in the bill passed to the administrator of the principal who acquired a right to sue on it; (ii) the administrator was only entitled to recover interest on bills accepted after the testator's death from the time of the demand of payment by the administrator, and not sooner.

Per Curiam: (i) It cannot be said that a cause of action exists unless there be also a person in existence capable of suing.

(ii) The several statutes of limitation being all in pari materia ought to

receive a uniform construction, notwithstanding any slight variation of phrase, the object and intention being the same.

Notes. Considered: *R. v. Okeford Fitzpayne* (1830), 9 L.J.O.S.M.C. 12. Applied: *Ward v. Shew* (1833), 9 Bing. 608. Considered: *Perry v. Jenkins* (1836), 1 My. & Cr. 118; *Rhodes v. Smethurst* (1838), 4 M. & W. 42. Applied: *Davidson v. Stanley* (1841), 2 Man. & G. 721. Considered: *Curlewis v. Mornington* (1858), 27 L.J.Q.B. 439. Distinguished: *Bateman v. Mid Wales Rail. Co.* (1866), Har. & Ruth. 808. Referred to: *Tolson v. Kay* (1822), 3 Brod. & Bing. 217; *Blades v. Free* (1829), 7 L.J.O.S.K.B. 211; *Cowper v. Godmond* (1833), 9 Bing. 748; *Esdaile v. La Nauze* (1835), 1 Y. & C. Ex. 394; *Goldstone v. Tovey* (1839), 6 Bing. N.C. 98; *Webster v. Kirk* (1852), 17 Q.B. 944; *Thomson v. Harding* (1853), 2 E. & B. 630; *Re Fuller* (1853), 2 E. & B. 573; *Sturgis v. Durell* (1859), 4 H. & N. 622; *Crouch v. Credit Foncier of England* (1873), L.R. 8 Q.B. 374; *Musurus Bey v. Gadban*, [1891-4] All E.R. Rep. 761; *Smith v. Islington Guardians* (1902), 66 J.P. 664; *Meyappa Chetty v. Supramanian Chetty*, [1916] 1 A.C. 603.

As to a company's power to draw and accept bills of exchange, see 9 HALSBURY'S LAWS (3rd Edn.), 67, 68; and for cases see 10 DIGEST (Repl.) 1267. As to the construction of an agent's authority, see HALSBURY'S LAWS (3rd Edn.) 161 et seq.; and for cases see 1 DIGEST (Repl.) 344 et seq. As to when a cause of action arises on a bill of exchange, see 3 HALSBURY'S LAWS (3rd Edn.) 223 et seq.; and for cases see 6 DIGEST (Repl.) 434 et seq.

Cases referred to :

- (1) *Broughton v. Manchester and Salford Waterworks Co.* (1819), 3 B. & Ald. 1; 106 E.R. 564; 3 Digest (Repl.) 140, 83.
- (2) *Edie v. East India Co.* (1761), 1 Wm. Bl. 295; 2 Burr. 1216; 96 E.R. 166; 6 Digest (Repl.) 205, 1412.
- (3) *Hogg v. Snaith* (1808), 1 Taunt. 347; 127 E.R. 867; 1 Digest (Repl.) 349, 283.
- (4) *Hay v. Goldsmid* (1804), 2 Smith, K.B. 79; 127 E.R. 868; cited sub nom. *Hay v. Goldsmidt*, 1 Taunt. 349; 1 Digest (Repl.) 348, 282.
- (5) *Sanders v. Stanford* (1579), Cro. Jac. at p. 60; 79 E.R. 51; sub nom. *Sanders v. Starky*, 2 Leon. at p. 157; sub nom. *Saunder's Case*, 5 Co. Rep. at p. 123 b; sub nom. *Stamford's Case*, Gouldsb. at p. 171; 30 Digest (Repl.) 479, 1216.
- (6) *Cary v. Stephenson* (1694), 2 Salk. 421; 91 E.R. 366; sub nom. *Curry v. Stephenson*, Carth. 335; Comb. 311; Holt, K.B. 98; 4 Mod. Rep. 376; Skin. 555; 24 Digest (Repl.) 813, 8044.
- (7) *Fairclaim v. Little* (prior to 1821), unreported.

Also referred to in argument :

- Walker v. Barnes* (1813), 5 Taunt. 240; 1 Marsh. 36; 128 E.R. 681; 6 Digest (Repl.) 313, 2287.
- Anon.* (1704), 6 Mod. Rep. 138; 87 E.R. 898; 6 Digest (Repl.) 312, 2273.
- Matthews v. Phillips* (1707), 2 Salk. 424; 91 E.R. 369; 32 Digest (Repl.) 613, 1929.

Rule Nisi obtained by the defendants for a new trial of an action upon four bills of exchange, the court directing the facts to be stated in a Special Case.

The defendants were acceptors of four bills of exchange. The first was for £8,940, and dated Fort St. George, Jan. 20, 1809, drawn by Keble, the secretary to government, and payable to William Hope three months after sight. This bill was directed to the Honourable Court of Directors for affairs of the Honourable United Company of Merchants trading to the East Indies, in London and it appeared to have been accepted by the secretary, by order of the court, from July 20, 1809. The second and third bills of exchange, which were for £13,200 and £1,141, respectively, were of the same date, payable at three months' sight,

A and precisely in the same form as the first. The fourth bill, which was for £705, was dated Aug. 26, 1809, and was accepted from April 12, 1810, and payable at twelve months' sight to Messrs. Binny & Dennison, and endorsed by them to William Hope, or order. The four bills were severally accepted in the usual manner by the secretary to the company, by order of the Court of Directors. Bills so drawn
B being, by order of the Court of Directors, and, being so accepted, paid by the company. The defendants had paid bills so drawn and accepted to the amount of many millions.

Mr. Hope, the payee of the three first bills, being about to embark for London, remitted them in a letter by one of the ships in the fleet hereinafter mentioned. That letter was enclosed in a sealed envelope, addressed thus: "Wm. Hope, Esq.,
C to the care of John Card, Esq., London." It was not addressed to any person by name, and was as follows: "My old friend, you will find enclosed bills as follows, which, when cashed, I would recommend your being particularly careful of." The letter then specified the several bills enclosed, including the first three bills mentioned in the declaration in this cause. On Jan. 30, 1809, Hope embarked,
D with his wife and family, on board the *Jane Duchess of Gordon* and sailed with a large fleet of East Indiamen for Europe. On Mar. 14 the fleet encountered a hurricane, and the *Jane Duchess of Gordon* perished in the storm and Hope was drowned. On Oct. 7, 1800, Hope had executed a power of attorney to Card, by which he appointed J. Card to be his true, certain and lawful attorney for and in his name, and to and for his proper use and behalf, to demand, levy, sue for, recover and receive, by all lawful ways and means whatsoever, and from all
E and every person and persons whomsoever, whom it did or might concern, all such sums of money, debts, dues, goods, effects and things whatsoever, which then were and should be and prove due, owing, payable, or belonging to him the said W. Hope, on or by virtue of any bill, bond, book or on account of trading or dealing, or on any account howsoever; and, if need were, to call to account all
F persons concerned in the premises; and on receipt and recovery of all such sums of money, debts, dues, goods, effects or other things, or any part thereof, sufficient acquittances and discharges for him and in his name, from time to time, to make and give; giving and granting by them unto his attorney full power and authority in the premises to sue, pursue, arrest, attach, seize, sequester, implead, imprison, condemn and prosecute, and them and thereof again to acquit, discharge and out
G of prison to release, also for him to appear, and his person to represent in all or any court or courts, or other places, as demandant or defendant in any suit or action, or by reason of the premises; likewise one or more attorneys under him, to set and substitute and appoint, and again at pleasure to revoke; and generally to do, act and perform all other matters and things in and towards the premises requisite and necessary, as fully as himself could do, if he were personally present.

H John Card, who was at Madras at the time when the power of attorney was executed, and who had been at one period in partnership with Hope, in India, soon after sailed to England, and since his arrival had continued to reside there and had been in partnership with William Davies, under the firm of Davies & Card. The first three bills of exchange were not endorsed by Hope, but, having come into the possession of Card after Hope's death, were endorsed by him in the
I following form: "Pay Messrs. Davies & Card, or their order, per procuration of William Hope.—J. Card." These bills, when due, were paid by the defendants to Barclay, Tritton & Co., then the holders thereof. Before Hope left Madras, he appointed Messrs. Binny & Dennison, of Madras, his agents to manage his private affairs, collect his property there and transmit the same to London; and he left in their hands a government promissory note for 1,660 pagodas, which was paid by them at the Treasury, and they received for it the fourth bill of exchange mentioned in the declaration. Binny & Dennison endorsed the bill specially to Hope, and remitted it in a letter addressed to him at Messrs. Davies & Card's.

The letter came to Davies & Card in April, 1810, was opened and the bill taken out, and the name "W. Hope" was endorsed on the bill. This bill was paid when due to Glyn, Mills & Co., then the holders thereof. On Feb. 13, 1812, letters of administration of the effects of Hope, with his will annexed, were granted to James Murray. There were no executors named in the will of Hope. James Murray died on Oct. 10, 1814, and on Oct. 31, 1814, letters of administration of the effects of Hope, unadministered by James Murray, with his will annexed, were granted to the plaintiff.

The plaintiff commenced an action against the defendants on Aug. 27, 1816. At the trial before ABBOTT, C.J., the jury found a verdict for the plaintiff for the principal sum due on the bill, with interest from the time when they respectively became due till the time of signing final judgment.

Campbell for the plaintiff.

Tindall for the defendants.

For the plaintiff, it was contended that assumpsit was maintainable in this case against a corporation; for a corporation established for trading purposes, might bind themselves, by accepting bills of exchange: *Broughton v. Manchester Waterworks Co.* (1). And that power of the defendants to draw and accept bills was recognised and regulated by East India Company Act, 1697 [repealed by S.L.R. Act, 1892], and the East India Company Act, 1813 [repealed by Government of India Act, 1915, s. 130, Sched. 4], s. 57 and s. 58. In *Edie v. East India Co.* (2), it was not doubted that an action would lie against the company on a bill of exchange. As debt would not lie against the acceptor of a bill of exchange, assumpsit must in this case, otherwise there would be no remedy. For the defendants it was argued that, although they had undoubtedly the power of binding themselves as acceptors of bills of exchange, it by no means followed that the remedy which the law gave for the breach of a parol promise would apply against a corporation. The objection to that form of action was that a parol promise could be made only by the members of the corporation, and that the individuals, and not the body corporate, would be liable. The proper remedy in this case was by bill in equity. On this point, the court were clearly of opinion that, wherever an Act of Parliament authorised a corporation to draw and accept bills, it must be taken to give the holder of those bills the same remedy against the body corporate as the law gave in other cases against any parties to a bill.

The next point was whether Card was authorised to endorse those bills. It was contended for the plaintiff that he had no authority to endorse the bills, even during the life of Hope. The power of attorney only gave an authority to him to receive debts due, and not to negotiate the bills. *Hogg v. Smith* (3) and *Hay v. Goldsmidt* (4), there mentioned, were authorities to show that a power of attorney to receive all salary and money belonging to the principal, and to give releases, and even to transact all business for him, did not authorise the attorney to negotiate or endorse bills. The letter contained no such power, for Card had not even an authority to break the envelope. For the defendants, it was argued that Card had such authority; for the endorsing of the bills was one mode of receiving payment, and in the cases cited the action was brought against the persons who had discounted the bills and not against the acceptor; and it was the same thing whether Card received the amount of the bills at maturity or authorised another to receive it. Besides, it appeared clearly from the terms of the letter that Card was to open it, if Hope died on the voyage. The words in the letter "when cashed," implied that he was to have authority to endorse the bills; for one mode of cashing was by endorsement. On this point, the court were clearly of opinion that Card had no authority to endorse the bills, even during the lifetime of Hope; and, therefore, it became unnecessary to consider the question whether Hope's death operated as a revocation of any authority given to him by the power of attorney.

A On the other points raised in this case, the court gave no opinion at the time and judgment was reserved.

Cur. adv. vult.

ABBOTT C.J., delivered the following judgment of the court.—At the late argument of this case, some of the points were disposed of by the court at the time. It is now proposed to give our judgment on such as were then reserved for our further consideration. First, as to the Statute of Limitations. The action is brought by an administrator, with a will annexed, of goods left unadministered by a former administrator, but it may be considered as brought by the first administrator. The action is upon several bills of exchange accepted by the defendants, who have pleaded as to three of them that the cause of action did not accrue within six years before the exhibiting of the plaintiff's bill. The plaintiff has replied generally that the cause of action did accrue within six years, etc. These bills were made payable to Mr. Hope; they were accepted after his death, being presented through an unauthorised channel and before any administration was granted. The acceptance of the bills, and also the day of payment, was more than six years before the exhibiting of the bill, but the granting of the first administration was less than six years before, etc. On this state of facts, the general question of law abstracted from the particular form of the replication is this: Did the time of limitation prescribed by the Limitation Act, 1623, s. 3 [now s. 2 (1) of the Limitation Act, 1939], begin to run from the date of the defendants' acceptance, or the day of payment, at which time there was no person in existence, who could acquire a right of action by the acceptance, and non-payment, or from the date of the first administration, whereby a person was brought into existence who might acquire a right of action by the non-payment? The plaintiff insisted on the latter, the defendants on the former date.

On behalf of the plaintiff, *Sanders v. Stanford* (5) and *Cary v. Stephenson* (6), were quoted. The first of these cases arose on the Statute of Fines, 4 Hen. 7, c. 24 [repealed by the S.L.R. Act, 1863]; a term of years was granted in remainder, expectant on another existing term; before the expiration of the first term, the grantee died; at the expiration of the first term the lessor entered, and levied a fine before administration granted; the five years passed, administration was granted, and resolved, that the administrator should have five years, for none had title of entry before. The last of these cases is precisely the same as the present case. It was an action of assumpsit for money had and received, brought against one who had received money belonging to the estate of the intestate after his death, and before administration granted; the receipt being more than six years before the action, but the grant of the administration within six years. The opinion of the court was that the time of limitation did not begin to run until the grant of the administration; but the suit appears to have gone off, or the plaintiff to have failed on a supposed defect in his application.

Since the argument we have been apprised of another case lately decided in the Court of Common Pleas, but not reported. The name of it is *Fairclaim v. Little* (7). It arose on the gift of a term of years to A. for life, remainder to B. for life, remainder to C. C. died in 1736, A. in 1757, B. in 1779. Administration of the effects of C. was first granted in 1816, and the administrator brought an ejectment and was nonsuited at the trial, but the court granted a new trial. No authority was quoted on this part of the case on behalf of the defendant; but it was said that *Sanders v. Stanford* (5) was not an authority in point because it arose on a statute differently expressed; the words of the statute 4 Hen. 7 being "so that they take their action or pursue their right within five years next after such action, right, etc., to them accrued, descended, etc." In answer to the other case quoted for the plaintiff, it was said that, as the cause was not decided in favour of the plaintiff, the opinion must be considered as extrajudicial, and that the whole of that case taken together was in favour of the defendant on the other point, to which I shall advert hereafter.

We are, however, of opinion that the time of limitation in the present case did not begin to run until the grant of the administration. The words of the Limitation Act, 1623, s. 3, are that actions on the case, etc., shall be brought within six years next after the cause of such actions, and not after. Independently of authority, we think that it cannot be said that a cause of action exists unless there be also a person in existence capable of suing; and we think that great deference is due to the opinion delivered by the judges on this point in *Cary v. Stephenson* (6) and, also, that *Sanders v. Stanford* (5), and the late case in the Common Pleas, *Fairclain v. Little* (7), are authorities in favour of the plaintiff. The several statutes of limitation being all in pari materia ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same. I have already quoted the words of the Statute of Fines. The words of s. 1 of the Limitation Act, 1623 [now s. 4 (3) of Limitation Act, 1939], as it regards entry into lands, are

“that no person or persons shall make entry into any lands. . . . but within 20 years next after his or their right or title, which shall hereafter first descend or accrue to the same.”

Other slight variations of expression may be found in other parts of this, and the statute 32 Hen. 8, c. 2 [repealed by the S.L.R. Act, 1887]. But it is not necessary to particularise them; the object manifestly being to limit the time of entry or suit to a person in esse capable of entering or suing, and nothing more.

On this part of the case, another and formal objection was taken by the defendants. It was said that the plaintiff ought to have made a special replication setting forth the time of the grant of administration and other particulars. It already appears on the record that the acceptance was after the death of the intestate. What special matter, then, could the plaintiff reply? It could only be that the first administration was granted at such a certain time, which probably does not appear with sufficient precision on the declaration. But this would only have been an argumentative replication, for its effect would be this: you, the defendants, have alleged that the cause of action did not accrue within six years; I, the plaintiff, say that it did accrue within six years, because my bill has been filed within six years of the grant of administration. If this be the due effect of the grant of the administration, then the plaintiff did right in omitting the argument and replying generally that the cause of action did accrue within six years, and offering the administration, and the time of granting it, in evidence to prove his allegation. And this is very different from all the cases in which a special replication is usually made, such as infancy, coverture, absence beyond sea, or the suing out a lilitat, or other writ or process, because, in all those cases, the plaintiff admits that the action did not really accrue within six years of the apparent commencement and either brings himself within some exception in the statute, or shows that his action was commenced before the date which the plea assigns as the commencement of it.

There was a fourth bill of exchange to which the statute was not pleaded, and which gave occasion to another point. Mr. Hope, at his departure from India, had left some property under the management of an agent. For the value of this, and for the purpose of transmitting the value to England, the agent obtained this bill of exchange and, being ignorant of the death of Hope, endorsed it specially to him. It was urged that no property in this bill could pass to the administrator and, consequently, that he could not sue on it; but we are of opinion that, as the money for which the bill was remitted belonged to Hope's estate, it was competent to the administrator to elect to take the bill as the mode of payment and that, thereby, the property did vest in him and he acquired a right to sue on it.

The only remaining matter is the interest on the bills which has been taken from the time that they respectively fell due. We are of opinion that the plaintiff is entitled to recover interest, but that the calculation must begin from the time of the demand of payment by the first administrator, and not sooner.

Judgment for plaintiff.

A Re CHERTSEY MARKET. Ex parte WALTHER AND OTHERS

[COURT OF EXCHEQUER (Sir Richard Richards, C.B.), November 23, 1818, January 13, 1819]

[Reported 6 Price, 261; Dan. 174; 146 E.R. 803]

B Charity—Royal charter—Jurisdiction of court—Charge of misapplication of money by trustees.

Trustee—Action against trustees—Parties—Alleged breach of trust—Need for all trustees to be parties.

C Charity—Practice—Parties—Attorney-General—Charge of misapplication of money by trustees.

Trustee—Breach of trust—Injunction—Right and duty of one trustee to restrain breach by another.

Equity—Equitable relief—Principles affecting—Laches—Breach of trust—Claim brought nine years after alleged breach, and six years after death of trustee.

D Land was granted by the Crown to trustees to erect thereon a market-house, and under letters patent, the trustees were granted power to hold a market there and to apply the profits for the benefit of the poor. In 1809 the market-house had become inconvenient and was a nuisance. B., who was then the acting trustee, pulled it down with the concurrence of his co-trustees except for one who took no steps to prevent it. By means of money raised by subscription in the parish, B. built another market-house on different land. B. died in 1812. E A petition, brought in 1818, by three inhabitants for breach of trust against the personal representatives of B. alleged that the old market-house was only in a small degree out of repair when it was pulled down, that the new market-house was greatly inferior, and that B. had misappropriated trust moneys.

F **Held:** (i) although the charity was founded by royal charter, the court had jurisdiction since the petition did not require the interference of the court to regulate the charity and the object of it was not to alter or carry it into execution on any principle of *cy-près*, but was purely directed against the trustees on a charge of misapplication of part of the charity funds by what they had done; (ii) it was not necessary that the Attorney-General should be a party to the petition; it was sufficient for him to certify that he allowed it; (iii) all the G trustees at the time of the alleged breach, whether or not they had concurred in it (or the personal representatives of those who had died) should have been made parties, since they were all equally amenable in the eye of the law: if there was a breach of trust, the trustee who did not concur in it could have prevented it by applying to the court for that purpose; (iv) although the trustees of the charity might have been originally bound to build the market-house on the particular spot pointed out by the charter, they were not H restrained from removing it to any other place which they might think more fit for it in the sound exercise of their judgment and discretion in after times; (v) the design of the new market-house was a matter for the discretion of the trustees, and it was obvious that they had used due discretion, for they had the concurrence of all the principal inhabitants of the place, as evidenced by the I subscriptions of all those who concurred; (vi) accordingly, no breach of trust was established, and, in any event, it was unjust to proceed against the estate of a person who died so many years ago and might have stated many facts in his favour which it might be impossible to be shown by his personal representatives: and, therefore, the petition would be dismissed with costs.

Notes. As to the liability of trustees, see the Trustee Act, 1925, s. 30; 26 HALSBURY'S STATUTES (2nd Edn.) 92.

As to jurisdiction of courts over charities founded by royal charter, see 4 HALSBURY'S LAWS (3rd Edn.) 416, 417; as to the Attorney-General as a party, see

ibid., 446 et seq; as to liability of trustees, see 38 HALSBURY'S LAWS (3rd Edn.) 970, 971; as to injunctions against trustees, see 21 HALSBURY'S LAWS (3rd Edn.) 393; and for cases see 8 DIGEST (Repl.) 510, 520, 523-526, 532, 533.

Cases referred to in argument:

Eden v. Foster (1726), 2 P. Wms. 325; Cas. temp. King, 36; 24 E.R. 750; sub nom. *Birmingham School Case*, Gilb. Ch. 178, L.C.; 8 Digest (Repl.) 506, 2293.

Anon. (1698), 12 Mod. 232; 88 E.R. 1284; 8 Digest (Repl.) 506, 2290.

A.-G. v. Foundling Hospital (1793), 4 Bro. C.C. 165; 2 Ves. 42; 29 E.R. 833; 8 Digest (Repl.) 505, 2261.

A.-G. v. Smart (1748), 1 Ves. Sen. 72; 27 E.R. 898, L.C.; 8 Digest (Repl.) 510, 2348.

A.-G. v. Middleton (1751), 2 Ves. Sen. 327; 28 E.R. 210, L.C.; 8 Digest (Repl.) 510, 2349.

Ex parte Rees (1814), 3 Ves. & B. 10; 35 E.R. 382, L.C.; 8 Digest (Repl.) 523, 2572.

Ex parte Greenhouse (1815), 1 Madd. 92; reversed sub nom. *Ludlow Corpn. v. Greenhouse* (1827), 1 Bli. N.S. 17; 4 E.R. 780, H.L.; 8 Digest (Repl.) 524, 2597.

Rugby Charity Trustees v. Merryweather (1790), 11 East, 375, n.; 103 E.R. 1049; 26 Digest (Repl.) 305, 253.

R. v. Lloyd (1808), 1 Camp. 260, N.P.; 26 Digest (Repl.) 274, 43.

Woodyer v. Hadden (1813), 5 Taunt. 125; 128 E.R. 634; 26 Digest (Repl.) 347, 639.

Curwen v. Salkeld (1803), 3 East, 538; 102 E.R. 703; 33 Digest (Repl.) 458, 91.

R. v. Cotterill (1817), 1 B. & Ald. 67; 106 E.R. 25; 33 Digest (Repl.) 460, 113.

Petition brought by three inhabitant house-keepers of Chertsey, Surrey, against the personal representatives of John Brown for breach of trust alleged to have been committed by him.

The petition, which was filed in 1818, after setting out the letters patent of Queen Elizabeth I, by which Her Majesty granted to certain trustees, their heirs and assigns, power to hold an additional weekly market, and an additional yearly fair, and Court of Pie Poudre in the village of Chertsey, for the improvement of the village, and the relief of the poor there, recited that Her Majesty had also granted a vacant piece (an acre) of waste ground, described by its appurtenances, for the purpose of the said fair and markets. and for building a market-house thereon, and stalls and standings thereon, or elsewhere within the manor, to hold, etc., to the trustees, to apply the profits to the use and relief of the inhabitant poor, paying 2s. a year for all services and demands whatsoever.

The petition stated that by indentures of lease and release of Dec. 10 and 11, 1789, William Dundas, of Chertsey, only surviving feoffee and trustee under a former deed of feoffment, granted to certain new trustees the same premises for the same purposes, and upon the same trusts. Soon after the grant of the letters patent a market-house of certain dimensions and description had been built on the said spot of ground, and that large tolls were derived from the influx of business done there. John Brown, one of the trustees in the said indenture of 1789, had been continually the acting trustee or manager of the trust estate. In 1809, Brown, without the concurrence of any of the then surviving co-trustees in the deed of 1789, and against the express objection of some of them, and particularly of William Goring, under the indemnity of certain persons (not trustees) interested in the destruction of the market-house, caused it to be pulled down: and that he had sold the materials, and applied the proceeds to his own use, the market-house being at that time only in a small degree out of repair. Brown, being afterwards alarmed by the general complaint of the inhabitants, set on foot a subscription, and having collected a considerable sum of money, built a new market-house in the town of

A Chertsey; but that it was a merely a small open building without a court-house, which the other had had, and in all respects very inferior to the old one, tending in consequence to the decay of the market, and the abolition of the ancient Court of Pie Poudre, which had been formerly held there once a fortnight.

B The petition also stated that the new building had been erected on premises which were the property of individuals (Messrs. Porters) for their private benefit, and not on the site of the old market-house (the ground granted by the charter) and that Brown had applied a very small portion of the money received by him during the exercise of his trust arising from the tolls, etc., to the use of the poor, and had appropriated the remainder to his own use.

C The petition then stated that Brown died in 1812, leaving sufficient assets. Since Brown's death, Goring, the only surviving trustee, had appointed certain other persons to be new trustees; and during the life of Brown some of his co-trustees had received part of the profits of the said market, and part of the subscription money, which had not been applied to the relief of the poor; and so also of the new trustees. The petition concluded by stating particular instances of consequent decay of the market, and failure of the profits which it alleged to be attributable to the removal and inferior accommodation of the new building.

D The petitioners, therefore, prayed that it might be referred to the deputy remembrancer, to inquire and state the value of the materials of the old market-house pulled down by the said John Brown, and how much money he received from the sale of such parts thereof as he had sold, and if he had converted any part thereof to his own use, and what was the value thereof. That the deputy remembrancer might also inquire and state what were the dimensions, state, and condition of the market-house and court-house at the time the same was so pulled down, and what sum of money would then have been sufficient to repair the same, and what sum of money would be required for re-building the same upon its former plan, site, and dimensions, and that the personal representatives of Brown might be directed to pay into court on account of the charity estate, the value of the materials of the said old market-house and court-house; and that such sum of money as the deputy remembrancer should report to be necessary for re-building and reinstating the said market-house and court-house on the same plan and site, and in the same state and condition as they were in when the same were pulled down.

G The petitioners also prayed that an account might be taken of the tolls due, and other profits or sums of money possessed or received by the said John Brown in his lifetime for or on account of the said trust estate; and also of his payments for or on an account of the said trust estate, and that they should be ordered to pay what should appear to be due from the estate of Brown to the trust estate, into the hands of the deputy remembrancer, to the credit of the charity estate: and that an account might also be taken of the sums of money and property possessed and received by William Goring the elder, for or on account of the said trust estate, previous to July 8, 1813, and of his payments on account of the said trust estate, up to the same time; that he might be ordered to pay into the hands of the deputy remembrancer, to the credit of the said trust estate, what, if anything, upon taking the accounts should appear to be due from him thereto; that an account might also be taken of all the sums of money or other property of the said trust estate, possessed or received by the trustees named in the indenture executed by Goring or by any of them, or by their or any of their order, or for their or any of their use, since the date and execution of such indenture; and that the last-mentioned trustees might be ordered to pay to the deputy remembrancer to the credit of the trust estate what, if anything, upon taking such accounts should appear to be due from them to the said trust estate.

I Further it was sought by the petition that the said deputy remembrancer might be directed to inquire into the trusts of the said charity, and to approve of a proper scheme for re-building the said market-house and court-house, and for restoring the said Court of Pie Poudre, and for building shambles or sheds in the said market;

and for re-establishing a morning market in the said town and village of Chertsey; and also for applying the rents and profits which should henceforth arise from the said trust estate according to the original trusts thereof; and that all necessary and proper directions might be given for effectuating all those purposes; and that the costs of this application might be paid to the petitioners, either by the representatives and out of the assets of the said John Brown, or out of the funds of the said trust estate, now in the hands of the present trustees.

The petition was supported by the affidavit of the petitioner, verifying the allegations. Other affidavits were made to the same effect, and several by persons bringing poultry to the town for sale, who stated that they had been inconvenienced by the want of shelter afforded by the old market-house.

Affidavits were also filed by the representatives of Brown, on their part. The most material of them in point of the facts detailed (admitting much of the matter of the petition), stated that for fifteen years and more previous to the year 1809, the market-house and market-place (being nothing more than a vacant space of ground, surrounded or enclosed by wooden pillars which supported a building consisting of one room of the same dimensions as the vacant space beneath) was let to one Edward Wright, a fellmonger, at the annual rent of £7 12s. being the best rent which could be got for it, and its value; that the said fair and markets, and all the tolls, pittance, stallage, customs, profits, commodities, and emoluments belonging to the same, were let to the said Edward Wright, for the annual sum of £5 making together the annual rent of £12 12s.; and that adjoining the said market-house, and forming the side thereof next to the church, was erected a cage or prison, for the confinement of disorderly persons. The deponents had resided in the town of Chertsey for a considerable number of years, and during all that time they did not remember or believe that the room or building over the market-place was ever used for a court-house, or that the magistrates of the district ever assembled there for the purpose of transacting any public business, or for any other purpose: or that any Court of Pie Poudre was ever held therein, or that it was ever used or required for the purpose of the markets or fairs, or that any pitched market was ever held in the market-place beneath the room or building, or that persons from the surrounding country were accustomed to bring the produce of their lands and commodities into the said market-house for sale, but that on the contrary, the market had from time immemorial been a sample market for grain; and that few other commodities except poultry were exposed for sale on the market days, and that the sellers of fowls did not use the said market-place for the sale of their poultry except in wet weather; but such sales generally took place in a street in the said town of Chertsey, called Guildford Street, nearly opposite to the said market-place.

A few years previous to the year 1809 (in which year Brown first became the acting manager of the trust property), the parish church of Chertsey having become ruinous and falling into decay, an Act of Parliament was obtained for taking down the body thereof, and re-building the same, which was accordingly done at an expense of above £12,000, and the same was completed in 1809. At that time the market-place and room over it which adjoined the churchyard, and were very close to the body of the church and obstructed the view, and darkened some of the windows, and also projected to a considerable distance into the public street and highway were greatly out of repair, and would have required a considerable sum of money to put them into complete repair. The cage or prison adjoining the same had also become ruinous and insecure, and the said market-place (which was very seldom used for the vending of commodities therein) had become the evening rendezvous of a number of idle persons, and consequently a nuisance to the town, and particularly to the church.

Other affidavits were filed in support of many of the material facts alleged against the petition, in some of which it was stated that the subsequent re-building of the new market-house and the plan of it had been effected on the request of the

A principal inhabitants, that it had proved in all respects more commodious and beneficial than the old one, that it had been entirely, or in part erected, on the ground granted by the charter; that the sum necessary for defraying all expenses had been raised by voluntary contributions, to which all the principal inhabitants had subscribed, and that the parish assembled in vestry had also voted a considerable sum out of the poor's rates for the same purpose.

B *Dauncey, Agar and Duckworth* for the petitioners.
Jervis and Beames for the representatives of Brown.

[On its being objected that the Attorney-General should have been a party to this petition, the LORD CHIEF BARON said: "The course of the court is, as I have reason to know, for the Attorney-General to certify his allowance of the petition, and that is sufficient."]

C *Martin and Hutchinson* for the present trustees.

Cur. adv. vult.

Jan. 13, 1819. **SIR RICHARD RICHARDS, C.B.**, stated the petition and the letters patent, and continued: The charter was certainly the foundation of this charity. On the question of the court having jurisdiction, we must observe that the present application does not require the interference of the court to regulate the charity; the object of it is not to alter or carry it into execution on any principle of *cy-près*; but it is purely directed against the trustees, on a charge of misapplication of part of the charity funds by what they have done. I, therefore, think that it comes within the jurisdiction of this court, and that that jurisdiction is not touched by the objections founded on the authorities which have been particularly pressed against it by the counsel for one of the trustees.

Under this grant the trustees had beyond all question power to build a market-house. One was accordingly built by them, and I think, according to the true construction of the instrument, it was then properly built on the spot in question. There was no discretion to place it in any other situation, though there was a discretion as to putting up standings and stalls in any other place. There was no market-place there at that time, nor were there any funds set apart for building one, nor does it appear with what property, or by whom or with what fund the market-house was erected. It is singular enough that the market-house was to be built on that particular place, while the stalls and standings were to be in any other place. We know perfectly that the stalls and standings are as important a part of a market as the market-house itself. I should hardly suppose, therefore, that it could have been considered a matter of any particular importance where the market-house should stand; but still it was directed by the charter to be built on the ground given, and the market-house was in fact erected there. By divers *mesne* conveyances the premises were from time to time transferred, and by deed of Dec. 10 and 11, 1789, they were conveyed to divers trustees (fifteen in number), among whom was John Brown, the person of whose acts this petition complains.

It appears that Brown, in 1809, built a new market-house. The petitioners complain that it is in every respect inferior to the old one, in consequence of which a much less quantity of commodities have been from time to time brought to the market, and they also complain that there is no court-house, by reason whereof the Court of Pie Poudre cannot be held on the market-days, and fair-days, as formerly. The first ground of complaint is (as it is stated, and perhaps truly), that the new market-house is not built on the ground mentioned in the charter, but on ground which is the property of Messrs. Porters, brewers. Then the petition proceeds to state that the trustees have received large sums of money which they have misapplied and not accounted for.

I In the first place, I must observe, that all the then trustees, beyond all question, if I could administer relief, should have been made parties to this suit. I am required to carry into execution the charter, and to call for the rents and profits

of the charity estate: for that purpose I must call upon all who have, or might have, received them. I cannot say that Brown shall account for his proportion, I must have all who were concerned in the trust before the court; but as I do not intend to give any relief, I do not think it necessary now to insist on the necessity of the other trustees being made parties.

On Sept. 21, 1812, Brown died, and the respondents are his personal representatives. It is said that Goring possessed himself of the outstanding funds, and paid them over to the new trustees. Under these circumstances the court is called upon to administer relief. The affidavits in answer to the petition state that the late surviving trustees, who were in existence at the time when this building was pulled down, all concurred in the act, except Goring, but that Goring took no steps to prevent it. It is quite clear that he might have prevented it, for he might have applied to a court of equity for that purpose, and it was in his power, by such a proceeding, to have taken the matter out of the hands of these persons who were misapplying the funds. He has, however, not done so, nor has he even joined in this petition. It is stated that all the rest except Goring consented, and that would certainly make it important that they should be parties.

This new market-house, it seems, was built by subscription among the people in the neighbourhood, and a considerable contribution was raised for that purpose. Now nothing can show the general concurrence of the inhabitants more plainly than such a subscription; for those who paid their money, and gave the plan the sanction of their name, evinced, by pretty strong evidence, their entire approbation. But that is not all; the parish was applied to, and they also contributed, for the vestry gave money for the purpose out of the poor's rates. I will not stay to inquire whether the vestry had a right to give the parish money away for such a purpose; but they did so in point of fact, and there was no complaint made of their giving it in a way that the law does not warrant. That shows that the thing was done with the concurrence of the parish generally. £400 was expended on the erection of this building, and it is stated as one of the principal causes of the general approbation expressed by the parish at pulling down the old house, and erecting a new one, that the old one had become a great nuisance to the church. I am bound to take it that it was so, because it is so sworn, and not contradicted. It appears that the old building had become the harbour of idle, dissolute, and disorderly persons, who assembled there in church-time, and, therefore, it was extremely fit and proper, in point of decorum and decency, that it should be removed. This building then having been erected by persons who laid out their money for the purpose, it does seem to me to be proved that all the people in the neighbourhood approved of pulling it down for some reason, whether it was because it had become a nuisance in consequence of the riotous conduct of the people who assembled about it, or whether it was in consequence of the altered state of society no longer of use as a market-house to the extent that it had before been. I cannot, therefore, say, that to pull it down was a breach of trust, or of the duty which the trustees owed to the founder of the charity. The trustees might perhaps have been originally bound to build the market-house on the particular spot pointed out and granted by the charter, but they were not, I think, restrained from removing it to any other place which they might think more fit for it, in the sound exercise of their judgment and discretion, in after times.

Thus, the whole appears to have been a transaction not disapproved of at the time by any person interested in it, except Goring—he, it is said, expressly disapproved of it, yet he had the power to have prevented it, and he did not—he does not even now complain, for he is not one of the petitioners.

Then, with respect to the charge of the improper use made of the materials which formed the old house, a great deal is said in the petition, and very little in the evidence. The petition also says a great deal about the Pic Poudre Court, and so on, but in the evidence there is to be found one complete answer in point of fact with respect to all the allegations, and one which made a great impression

A on my mind, on account of the respectability of the testimony. It is stated, and particularly in the affidavit of Mr. Clarke, the chamberlain of the city of London (who also swears, that he has been an inhabitant of the parish fifty years), that during all that time he never saw or heard of the room which was over the old market-house having been used by the magistrates as a court-house to transact public or judicial business in, or that it had been ever used as a Court of Pie
B Poudre; and he and others say, that in their judgment and belief, the taking down the old market-house was a great improvement to the town. In this place, where I am sitting as a judge, I should not perhaps know any difference between this gentleman and any other witness; but still when I see that he is a person of distinction and character, for he is the chamberlain of the city of London, and a justice of the peace for the county of Surrey, and has lived in this place for fifty
C years, I confess that the affidavit of a person of his description weighs more with one than the affidavits of these petty traders, who are brought forward to support the petition.

It being admitted (as I think it must be) that the trustees had a right to pull down the old building and to erect another, the question is whether it must necessarily be built on the spot granted. There is no definition of the very spot
D on which any new building shall be after erected in the letters patent, so that that objection is very questionable, even if it be true that this market-house is not built on the place which the Queen pointed out. But I am not clear upon the evidence as to that being the fact. I understand, however, that if it shall appear that the ground upon which any part of the building stands, does belong to Messrs. Porters, they are willing to release it to the trustees, in order to obviate all difficulty
E on that part of the case. I think it right that the trustees should accept of their offer. They will convey it by a grant by bargain and sale, enrolled of course. I am not, however, satisfied that this is built on any ground that is not part of the spot designated by the charter.

Another objection was that this market is not of the same dimensions as the former one. But there is nothing in the letters patent that requires that the market-house should be of any particular dimensions, shape, or convenience. The duty
F of the trustees was to erect a market-house, which market-house they might afterwards alter, destroy, or replace. They are the judges of the size and whole plan. It was built according to their discretion, and if they were to build another, they had a right to do so on any new plan, always using due discretion. That they
G have used due discretion appears obvious, for they have had the concurrence of all the principal inhabitants of the place, as evidenced by the subscriptions of all those who concurred. In fact, the whole parish concurred, for through the medium of the vestry, a sum of money has been given by the parish for the purpose of this building, to the erection of which, they were not compellable to pay anything. Supposing this to be built upon the particular spot, and I do not see sufficient
H evidence to enable me to say that it is not, there is an end of that part of the case. That difficulty may be obviated at once by accepting the offer of Messrs. Porters.

The whole case then amounts to this. Here is an old building erected in the reign of Queen Elizabeth I, or soon after her death, and which has continued standing till the year 1809. It had consequently become pretty old. It is sworn
I that it had become inconvenient to the parish, and particularly with respect to the church, and that it was a nuisance which in my opinion was a great inconvenience indeed. It was in the power and within the scope of the authority of the trustees to pull it down and build another in the room of it. It is equally clear that the parish consented to it, for they assisted them with money in building another, and by so doing certainly evinced their concurrence in the act done by the trustees. That being so, it seems to me that this petition is a peevish proceeding. Then it does not attempt to affect the other trustees, and I said before, that I could not relieve the petitioners without having the other trustees before me, every one of whom, except Goring, concurred in the act of Brown, but even

if they had not so concurred I should still insist on having them before me; for those who did not act, were as much trustees as the acting trustee, and are equally responsible with Brown, who was only a joint trustee with fourteen others. They select Brown singly, however, because he was the acting trustee; but all the others are equally amenable in the eye of the law.

Then it appears that this market-house was erected in 1809, and that Brown died in 1812, yet this petition is not presented till 1818, so that there is a lapse of nine years after the erection of the building, and six years after the death of the person who pulled down the old and erected the new house, before any application is made to the court. It is inconsistent, and even unjust, to proceed against the estate of a person who died so many years ago. Many reasons might have been assigned by Brown which his executors or administrators are not able to disclose. He might have stated many facts that might have been decisive as to his conduct in his favour, and which may be impossible to be shown by his representatives. Then am I to assist petitioners who come at such a distance of time as renders it impossible for the party accused to make a defence which he might have made, had the petition been brought forward earlier. It seems to me to be (I repeat) an extremely peevish application. It also refers (I must repeat) solely to the representatives of the personal estate of Brown, though he was only originally a co-trustee with fourteen others, all of whom are equally liable, and even Goring himself on the ground of his personal negligence. Brown erected the new market-house, with the concurrence of all the other trustees. No step has been taken since 1809. No complaint has till now been made that the trust money had been expended improperly; the subscribers to the new building had the satisfaction of seeing the application of this money, and six years after that application of it, and in the absence of those who ought to have been parties, and against the acting trustee only, who is dead, and whose personal estate ought to be protected, is this petition directed. That estate may have been applied in payment of debts and legacies in a regular course of administration, and the administrator would be obliged to call it all back again. Under these circumstances then, and taking into consideration all the case, having read the affidavits on both sides, I am perfectly satisfied with the decree which I shall make, that this petition be dismissed.

Petition dismissed.

R. v. EDMONDS AND OTHERS

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), May 24, 1821]

[Reported 4 B. & Ald. 471; 1 State Tr. N.S. 785; 106 E.R. 1009]

Juror—Challenge—Time—Challenge not to be made until full jury has appeared.

Juror—Challenge—Form—Challenge to be on the record.

At a trial on indictment before a special jury, challenges were made by the defendants both to the array and to the polls. The judge disallowed those challenges. The challenges were taken before a full jury had appeared, and were not put on the record. On a motion for a new trial,

Held: (i) no challenge could be taken either to the array or to the polls until a full jury had appeared; (ii) every challenge must be propounded in such a way that it might be put at the time upon the nisi prius record, so that the adverse party might either demur, counterplead, or deny the matter of the challenge; (iii) the challenges were, accordingly, irregular in form.

Juror—Challenge—Challenge to the array—Sufficiency of grounds—Partiality of Master of Crown Office and sheriff.

On the trial of the defendants for conspiracy a challenge to the array was based on two distinct grounds. The first was the alleged partiality of the Master of the Crown Office in that: (a) in nominating the jury he selected the names of the jurors and did not take them by chance from the freeholders' book; (b) he took only those whose names had the addition of "esquire" or some higher degree; (c) he included some persons who were in the commission of the peace; and (d) he included in his nomination some persons who, as grand jurymen, had found the indictment, and persisted in his opinion as to their sufficiency unless the Crown would consent to abandon them, which was done, and others were then substituted in their places.

Held: (i) there could be no challenge to the array on the ground of partiality in the Master of the Crown Office, he being the officer of the court expressly appointed to nominate the jury: the only remedy in such a case was to apply to the court by motion to appoint some other officer to nominate the jury; and (ii) the Master of the Crown Office was wrong in nominating grand jurymen who had found the indictment, not in respect of the other matters complained of, and there was no ground for presuming partiality; but there was, accordingly, no substance in the defendants' complaint.

The second ground for the challenge was the alleged partiality of the sheriff, which allegation was put forward because the sheriff's officer had neglected to summon one of the twenty-four special jurymen returned on the panel.

Held: the omission, occurring without the privity of the high sheriff or his under-sheriff, could not lead to any inference of partiality in either of those persons, and, accordingly, there was no substance in the complaint.

Juror—Challenge—Challenge to the polls—Cross-examination of jurors.

On the trial of the defendants for conspiracy a challenge to the polls was made on the ground of opinions alleged to have been expressed by the jurors hostile to the defendants and their cause, and the defendants sought to put questions to the jurors as to whether they had expressed themselves adversely to the defendants before the trial.

Held: it was not competent to ask jurymen whether they had previously expressed opinions hostile to the defendants and their cause; such expressions had to be proved by extrinsic evidence.

Notes. Applied: *Angell v. Angell* (1826), 11 Moore, C.P. 272. Considered: *R. v. Cuffey* (1848), 7 State Tr. N.S. 467; *R. v. Martin* (1848), 6 State Tr. N.S. 925;

Referred to: *O'Connell v. R.* (1844), 1 Cox, C.C. 413; *Mansell v. R.* (1857), 8 E. & B. 54; *Crane v. D.P.P.*, [1921] All E.R. Rep. 19.

As to challenging juries, see 23 HALSBURY'S LAWS (3rd Edn.) 24-29, and 10 HALSBURY'S LAWS (3rd Edn.) 411-414; and for cases see 30 DIGEST (Repl.) 257-261.

Cases referred to:

- (1) *Vicars v. Langham* (1618), Hob. 235; Jenk. 310; 80 E.R. 381, Ex. Ch.; 30 Digest (Repl.) 253, 97.
- (2) *Kynaston v. Shrewsbury Corpn.* (1737), Andr. 85, 104; 95 E.R. 309, 318; on appeal sub nom. *Shrewsbury Town v. Kynaston*, 7 Bro. Parl. Cas. 396 H.L.; 30 Digest (Repl.) 255, 123.
- (3) *Hesketh v. Braddock* (1766), 3 Burr. 1847; 97 E.R. 1130; 30 Digest (Repl.) 255, 124.
- (4) *R. v. Johnson* (1734), Cunn. 110; 2 Stra. 1000; 94 E.R. 1094; 30 Digest (Repl.) 257, 151.
- (5) *R. v. Burridge* (1724), 2 Ld. Raym. 1364; 8 Mod. Rep. 245; 1 Stra. 593; 92 E.R. 389; sub nom. *R. v. Burroughs*, 11 Mod. Rep. 385; 30 Digest (Repl.) 254, 110.
- (6) *R. v. Cook* (1696), 13 State Tr. 311; sub nom. *Anon.*, 1 Salk. 153; 30 Digest (Repl.) 257, 138.

Rule Nisi obtained by the defendants for a new trial of an indictment tried before SIR RICHARD RICHARDS, C.B., at the Warwick Summer Assizes, 1820, for conspiracy, on the grounds that (i) he had refused to allow a challenge to the array on the ground of the alleged partiality of the Master of the Crown Office in nominating the special jury, and to appoint triers to try the facts alleged in support of that charge; (ii) he refused similarly to allow a challenge to the array, on the ground of the alleged unindifferency of the sheriff, and to appoint triers as before; (iii) he refused to permit questions to be put to the special jurymen, as to whether they had expressed themselves adversely to the defendants before the trial, although (the special jury, not being full) he did permit such questions to be put to the talesmen before they were sworn. The motion for the rule was supported by affidavits, stating the different grounds of the complaint against the Master of the Crown Office and the sheriff.

The Attorney-General (Sir Robert Gifford) and the *Solicitor-General* (Sir John Copley) (with them *Serjeant Vaughan, Clarke, Reader, Littledale* and *Balguy*) showed cause against the rule upon affidavits.

Denman and *Hill* supported the rule.

Cur. adv. vult.

May 24, 1821. **ABBOTT, C.J.**, delivered the following judgment of the court.—This was an application to the court for a new trial. The cause (an indictment prosecuted by His Majesty's Attorney-General for a misdemeanour) came on to be tried by a special jury at the last Summer assizes at Warwick. The special jury was struck in or soon after Hilary Term, 1820, and the record was carried down for trial at the spring assizes in that year, but stood over until the summer. The ground of the motion for a new trial was the refusal to allow certain challenges, supposed to have been duly taken at the trial: viz., a challenge to the array, and a challenge to some of the polls. The challenge to the array was made on two distinct grounds: first, the supposed partiality of the Master of the Crown Office, by whom the special jury was nominated; secondly, the supposed partiality of the sheriff. The supposed challenge to the polls was on the ground of opinions, supposed to have been expressed by the jurors hostile to the defendants, or some of them, and to their cause.

Before I make any comments on these grounds, I will observe that it is an established rule as to proceedings of this kind, that no challenge either to the array or to the polls can be taken, until a full jury shall have appeared, and if

A twelve of those named in the original panel do not appear, a tales must be prayed, and the appearance of twelve obtained before any challenge be made. Upon this point, it will be sufficient to refer to *Vicars v. Langham* (1). In that case, the plaintiff first prayed a tales, and after the jury made full by tales, he challenged the whole panel by exception to the sheriffs. The panel was thereupon quashed, and a new jury returned by the coroners, by which the cause was tried. A writ of error was brought, and the exception taken thereon was, that the plaintiff having first prayed a tales to the sheriffs and obtained it, was estopped to challenge the panel for exception to the sheriffs. But it was resolved, that there could be no challenge, neither to the panel nor to the poll, till first there were a full jury, so that the jury not appearing full, there was a necessity to have a tales, or else the challenge could not have been taken; and so the cause would have remained *pro defectu juratorum*, if the plaintiff had not prayed it, for the defendant could not, and so the judgment was affirmed.

Every one of the challenges taken at this trial, was taken and made before a full jury had appeared, and, therefore, made irregularly and out of season. It must further be observed, that the disallowing of a challenge is a ground not for a new trial, but for what is strictly and technically a *venire de novo*. The party complaining thereof applies to the court, not for the exercise of the sound and legal discretion of the judges, but for the benefit of an imperative rule of law, and the improper granting, or the improper refusing of a challenge, is alike the foundation of a writ of error. Every challenge, either to the array or to the polls ought to be propounded in such a way, that it may be put at the time upon the *nisi prius* record, and so particular were they in early times, when challenges were more in use, that it was made a question in Y.B. 27 Hen. 8, fo. 13 B., pl. 38, whether it was not a fatal defect to omit the concluding of it, with an "*Et hoc paratus est verificare*," and it was, because many precedents were shown without such a conclusion, and the justices did not choose to depart from the precedents that it was held unnecessary. When a challenge is made, the adverse party may either demur (which brings into consideration the legal validity of the matter of challenge) or counter-plead (by setting up some new matter consistent with the matter of challenge, to vacate and annul it as a ground of challenge), or he may deny what is alleged for a matter of challenge, and it is then, and then only that triers are to be appointed. The case before quoted from HOBART (*Vicars v. Langham* (1)) furnishes an instance of a writ of error, for the allowance of a challenge, which could not have been brought, unless the challenge had been returned on the *postea*: and in comparatively modern times there are two instances of the like nature, one in *Kynaston v. Shrewsbury Corpn.* (2), and another in *Hesketh v. Braddock* (3). In the latter case, the defendant challenged both the array and the polls; both challenges are entered upon the record. To the first (and probably to the second) the plaintiff demurred. The demurrer was allowed, the challenges overruled, and the cause tried. Error was brought thereon, and the judgment reversed, and upon the judgment of reversal, a writ of error was brought in the King's Bench. The validity of the grounds of challenge was then again discussed, and the judgment of reversal was affirmed.

The challenges, therefore, ought in this case to have been put upon the record, and the defendants are not in a condition in strictness to ask of the court an opinion upon their sufficiency. But notwithstanding this defect of form on the part of the defendants, the court has taken into consideration the validity of these challenges, and it is upon the ground of their invalidity, not on the defect of form, that we think the new trial ought to be refused. It has never been the practice of the court to grant a new trial, for the purpose of giving a party an opportunity of advancing an untenable objection, and I have noticed these points of irregularity, chiefly in answer to one of the topics that was addressed to us on the part of the defendants. It was said the defendants had a right to make their challenge, and to have it tried, whether they could sustain it by proof or not. To which I answer,

if they had that right and would insist upon it, they should have pursued it rightly and regularly. Not having done so, their ground and their intended proof must be open to examination. And if upon examination, it appear that they could not have sustained their challenge, they are not entitled to a delay of justice, in order to give them an opportunity of making an experiment in due form, which, in the opinion of the court, would be deficient in substance. I proceed, therefore, to examine the grounds and substance of the several challenges.

First, as to the challenge of the array, that is, of the whole special jury panel, for the supposed unindifferency of the Master of the Crown Office. To sustain this charge of unindifferency, several matters of fact were mentioned, from some or all of which it was contended, that triers, if appointed, might infer that the officer was not indifferent. Of those matters, two were of a general nature, and two more specially addressed to the particular case in question. First, it was said, that the officer had selected the names of the jurors, and not taken them by some mode of mere hazard or chance from the freeholders' book. Secondly, that in this selection he had taken those names only which had the addition of esquire. Thirdly, that among those selected and ultimately retained by him, some were gentlemen acting in the commission of the peace for the county. Fourthly, that the original nomination comprised several persons, who, as grand jurymen, had found the present indictment; and that although this objection was pointed out to the Master, as soon as it was discovered, that two or three gentlemen whom he had named were of that class, yet he persisted to retain those and to name others, until the Solicitor of the Treasury, being consulted, consented to abandon them; upon which he struck them all out, and substituted other names in their places. Before the discussion of these points, a preliminary inquiry must be made; and if it shall turn out that there cannot, by law, be any challenge of the array at a trial, on any supposed ground of unindifferency in the officer of the court who has nominated a special jury, the consideration of these points will become immaterial, or material only in another view of the subject.

It cannot be, or at least it has not hitherto been ascertained, at what time the practice of appointing special juries for trials at nisi prius first began. It probably arose out of the practice of appointing juries for trials at the Bar of the courts at Westminster, and was introduced for the better administration of justice, and for securing the nomination of jurors duly qualified in all respects for their important office. It certainly prevailed long before the statute 3 Geo. 2, c. 25 [repealed by the Juries Act, 1825], and was recognised and declared by that statute, which refers to the former practice. The whole matter is comprised in ss. 15, 16 and 17 of the statute. Section 15 begins by reciting, that some doubt had been conceived, touching the power of the courts at Westminster to appoint juries to be struck before the Clerk of the Crown, Master of the Office, Prothonotaries, or other proper officer of the respective courts, for the trial of issues depending in the courts, without the consent of the prosecutor of parties concerned, unless such issues are to be tried at the Bar of the same court, and then declares and enacts, that it shall be lawful for the courts, upon motion made on behalf of His Majesty, or of any prosecutor or defendant, in any information or indictment for misdemeanour, etc.; or plaintiff or defendant in any action or suit, and the courts are thereby authorised and required, upon such motion, to order and appoint a jury to be struck before the proper officer of the courts, in such manner as special juries have been and are usually struck in such courts, upon trials at Bar had in the same courts; which said jury, so struck as aforesaid, shall be the jury returned for the trial of the said issue. Section 16 relates only to the costs. Section 17 enacts, that when a special jury shall be ordered to be struck, in any cause arising in any city or county of a city, or town, the sheriff or under-sheriff shall be ordered, by the rule, to bring before the proper officer the books or lists of persons qualified to serve on juries within the same, in like manner as the freeholders' book hath been usually ordered to be brought, in order to the striking of juries for trials at Bar, in causes arising in counties at

A large, and the jury shall be taken and struck out of such books or lists. Upon this statute it may be observed, first, that there is no provision as to the mode of taking and striking the special jury; but that matter is left to the ordinary practice used in cases of trials at Bar. Secondly, that there is a positive enactment, that the jury so struck shall be the jury returned for the trial of the issue. And, thirdly, that although the statute contains a provision for the attendance of the sheriff of the county of a city or town, it contains none as to the attendance of the sheriff of a county at large; leaving that to be enforced according to antecedent practice, which may well be supposed have been more perfectly established in the cases of counties at large, than in smaller districts, by reason of its more frequent occurrence. This statute, therefore, must necessarily be understood and construed, in many respects, by reference to the antecedent and existing practice of the courts. And, notwithstanding all the learning and research that have been bestowed on the present case, on the part of the defendants, not one solitary instance has been found of an offer to challenge the array on the supposed ground of unindifferency in the officer of the court by whom a jury had been nominated for any trial, either at Bar, or at nisi prius, either before or since the statute; although there must have been many occasions, on which it may reasonably be presumed, that such a step would have been taken, if it had been thought maintainable.

In considering the causes of the absence of any such attempt in former times, it will be proper to advert to the circumstances under which a challenge to the array is made in other cases. Such a challenge is always grounded upon some matter personal to the officer by whom the jury has been summoned, and their names arrayed or placed in order upon the parchment or panel whereon they are returned, in writing, to the court. Upon trials for felony, this panel is not in any manner published or made known, until the sitting of the court, at which the trial takes place; and, therefore, that sitting necessarily furnishes the first opportunity of making any objection to it. Upon other trials, and in the superior courts, there have always, or at least almost universally, been two successive processes to enforce the attendance of the jury. First, a venire returnable in the court above, at the place of its sitting, and in some day in term. To this process, the sheriff formerly made an actual return of the names of jurors as summoned, but the jurors themselves did not appear. This, therefore, was followed by a second process, more compulsory in its nature, requiring their attendance in the court, in like manner, on some other day. This process is still issued in its primitive and unqualified form for trials at Bar; but, for trials at nisi prius, it contains a clause, inserted by virtue of the ancient statute of nisi prius, qualifying the command for their attendance in the court above, in case the justices of assize shall, before the day appointed, come into the county at some day and place particularly mentioned.

Upon this view of the process, and adverting to that established rule which postpones a challenge of the array until the actual appearance of a full jury, it is manifest that no party has an opportunity of making such a challenge until the cause has been actually called on for trial. This, therefore, being the first opportunity, is, in the ordinary course, the proper time and season for such a challenge, where the jury have been impanelled and chosen in the usual way by the sheriff. But as the effect of such a challenge, if allowed, would often be to delay the trial, it became usual for a plaintiff, who anticipated that such a challenge might be effectually made, to apply to the court, and suggest the objection to the sheriff, and, if this was not denied, the court directed its process to the coroners of the county instead of the sheriff. And, in case the coroners also were liable to objection, and this was suggested to the court, then the court appointed certain persons of its own nomination, called elisors, to whom the process should be directed. This course of practice is not altogether obsolete at the present time. The coroners, like the sheriff, are general officers, and not the particular officers of the court; amenable, indeed, to the court for misconduct, but acting officially under the general authority of the law, and not, like elisors, under the special authority of the court. The array,

therefore, may be challenged for causes of personal objection to the coroners. But where the process has been directed to elisors, there can be no challenge of the array: *Co. Litt.* 158, a; because, saith the author, they were appointed by the court; but he may have his challenge to the polls. So, likewise, on a writ of right, whereon the sheriff returns to the court four knights, by whom, after being sworn for this purpose, twelve others are chosen and named in the presence of the parties, to constitute with the same knights the grand assize, or trying jury, consisting of sixteen persons, there cannot, after the panel is returned by the four, be any challenge, either of the panel or of the polls; though the twelve, before any assent or return of the panel, may be challenged before the four knights electors: *Co. Litt.* 294. See also *BOOTH'S REAL ACTIONS*, pp. 97 and 102; *Y.B.* 7 Hen. 4, fo. 20.

The nomination of a special jury by the known and general officer of the court, whether the Clerk of the Crown or Master of the Office, or otherwise, is precisely analogous to a nomination by elisors specially appointed by the court for the particular purpose; and, as the array cannot be challenged in the latter case, I am unable to discover any satisfactory reason for saying, in the absence of all practice and authority, that it may be challenged in the former. The reason for disallowing it holds equally in both cases; the court may be applied to. If there be any reasonable personal objection, known beforehand, the court will, upon proper application, order the nomination to be made by another officer: if any reasonable objection arises from the conduct of the officer on the particular occasion, the court, having power over its own rule, at least until everything shall have been completed under it, can reform and correct, and, if necessary, make a new rule for nomination by another officer, or abrogate the rule entirely, and leave the nomination to the sheriff. If the application be not made, or be refused by the court as unreasonable, it may well be supposed that no reasonable objection exists, especially when it is considered that the party has the power of striking out twelve names.

Another reason against allowing such a challenge is the great inconvenience that would ensue, and the almost utter impossibility of inquiring into the matter satisfactorily at *nisi prius*. If such a challenge can be allowed in one case, it must be allowed in all, criminal and civil, for the prosecutor and for the defendant. And such challenges may be used as an instrument of delay or vexation at every assizes throughout the kingdom, and must be tried in the absence of the person by whom the panel has been formed, and consequently without any opportunity of answer or explanation; whereas the sheriff and the coroners are bound by the duty of their office to attend at the assizes, and in fact almost invariably do so.

I have already mentioned, that the practice of nominating jurors under a rule of the courts at Westminster, is antecedent to the statute, and confirmed by it; and I must here again notice the concluding words of s. 15: "which said jury, so struck, shall be the jury returned for trial of the issue." I cannot reconcile that expression to the supposition, that any idea was entertained by the legislature that the jury so struck and returned, that is, the whole panel and the whole proceeding, should be set aside at *nisi prius*, at least upon any challenge to the favour. In *R. v. Johnson* (4), the challenge was on an objection to the sheriff; and the answer, that he was acting under a rule of the court, could not be satisfactorily given at *nisi prius*, because the other party was not prepared with the rule of court. This matter appears to have been introduced by way of counterplea to the challenge; and there was a special demurrer to the counterplea, assigning, among other causes, the non-production of the rule. According to the account of the case in the *CROWN CIRCUIT COMPANION* (8th Edn.), pp. 105-6; the judges of Chester held the counterplea ill, because the court there could not take notice of the rule of court; and *LORD HARDWICKE* afterwards said the judges had done right, because the rule of the court could not be taken notice of. And this appears to be a more satisfactory reason than that which is mentioned in the report in 2 *STRANGE*, 1000 (which reason, however, does not apply to the present point), namely, that the sheriff would have the ordering of the names on the panel. It may be further observed, in support of the reason

A mentioned in the CROWN CIRCUIT COMPANION, that the trial being in Cheshire, the jury process did not issue from this court; but the record was sent by mittimus to the chamberlain of the county palatine, and the jury process issued from the Court of Great Sessions; and the case was tried at the Bar of the court there, in the usual course.

B One other instance only of challenge of the array of a jury nominated under a rule of court was mentioned, viz., *R. v. Burrigge* (5). This was before the statute; and it appears to have been thought that the rule of court could not dispense with the rule of law as to hundredors. It is unnecessary to give any decisive opinion on that point at present; I will, therefore, only say, that if it be law, great inconvenience may ensue.

C We are all, therefore, of opinion, that a challenge to the array cannot be taken at nisi prius for the supposed unindifferency of the officer, by whom the jury was nominated under a rule of court, according to the statute. Indeed, it stands as a matter of doubt in the books, whether any challenge to the array, which operates only as a challenge to the favour, like the present, can be taken against the Crown. This being doubtful, I place no reliance upon it. And as these defendants had two entire terms in which they might have applied to this court, and forbore to do so, unless their objections could prevail as grounds of challenge, they must be of a very plain and cogent nature to induce the court to listen to them at this stage of the proceedings for the purposes of a new trial, which would be contrary to all rules and analogy of practice. So that it is not absolutely necessary to notice or discuss the particular grounds alleged. But it will be more satisfactory to do so; and I will, therefore, for the purpose of considering them, suppose that the array may, in a case like the present, be challenged for alleged unindifferency in the officer who nominated the jury.

F The first ground was that the officer selected the names, and did not take them by some mode of chance or hazard. Now such a mode would be contrary to all precedent and example. Jurymen have always been named by the discretion of some person; of the sheriff, the coroners, or elisors. In special juries, before the statute, they were named by an officer of the courts; the statute recognises and confirms the practice in general terms. It is impossible to suppose, that the legislature passed a statute to confirm the practice, without knowing how that practice was conducted; and not less impossible to suppose, that an Act of Parliament, evidently passed for the purpose of obtaining jurymen of some superior qualification, should be carried into effect by the adoption of a mode that would leave the qualification absolutely to chance. The second ground was, that the officer nominated those persons only whose names had the addition of esquire, or of some higher degree. On a charge of partiality, it is material to consider, whether the act be according to usage and precedent, or a departure from them. And it is well ascertained, that the nomination of gentlemen of this class is according to the general and ancient usage of all the courts, so that it affords not the slightest evidence of partiality in the particular case. Something like ridicule was attempted to be cast upon this addition of esquire in the freeholders' book, and we were told, that it is the constable who makes the esquire. But how is it that the constable acts in this case under the statute that was referred to? He selects from the ratebook of his parish, the names of persons qualified to serve on juries, and affixes the list on the church door in the first instance, and afterwards returns it to the quarter sessions, and we must, therefore, suppose, that he gives to each individual the addition and description by which he is usually known and addressed in his own neighbourhood. But, suppose the constable to give this addition to persons of inferior rank, and to withhold it from those of superior, he may indeed, by so doing, deceive the officer of the court in some respect, but he will do nothing of which these defendants can complain without inconsistency, because they say, they ought not to be tried by persons above the common degree, and this is the substance of their complaint against the nomination

of esquires. Nor is partiality in any degree evidenced by the particular circumstance on which so much stress was laid, namely, the small number of persons having the addition of esquire in the freeholders' book of Warwickshire; indeed, that circumstance has a contrary tendency, because by narrowing the choice, it shows that the officer looked to a class only, according to the usual practice, and not to the personal character of particular individuals. If he had looked at the latter, he would naturally have taken to himself a larger scope, as furnishing more numerous objects for his selection. It is the very object of a special jury to obtain the return of persons of a somewhat higher station in society, than those who are ordinarily summoned to attend as jurymen at nisi prius. A similar practice has long prevailed, even in the execution of writs of inquiry of damages, before the sheriff; wherein a party obtains, on application, a rule of the court, in obedience to which, the sheriff summons persons of a somewhat higher class, than those by whom he is ordinarily attended. This object is accomplished in the mode open to the smallest portion of suspicion or objection, by adverting to the addition placed against the name. And we have no doubt, that the officer has the power of nomination, and of nominating only from the higher classes according to the ancient practice, and that he acts wisely in doing so, unless there be some special reason for adopting a new and different course. In the present instance, we have the affidavit of the officer, stating that, to the best of his knowledge and belief, he knew not even by name more than two of the persons whose names he put upon the list; that he had not, to the best of his knowledge, ever seen more than one of them, and that one only once; and further, that he knew nothing of or concerning the connections or principles of any of them, by which he was influenced in his nomination; and that he nominated each of them solely, because, in looking indiscriminately over the books, in the manner that he has mentioned, he met with his name among that class of persons, from which, according to his opinion, the special jurors have been usually struck.

The third ground of complaint was that the officer named several gentlemen acting under the commission of the peace for the county. It was said that those gentlemen must be supposed not to be unindifferent between the Crown and the defendants, upon this, which was termed a political prosecution, because they hold their office at the pleasure of the Crown. I do not exactly know what is meant by a political prosecution; the present, as I collect from the indictment, is a prosecution for a high misdemeanour against the public peace, and the constitution and rights of one branch, at least, of the legislature of the country. It is true, indeed, that justices of the peace hold their office at the pleasure of the Crown, but they hold a laborious and burdensome, and not a profitable office; and it is really a gross calumny upon a class of persons, to whom the nation is most peculiarly indebted for valuable and gratuitous services, to suppose that they will not act impartially between the King and his people. If gentlemen of this description should be returned by the sheriff, no challenge could be taken to them individually, as a challenge to the polls, on the ground of their office; it has been the constant practice, to name some gentlemen of this class on special juries, or rather no one has ever thought of omitting them on the nomination. Some of them are constantly returned by the sheriff as grand jurymen; and no man, who wishes well to the country, can wish to see them excluded as a class, and by reason of their office, from any portion of the administration of justice, wherein they have been accustomed to take a part.

The last ground of complaint on this head was the original nomination of some of the gentlemen who had been named on the grand jury, by which this indictment was found. The Master of the Crown Office has informed us, upon his oath, that he did not consider this fact to form a valid objection to their nomination. Taking this, as we are bound to take it, not merely from the particular oath, but from the well-known and general honour and integrity of that officer, to be true, it is impossible to say that, although he might be mistaken in his opinion, he did not act honestly in abiding by it, until the Solicitor of the Treasury consented to waive the nomination. The nomination was waived and abandoned, and in fact, every name of this

A description was struck out of the list of 48, and other names substituted, before the list was delivered out to the parties for reduction; so that the defendants sustained no possible prejudice or inconvenience from the intended nomination.

Here I will observe that this circumstance affords an instance of the utility of the presence of the parties at the time of the nomination of the 48, which we were told would be useless, if the officer might name at his pleasure. For if the parties had not been present, it is probable that some names of this description might have stood among the 48, either from ignorance of the fact, or from the mistaken opinion of want of objection to them. The presence of the parties may enable them, on many occasions, to give useful hints which the officer will adopt, as for instance, the death, absence, or ill health, of a person named in the freeholders' book.

The only remaining ground of challenge to the array was, the supposed unindifferency of the sheriff; and this was to be manifested by the supposed omission to summon one of the gentlemen named in the panel of the special jury. This was treated as a challenge to the favour for unindifferency. It could not be a ground of principal challenge, according to any authority. Considering it as evidence of partiality, let us see how the fact stands. The under-sheriff directed the summons of this gentleman, at the same time and manner as of the other named in the panel. The inferior officer, whose duty it was to serve the summons, sent it in a very negligent and blameable manner, together with a summons in some other causes, by a carrier or newsman, instead of taking it himself. This was done without the privity of the high sheriff, or his under-sheriff. How, then, can it lead to any inference of partiality in the mind of either of those officers? But, further, how were the defendants prejudiced by it? Mr. Peach, the gentleman in question, appears, by the affidavits before us, to have been long in an infirm state of health; to have been summoned, either as a grand or special jurymen, to every assizes at Warwick, for the last eight years, and never once to have attended; and to have been summoned to this very assize, in due time, on some other cause, but not to have obeyed that summons. So that, upon the whole, we must conclude, that, at whatever time or manner summoned for the present trial, this gentleman would have availed himself of that excuse for absence which the state of his health afforded. It is, therefore, really absurd, to treat this neglect of the inferior officer, as furnishing evidence of partiality in the sheriff to sustain a challenge of the array on that ground, or as an inducement to this court to grant a new trial.

The last ground of the motion for a new trial, was the refusal of what has been called a challenge to the polls, in the case of the special jurymen. This challenge was made on the ground of opinions supposed to have been expressed by those gentlemen hostile to the defendants and their cause. There was no offer to prove such an expression, by any extrinsic evidence, but it was proposed to obtain the proof, by questions put to the jurymen themselves. The Lord Chief Baron refused to allow such questions to be answered; and, in our opinion, he was right in this refusal. It is true, indeed, that he permitted similar questions to be answered by the talesmen; but in so doing, we think he acted under a mistake. It does not appear, distinctly, in what precise form the question was propounded; but, in order to make the answer available to any purpose, if it could have been received, it must have been calculated to show an expression of hostility to the defendants, or some of them, a preconceived opinion of their personal guilt, or a determination to find them guilty; anything short of this would have been altogether irrelevant. The language of Mr. Serjeant HAWKINS upon this subject (*PLEAS OF THE CROWN*, lib. 2, c. 43, s. 28) is, that if the jurymen

"hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like, yet if it shall appear that the juror hath made such declaration from his knowledge of the cause, and not out of any ill-will to the party, it is no cause of challenge."

So that, in the opinion of the learned writer, the declaration of a juryman will not be a good cause of challenge, unless it be made in terms or under circumstances denoting an ill intention towards the party challenging. A knowledge of certain facts and an opinion that those facts constitute a crime, are certainly no grounds of challenge, for it is clearly settled, that a juryman cannot be challenged by reason of his having pronounced a verdict of guilty against another person charged by the same indictment. In BROOKE'S ABRIDGMENT, Challenge, pl. 90, it is thus stated: It is a good challenge, to say that a juryman has reported, that if he be impanelled, he will pass for the plaintiff; and Y.B. 21 Hen. 7, fo. 29, pl. 10 is referred to. Ibid. Challenge, 55. Another juryman was challenged for favour, in a suit of replevin:

"BABINGTON: If he has said twenty times that he will pass with the one party for the knowledge that he has of the matter and of the truth, he is indifferent; but if he has said so for any affection of the party, he is favourable."

and he charged the triers accordingly; and Y.B. 7 Hen. 6, fo. 25, pl. 8, is cited. In FITZHERBERT'S ABRIDGMENT, Challenge 22, the opinion of BABINGTON is thus given:

"If he will pass for one party, whether the matter be true or false, he is favourable; so, if he has said that he will pass for one party, if it be for affection that he has to the person, and not for the truth of the matter, he is favourable; but if it be for the truth of the matter that he has knowledge of it, he is not favourable; wherefore you will enquire accordingly to what I have said."

The charge of BABINGTON to the triers, as given in the YEAR BOOK, 7 Hen. 6, fo. 25, pl. 8, is thus. Addressing himself to the triers, he says:

"If, whether the matter be true or false, he will pass for the one or the other, in that case he is favourable; but if a man has said twenty times that he will pass for the one or the other, you will enquire, on your oaths, whether the cause be for affection that he has to the party, or for the knowledge he has of the matter in issue; if for affection that he has to the party, then he is favourable, but otherwise not; and if he has more affection to one than to the other; but if he has a full knowledge of the matter in issue, if he be sworn, he will speak the truth, notwithstanding the affection he has for the party, then he is not favourable."

Again, BROOKE, pl. 90. By FROWICK, J.:

"Not sufficient of freehold is a good challenge; and upon this the party himself shall be sworn, whether he has sufficient or not."

In the Y.B. 49 Edw. 3, fo. 1, it appears that some of the jurors were challenged, for that they had declared the right of one party or of the other beforehand, or given their verdict beforehand, and some for that they were of counsel with one party or the other, and of their fees: and mesmes les persons, that is the persons themselves, were sworn to speak the truth, where the challenge did not go to their reproof or shame; but those who were challenged, for that they had taken of the party, or procured without taking, were not sworn on the voir dire to give evidence to the triers.

These ancient authorities show that expressions used by a juryman are not a cause of challenge, unless they are to be referred to something of personal ill-will towards the party challenging; and also, that the juryman himself is not to be sworn, where the cause of challenge tends to his dishonour; and, to be sure, it is a very dishonourable thing for a man to express ill-will towards a person accused of a crime, in regard to the matter of his accusation. Accordingly, we find it established in later times, namely, at the trial of Peter Cook [*R. v. Cook* (6)], in 1696, that such questions are not to be put to the juror himself. So that all the authority in the law on this head is against the defendants, and shows, that the refusal of the Lord Chief Baron to allow the proposed questions to be answered by the special jurymen, was most proper and agreeable to law. Upon the whole matter, we all think that the rule for a new trial must be discharged.

Rule discharged.

ATTORNEY-GENERAL v. BURRIDGE AND OTHERS

PORTSMOUTH HARBOUR CASE

[COURT OF EXCHEQUER (Sir Richard Richards, C.B.), February 23, 1822]

[Reported 10 Price, 350; 147 E.R. 335]

Foreshore—Right of public to enter on—Navigation—Grant of foreshore by Crown—Grant subject to public right of navigation.

Land between the ordinary high and low water marks *prima facie* belongs to the Crown, but the subject may acquire a right of property therein by grant, charter or prescription. Any right so acquired is subject to the public's right of passage, and an erection thereon detrimental to that right is a nuisance and will be restrained by injunction at the suit of the Attorney-General.

Notes. Referred to: *A.-G. v. Lonsdale* (1868), L.R. 7 Eq. 377.

As to rights of navigation in tidal waters, see 39 HALSBURY'S LAWS (3rd Edn.) 533-540; as to public rights over foreshore, see *ibid.* 562-564; and for cases see 44 DIGEST 72, 73, 77, 78.

Information by English bill filed by His Majesty's Attorney-General on behalf of the Crown, praying that the defendants might set forth what right and interest they claimed in the wharf or quay, warehouse, and other erections and works (in the pleadings mentioned), or any of them, and how they make out the same; and that they might be restrained by the order and injunction of the Court of Exchequer from raising or making any erections, buildings, or works on the ground within the harbour of Portsmouth, between high and low water marks; and that the said wharf or quay, warehouse, and other erections and works so made and created by the defendant, William Burridge the elder, as charged in the pleadings, might be abated and removed: and that the said harbour might be restored to its ancient condition, so that the sea may again flow and re-flow over the piece or parcel of ground mentioned in the bill, in the same manner as the sea flowed and re-flowed over the same before the said defendant, William Burridge the elder, began to make such wharf as aforesaid: and that the same might be open and common for the passage and re-passage, anchorage, mooring and lying of His Majesty's ships and vessels, and other ships and vessels, as the same was before the erection and making of such nuisance: and for further relief.

The information stated as follows. By the royal prerogative the sea and sea coasts round this kingdom, as far as the sea flowed and re-flowed between the high and low water marks, and all the ports and havens of this kingdom, belonged to His Majesty. The harbour of Portsmouth was from time immemorial a public port. The erecting of any wharf or quay, warehouse, or other buildings in any part of the said harbour between the high and low water marks, or the making of any projection from the shore into the said harbour, or the preventing the water from flowing or re-flowing over the land where it formerly flowed and re-flowed, would be a great prejudice to the said harbour, and by degrees block up or much narrow and incommode the navigation there and the passage, re-passage, anchorage, mooring, and lying of vessels, and particularly by obstructing the flux and re-flux or lessening the force of the tide, and in process of time might entirely destroy the harbour. William Burridge, one of the defendants, in 1808, erected and built on the mudland between the high and low water marks, in the arm or part of the harbour, part of a large warehouse, and a wharf or quay, with a storehouse thereon, and other works. He completed said wharf or quay, warehouse, and other erections and works, despite a notice from the commissioners of the navy that they would be injurious, and requiring him to desist, and he disregarded a further notice requiring their removal. The wharf or quay, warehouse, and other erections and works, were a public nuisance, and injurious to harbour of Portsmouth as

aforesaid. At all times before the defendant began to build the same, the sea flowed in and over such part of the harbour, and His Majesty's ships, and other ships and vessels, had free passage and re-passage over the same, and used or might have used the same for anchoring, mooring, and lying of ships or vessels, without any interruption whatsoever.

The answer of the defendant, William Burridge, in substance stated and set out the granting part of a charter of 1638, to the corporation of the borough of Portsmouth, of groundings and anchorages for vessels in the haven of the borough to lade and be unladen upon the banks and wharfs of the borough, and a grant of the borough (with a confirmation of former grants) and all the messuages, lands and tenements, before granted to the corporation, under which the defendant set up a title in the corporation to all the waste lands within the town and borough, and all the lands between high and low water marks on such parts of the beach and shores of the haven or harbour within the town and borough; and he claimed a right under a lease, dated June 1, 1801, from the corporation to him, of the place in which the wharf, etc., had been made, by the description of a piece or parcel of mud land, or beach land, lying on the west side of the Camber, to erect and continue a stage, etc. The answer alleged that in 1802 the defendant became the yearly tenant of the corporation of another piece of beach or mud land, surrounding the before-mentioned parcel, occupied and used by him as a timber pound, admitting the buildings charged in the bill to have been erected thereon by him there, and that the tide had previously flowed and re-flowed over the same ground, but denied that any vessel drawing more than six feet water could have passed over the ground there. The answer denied that the wharf or stage and timber pound were prejudicial to the harbour generally and particularly.

The several answers of the other defendants presented the same case and ground of defence in substance and effect.

The cause came on to be heard before SIR RICHARD RICHARDS, C.B., upon several different occasions and on the various hearings, which occupied from time to time many days.

Jervis and *Wyatt* (counsel to the Admiralty) for the Crown in support of the bill. *Gaselee*, *Selwyn*, *Pepys* and *Carter* for the defendants.

SIR RICHARD RICHARDS, C.B.—The object of this information was to remove buildings and erections, etc. I am enabled to premise, for there can be no doubt of it, that the law with respect to the general rights of the Crown are clear, and that is admitted on all sides. It is a doctrine of ancient establishment, that the shore between the high and low water marks belongs *prima facie* to the King; and it is clear that the lands in question are between the ordinary high and low water marks, and consequently *prima facie* belong to the King; but it is equally clear that the King may grant his private right therein to subjects. It is upon such a grant that the defendants in this suit mainly rely; and such a title it is clearly incumbent on them to prove against the King.

The subject may acquire a right of property in these mud lands by grant, charter, or prescription. The first question is whether the defendant has, in this case, established his title by either of those means of acquiring the right of possession, and shown that the right has been taken out of the King and transferred to him. It is incumbent on the defendants to prove that case. I have bestowed as much pains as I could in considering the evidence and availing myself of the advantage of the very able addresses, replete with argument and learning on both sides, but I have not been able by all the diligence of which I am master to satisfy my conscience on the case as to the equity between the right of the Crown and the claim of the defendant. There has been a great deal of evidence laid before me by the parties on both sides, and I have given it an equal attention on either side. The defendant having the onus of proof on him, his evidence consists of acts of ownership inconsistent with the right of possession being in the Crown; but he must

A go much further and show that the right is in him. Without discussing that point so in dispute between the Crown and the defendant, which I carefully abstain from doing, I have come to the conclusion that I must have further assistance, in order to enable me to determine the right, and, therefore, I am of opinion that an issue must be directed to the purpose of having the claim of title set up by the defendants thoroughly investigated.

B There is no dispute on the part of the defendants on the present occasion, as to the jurisdiction of this court to entertain and decide the matter in dispute with respect to that part of the case; the learning of their counsel has precluded that difficulty here which seems to have been imposed upon the court in other cases of this nature. If, therefore, the Crown think fit to proceed to a decree, there must be an issue directed to try the question of right. If the verdict on that issue should be in favour of the Crown, it will not be necessary to proceed further with the suit. The defendants in this case do not claim a franchise in the port by this defence, but simply a right of possession and enjoyment of the land in question by virtue of a grant; and if the Crown has the right to possession of the soil, the Crown may do with its own property what it thinks fit, as any private person may, and may grant to a subject.

D If the verdict should be against the Crown, and the defendants should be right on that point, then the other very important question will arise—the question of nuisance. The Crown has no doubt a right to abate a nuisance notwithstanding it be on the lands of a subject. That necessarily gives rise to another question in this case. On that point an objection is made by the defendants' counsel to the jurisdiction of the court, and it is contended that if the defendants have the right to the land, this court cannot, on this proceeding, interfere to abate the nuisance by its decree. I have however no doubt that this court has jurisdiction in this case. This court and the Court of Chancery have each of them frequently interfered in such cases in the way now prayed by this bill, by administering the law in the way of injunction against the parties, restraining them from building, and ordering them to abate and remove what they have already erected. And if so, and if the Crown should take an issue and the cause comes back, and should eventually proceed to termination, this court may, as in the ordinary proceeding by injunction, make an ultimate decree according to the exigency of the case. A great many instances are to be found of issues in such cases having been directed by the courts of equity, which could not have been ordered unless the court had the power to act upon the verdict by carrying the proceeding further, because the court has ultimately to decide upon the whole case and to determine what should be done by pronouncing a final decree.

G As to the question of nuisance. It is quite clear the people have a public interest in all ports. This is laid down in a work you all have at your fingers' ends, SIR MATTHEW HALE'S *TREATISE DE PORTIBUS MARIS*, part 2, ch. 7, concerning the *jus publicum* of ports and harbours. He says that when a port is settled by such means (that is by licence or charter of the King, or that which presumes and supplies it, viz., custom and prescription) though the soil and franchise or dominions thereof *prima facie* be in the King, or by derivation from him in a subject; yet that *jus privatum* is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade, and intercourse. So that if the land in question be the property of the corporation, yet if the erections complained of be in fact a nuisance it must be abated, and this court is bound to do so by its decree, if what the defendants have erected shall have been found to be a nuisance by the verdict of a jury.

I Another proposition of SIR MATTHEW HALE is, that persons having acquired the *jus privatum* of the Crown by grant must not so use their right as to occasion a common nuisance, and if these defendants should have created a nuisance by these erections in the camber to the harbour, it must be abated notwithstanding they should be entitled to the soil and to the erections otherwise properly built upon

it. Upon the whole I am clearly of opinion that the present suit raises as proper a case for consideration of a jury as ever came before a court. SIR MATTHEW HALE, after having defined some of the many nuisances that may happen in ports, says (DE PORTIBUS MARIS, part 2, ch. 7, p. 87):

"I proceed now to set down the means whereby they may be prevented, or remedied, appointed, or allowed by law. And these provisions are of two kinds: I. By the common law. II. By particular Acts of Parliament.

"I. As to the provisions by the common law, we are to observe, that as the common law hath entrusted the King with the patronage and protection of the jura publica, as highways, public rivers, parts of the sea, and the like, so the care of preventing and reforming of public nuisances therein is left to him, and his courts of justice; the prosecutions for them are in his name and the fines for the defects or annoyances in them are part of his revenue."

This is in my opinion a very proper proceeding for the purpose and object of the suit, and there are precedents for it without number. It is clear that the question whether a port is straitened by building too far into the water in questio facti and not questio juris, and it is, therefore, proper that it should be determined by a jury. It has been for that reason in the argument of this case contended, that in every such case the court is not competent to decide, but that it must be referred to the determination of a jury in every instance. I am not however upon this occasion prepared to determine that general proposition of law, that in every case there must be an issue directed to try the fact where the question is nuisance or no nuisance; for if a court see no reasonable doubt, its duty is to determine the matter at once, because it is its duty to avoid putting parties to unnecessary expense; and there is danger in directing a trial where it is not necessary and can be of no use, and where no further justice can be obtained by it, or where justice can be done without. I throw this out as a general application of an opinion I have long entertained on this subject of directing issues, and for the purpose of declaring my sentiments on that important point. Where, however, the court cannot determine without such assistance, an issue may be properly directed to assist, not to control, the determination of the court. In such cases a jury is always a necessary medium for dispelling doubt or difficulty, where the court is satisfied with their conduct under the circumstances; and in such cases the personal convenience and accommodation to the judge of sending a matter to a jury are incalculable, and this is the true ground and the reasonable foundation of the practice of directing issues out of courts of equity.

I have taken the utmost pains in the investigation of the evidence to justify the order I am about to make, and I have been anxious to decide it if I could without further inquiry. There is a great body of evidence put in on the part of the Crown to show that these erections are a nuisance. There is also very much evidence on the other side, much of which does not militate with that offered by the Crown, but there is also very much which does, the object of which is to prove that the erections are not detrimental to the harbour. Depositions in these cases, however, are not the best media of testimony, because the cross-examination of witnesses is not so substantially an efficient cross-examination, as to produce in a case of this sort the necessary conviction in the breast of a judge. It is known by the cross-examiner what the witness has stated on his examination in chief, because his answers are never disclosed till after publication. Nothing can be known from the evidence furnished on paper to affect the character of the testimony, or to enable the court to estimate the value of the different witnesses, for no comparison can be instituted between such men as Rennie and Walker or one pilot and another. For these reasons I think there should be a further investigation.

Under these circumstances, if the Crown thinks right, I shall direct an issue on the first point, the question of property; and if that be established on the part of the defendants by a verdict against the Crown, there must be another issue

A to try the question of nuisance. I purposely avoid saying more at present, as I am yet ultimately to decide between the parties when the issues shall have been tried; I, therefore, direct the issues without giving any intimation of my opinion, which for the present may for very obvious reasons be much better spared. The just weight of the evidence cannot otherwise be fully appreciated than by the course of issues.

B *Issues directed to be tried by a jury to ascertain the facts on (i) the question of property, and (ii) the question of nuisance.*

[N.B. The case was not further proceeded with.]

BINKS v. LORD ROKEBY

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), May 4, July 25, 1818]

[Reported 2 Swan. 222; 36 E.R. 600]

Sale of Land—Misdescription—Compensation—Small part of estate sold as tithe free.

E *Sale of Land—Interest on purchase price—Purchaser in possession before completion—Possession pending inquiry as to title—Subsequent return of possession to vendor.*

F The purchaser of an estate sold as tithe free cannot be compelled to take it subject to tithe on terms of compensation. But where an estate of 140 acres was sold under a decree, the particulars stating only about 32 acres to be tithe free, and no evidence of exemption having been produced on the reference of the title, the Master was directed to certify the proper amount of compensation.

G A purchaser under a decree of sale having accepted, and (on a report of an objection to the title, for which compensation was ordered) returned possession, must pay interest on the purchase-money from the time at which he took, or at which a title was shown under which he might have safely taken, possession, and he is entitled to an allowance for prior, but not for subsequent, deterioration of the estate.

H **Notes.** Tithe rentcharge has been extinguished by the Tithe Act, 1936 (25 HALSBURY'S STATUTES (2nd Edn.) 295), with an exception of little practical importance, and replaced with redemption annuities charged in respect of the land and payable to the Crown for sixty years from Oct. 2, 1936, at the end of which (or sooner if the annuity is redeemed) the land formerly subject to the tithe will be absolutely freed from tithe, tithe rentcharge, or any other like charge. The rentcharge owner was compensated with the issue of redemption stock, guaranteed by the Crown: see 13 HALSBURY'S LAWS (3rd Edn.) 459 et seq., and *ibid.*, vol. 32, pp. 531, 532.

I Applied: *Smith v. Tolcher* (1828), 4 Russ. 302. Referred to: *Bowyer v. Bright* (1824), M'Cle. 479.

As to the right to interest on purchase-money, see 34 HALSBURY'S LAWS (3rd Edn.) 300, and *ibid.*, vol. 36, p. 340; as to when title deemed to be accepted by purchaser, see *ibid.*, vol. 34, p. 289; and for cases see 40 DIGEST (Repl.) 184 et seq., 214 et seq.

Case referred to in argument:

Ker v. Cloberry (1814), 1 Hov. Supp. 209; 34 E.R. 755; 44 Digest (Repl.) 163, 1426.

Motions before the Lord Chancellor.

On a reference to inquire whether a good title could be made to an estate of about 140 acres, purchased by one Carter at a sale under a decree, the Master certified by his report dated Dec. 20, 1815, that a good title could be made, except that the particulars of sale stated about 32 acres of the estate to be tithe free, whereas no sufficient evidence had been produced to him of any part thereof being tithe free. A special condition of sale stipulated that no misdescription should vitiate the sale. The plaintiff moved that the report might be confirmed and that it might be referred to the Master to certify what allowance should be made in respect of that part of the estate described as tithe free but not proved to be so.

Sir Samuel Romilly and Heald for the plaintiff.

Bell and Shadwell for the defendant.

LORD ELDON, L.C.—Where an estate sold as tithe free is subject to tithe, the court will not compel the vendee to perform the contract on terms of compensation; but here, as I understand, the estate of about 140 acres was described as subject to tithe, except 32 acres. I am of opinion that the principle which protects the vendee in the former cases, is not applicable to such a case.*

Order accordingly.

On July 25, 1818, the plaintiffs moved that Carter might on or before Aug. 10 next pay into the bank £6,334 13s., being the amount of the purchase-money of the estate, after deducting £315 7s. allowed by way of compensation for the tithes of 32 acres, and also £1,804 6s., the amount of interest from Nov. 31, 1812, to Aug. 10, 1818. Counsel for the plaintiffs insisted on possession taken by the purchaser. The defendant opposed the motion on the ground that the purchaser had taken possession subject to inquiry into the title, and had abandoned it on the Master's report that the whole estate was liable to tithe; and they claimed a deduction for deterioration of the estate since the purchaser quitted possession.

LORD ELDON, L.C.—There seems little reason to doubt that the vendor will eventually obtain both a compensation for a supposed liability of part of this estate to tithe, and also the advantage of the fact that it is not liable. I mention that for the sake of the observation that if this had been a case in which the greater part of the lands sold had been subject to tithe, I should not have followed the doctrine that the purchaser of an estate described as exempt from tithe shall be compelled to take it subject to tithe; but here only a small part was described as exempt; and the fourth condition of sale expressly stipulates, that errors in description shall not vitiate the sale. I was, therefore, of opinion that the purchaser must accept the estate.

With regard to possession, the purchaser was not to take possession till he had paid the purchase-money, and that condition of payment could not be performed unless, prior to the time appointed for giving possession, the vendor could show a title under which the purchaser would be safe in taking possession and paying his purchase-money. The case, therefore, requires that it should be ascertained when a good title could be made; for without that, the purchaser was not bound to take possession. That might raise another question; whether, by taking possession which he was not bound to take, he waived objections to the contract. If he ultimately obtains a title, he must be considered, by relation, as in possession, under that title, from the time at which he took possession, and from that time must be understood to say that if he could hereafter have a title made to him, he was to be considered as in

* *Smith v. Lloyd*, July 16, 18, 1818. On an application for a reference to the Master to certify whether a good title could be made to an estate sold and whether it was subject to tithe, the Lord Chancellor observed that whether an estate is free from, or subject to, tithe, is no question of title: when a vendor represents that he has a good title and that the estate is tithe free, the question whether tithe free is not a question of title, but a question whether the estate held by a good title is held free from tithe: if the purchase were of lands and of tithes, then the matter of tithe would be matter of title; but in a purchase of lands free from tithe, the tithe is not matter of title but of fact.

A possession and must receive the rents and profits and account for interest on the purchase-money. But the fact of possession must be investigated; and it is for those who sell, undertaking that the purchaser might have possession at Candlemas, to show that they were in a condition then to give possession. In that case he must pay interest from the time at which he took possession, and even for the time during which he returned the possession.

B The purchaser must pay into court the purchase-money, and the Master must inquire when he took possession; or if he did not take possession, when it appeared by the abstract that he had a title in respect of which he might take possession; and I reserve the consideration of interest till the report. Those inquiries will go far towards determining what is to be done in respect of deterioration. For as to deterioration after he took possession, or after there was a title under which he might take possession, the purchaser cannot have an allowance in respect of that; but for deterioration before he took possession, or before there was a title under which he could take possession, he is entitled to an allowance. I, therefore, reserve also the consideration of allowance for deterioration till after the report.

Order accordingly.

ID

TURNER v. HARVEY

E [LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), August 1, 1821]

[Reported Jac. 169; 37 E.R. 814]

Sale of Land—Misrepresentation—Purchaser with special knowledge of facts affecting value—Non-disclosure amounting to misrepresentation—Vendors in fiduciary position.

F Subject to the life interests of a husband and wife under their marriage settlement, an estate was held on trust for their married daughter R., whose husband became bankrupt, the plaintiffs being his assignees. During R.'s lifetime the defendant, as her father's attorney, negotiated unsuccessfully with the plaintiffs for the purchase of her husband's interest in her right, subject to her parents' life interests and subject to the obligation to settle the property for her benefit during her lifetime. At that time R. was in apparently good health and expected to survive her husband whose interest was correspondingly of less value. R. died in her husband's lifetime, and the defendant, with knowledge that the bankrupt's interest had vested absolutely subject to the life interest of R.'s parents, re-opened negotiations with one of the plaintiffs on behalf of a fictitious client at a slightly increased price. The contract was approved by the other plaintiff and by a meeting of the creditors in ignorance of R.'s death, and the price was paid. On a bill filed by the plaintiffs, the vice-chancellor refused to order the delivery up and cancellation of the contract and the return of the purchase money. On appeal,

G Held: the defendant must have known that the plaintiffs were dealing without sufficient knowledge, that the plaintiffs were carrying to the creditors a contract the effect of which they did not understand, and that the creditors, who were to ratify it, did not understand it, and, therefore, the contract must be delivered up and the purchase-money returned.

I Per Curiam: The purchaser is not bound to give the vendor information as to the value of the property, but a very little is sufficient to affect the application of this principle.

Trust—Improvident contract—Refusal of court to execute.

Per Curiam: A contract improvidently entered into by a trustee will not be cancelled, but the court will not execute it.

Notes. Considered: *Walters v. Morgan* (1861), 3 De G.F. & J. 718. Applied: *Thompson v. Lambert* (1868), 17 W.R. 111. Considered: *Davies v. London and Provincial Maritime Insurance* (1878), 8 Ch.D. 469. Referred to: *Shrewsbury and Birmingham Rail. Co. v. London and North Western Rail. Co.* (1853), 4 De G.M. & G. 115; *Davis v. Ohrlly* (1898), 14 T.L.R. 260.

As to misrepresentation, see 36 HALSBURY'S LAWS (3rd Edn.) 303-307, and *ibid.*, vol. 26, pp. 839-842; and for cases see 35 DIGEST (Repl.) 20 et seq.

Case referred to:

(1) *Mitford v. Mitford* (1803), 9 Ves. 87; 32 E.R. 534; 40 Digest (Repl.) 533, 447.

Also referred to in argument:

Evans v. Llewellyn (1787), 2 Bro. C.C. 150; 1 Cox, Eq. Cas. 333; 29 E.R. 86; 35 Digest (Repl.) 101, 53.

Fox v. Mackreth, *Pitt v. Mackreth* (1788), 2 Bro. C.C. 400; 2 Cox, Eq. Cas. 320; 29 E.R. 224, L.C.; on appeal sub nom. *Mackreth v. Fox* (1791), 4 Bro. Parl. Cas. 258, H.L.; 40 Digest (Repl.) 53, 342.

Appeal to the Lord Chancellor.

By a marriage settlement, an estate in Lincolnshire was settled, subject to a mortgage for £400, on trust for the husband, H. Jenkin, and his wife for their lives respectively, and after their deaths to be sold, and the proceeds, after discharging the mortgage and paying another sum of £500, to be divided among the children of the marriage: their shares to be vested at twenty-one if sons, and if daughters at twenty-one or marriage. There were several children of the marriage, of whom only one, Rebecca Ann, attained twenty-one. She married R. Everitt, who in 1805 became bankrupt; and the plaintiffs were appointed his assignees. At the time of the bankruptcy Mrs. Everitt was alive and the plaintiffs became entitled in her right to a vested interest in the surplus of the money to arise from the sale, subject to the contingency of her surviving her husband, to the provision to be made for her out of it, and to the life-interests of H. Jenkin and his wife; they were of advanced age, and not likely to have other children. Mrs. Everitt was at that time in good health and was thought to be likely to survive her husband.

In October, 1807, the defendant, stating himself to be instructed as solicitor to H. Jenkin, applied to the plaintiffs to treat them for the purchase of the bankrupt's interest in the proceeds of the estate. They first required £250 as the price, and afterwards £260; a few letters passed between them, and the treaty went off. In October, 1808, the defendant agreed in the name of one G. Whitely, with the plaintiff Turner for the purchase of the bankrupt's interest for the sum of £280; the contract was made subject to the approbation of the other plaintiff, and to the consent of the creditors, which were afterwards obtained. The name of Whitely was used in this transaction for the defendant, who was the real purchaser. The plaintiffs subsequently found that Mrs. Everitt had died in the previous July, and they filed a bill to have the agreement set aside, alleging that the defendant was aware of this circumstance, which was material, as enhancing the value of the property, and that he had concealed it from them. The defendant admitted his knowledge of the fact of Mrs. Everitt's death, and that in his conversations with the plaintiffs and their solicitor he had not mentioned it, but he conceived that they must or might have known of it, it having been announced in the public papers. The circumstances attending the contract are detailed in the course of the judgment of LORD ELDON, L.C. It was calculated by an actuary that at the time of the contract the property was worth about £600.

The cause was heard in November, 1813, before SIR THOMAS PLUMER, V.-C., who dismissed the bill. The plaintiffs appealed.

Horne and Shadwell for the plaintiffs.

Hart and Treslove for the defendant.

A **LORD ELDON, L.C.**—Few cases turn on greater niceties than those which involve the question whether a contract ought to be delivered up to be cancelled, or whether the parties should be left to their legal remedies. I was surprised at hearing it argued that this is a case in which a specific performance could be decreed; for nothing appears to me more clear than that it could not. Indeed, the circumstance that the contract was made so long ago as the year 1808, and that a bill has been
B filed to have it delivered up, operating as a provocative to the defendant to file a bill to have it performed, and the circumstance of his not having done so, show it to be a case in which no one could advise him to take that course. The decree does not go so far as to declare the defendant entitled to a specific performance; it only says that at the instance of the plaintiffs the court will not deal with the case for the purpose of directing the re-payment of the purchase-money and
C interest, and of ordering the agreement to be delivered up to be cancelled. It amounts to this only that the parties are to be left to law.

The case is this. By the settlement on the marriage of Jenkin, an estate was conveyed to trustees, and after the death of the husband and wife it was to be sold and the surplus of the purchase-money, after paying certain charges, was to be paid to the children of the marriage. The state of the family was this: there were three
D children besides Mrs. Everitt; the three others died and she thus became entitled to the whole sum, subject to the life interests of her father and mother and to the contingency of their having more children. She married Everitt and it appears in evidence that at the time of his bankruptcy his health was not in so good a state as hers, and it was most likely that she would survive him. On his bankruptcy his
E assignees became entitled to whatever he would have taken in her right; that is, they would be bound to make a settlement on her and her issue, and they took subject to the chance of her surviving him and the property falling into possession afterwards; and it is clear that they could only sell subject to these claims (see *Mitford v. Mitford* (1)).

F This being so, the first transaction is the treaty by the defendant on behalf of Jenkin, and I will take that to have been bona fide and that he was really acting for Jenkin. It seems he was the family attorney. On Oct. 29, 1807, he writes this letter to the plaintiffs' solicitor, and to be sure any representations he makes as to the nature of the interest may be very wisely, cunningly and astutely put; but certainly they cannot be disregarded here. He says:

G "Sir, Mr. Jenkin of Long Sutton has directed us to apply to you relative to the claim which the assignees of Mr. Everitt have set up to his supposed interest in an estate at Sutton, in consequence of his marriage with Miss Jenkin. From a perusal of the settlement on the marriage of Mr. and Mrs. Jenkin, it appears that Mr. Everitt's interest, if he has any at all, is so remote and contingent as to be worth very trifling."

H Now I cannot suppose the defendant to be so grossly ignorant as not to know that it was something more than a supposed interest. He speaks of it as being of trifling value; language which he could not use afterwards when the wife was dead; he must have known that the bankrupt would be absolutely entitled, subject to the life-interests of the father and mother. The letter then proceeds to say that Mr. Jenkin, wishing that Everitt should try his fortune again in business, was willing to give the
I assignees a reasonable compensation, and hopes that they will not press too hard upon an unfortunate individual. It is signed in the name of the defendant and his partner. This matter seems to have soon dropped.

In July, 1808, the wife died; the defendant knew this before October, and I must take it that he knew that the assignees were then entitled, subject to no claim to deduction, but subject only to the life-interests of Mr. and Mrs. Jenkin. In October he agreed to purchase it; the agreement was one that was of necessity subject to the consent of the creditors, and it was expressly understood that it was not to be binding without that consent. Accordingly a meeting of creditors was advertised for Nov. 12:

"To assent to or dissent from the said assignees selling and conveying the said bankrupt's interest in right of his wife to certain money under the marriage settlement of H. Jenkin and Ann Jenkin, the father and mother of the said bankrupt's wife."

The meeting was held under this advertisement, and all proves that what they were dealing about was considered to be the interest of the bankrupt in right of his wife. The defendant could have no title under the agreement without seeing these proceedings, from which he would see what was supposed to be the nature of the interest intended to be sold.

In December he sends a cheque for the £280 (and certainly there was some worldly prudence in sending the money) and with it a form of a receipt to be signed by the assignees; not apprising them that he had himself anything to do with the purchase but using the name of Whitely. The receipt is in these terms:

"Received on the of December, 1808, of Mr. George Whitely, by payment of Mr. Harvey, £280, being the purchase-money for the said bankrupt's right and interest under the marriage settlement of Mr. and Mrs. Jenkin, agreed to be sold to him on the 25th day of October last, subject to the life-interest of Mr. and Mrs. Jenkin therein; the assignees to show title at their expence under the bankruptcy, and transfer the said bankrupt's interest to Mr. Whitely, or as he shall direct, at his expence, whenever requested."

It is not immaterial in cases like this to attend to the description of the property to be sold; for if one man understands an expression in one sense, and another in a different sense, though the court must impute to both that they understood it in the right sense, yet if there has been any mistake, and especially if the expression used by one party has at all misled the other, it is always material in considering what a court of equity will do with the case. The condition that the assignees were to show title at their expence is also material, for being the family attorney and, therefore, conversant with the settlement, he must have known that the title would be shown at once, if it was the title of the daughter, and depended merely on the settlement and the commission of bankrupt. But if he knew of anything else that would be necessary, there was a degree of prudence in providing that the expense of it should not fall upon himself. And he gives a sort of explanation of this in a subsequent letter, in mentioning that administration to the wife must be taken out at the expense of the assignees; this shows the prudence of putting in these words.

It turns out that Whitely had nothing to do with the purchase; it is not unreasonable to suppose that the assignees might consider that if he was not acting for himself, he would not have the same motive for making a hard bargain. But no disclosure of the fact of his being himself the purchaser is made till after the receipt was returned signed by the assignees; nor was anything intimated as to his knowledge of the death of Mrs. Everitt till February, 1809, when he writes a letter mentioning that in consequence of an arrangement with Mr. Whitely the assignment is to be made to him, and that he finds it will be necessary for the assignees to take out administration to Mrs. Everitt. This was the first communication made to them of her death, and he does not then communicate what would have been fair, that he was aware of the fact not only then but at the time of the contract, at the time of the meeting of the creditors, and from the month of July preceding.

In a subsequent letter he states his reasons for not communicating it:

"It is true I did not mention Mrs. Everitt's death to you, nor did you inquire after her. It was a circumstance quite immaterial: your inquiry was confined to Mr. and Mrs. Jenkin who, if I may be allowed the expression, are the tenants for life, and the reversion I purchased depended upon them, and Mrs. Everitt's death neither affected it one way or the other. I told you and Mr. Turner, that Mr. and Mrs. Jenkin were both alive and well, and so they are now."

There might be negligence in their not inquiring whether the wife was alive or not; it is extraordinary that such an inquiry was not made, as it certainly should have

A been. But the defendant as a man of business could hardly suppose that the circumstance was not material. What? Was it immaterial that the property could not be made his without providing a settlement for the wife, and that the chance of her surviving her husband was considerable? At all events he probably could not have got the money without allowing her a moiety. However, I have no objection to impute to the defendant that he really supposed her death made no difference, B though it is scarcely possible. It would be great ignorance. But taking it so, it would be an innocent misapprehension, upon which this bargain has gone on to a certain extent, but never to a completion.

C The court in many cases has been in the habit of saying that where parties deal for an estate they may put each other at arm's length: the purchaser may use his own knowledge and is not bound to give the vendor information of the value of his property. As in the case that has been mentioned, if an estate is offered for sale and I treat for it, knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it; he acts for himself and exercises his own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends D to mislead the vendor, that principle will not be allowed to operate.

E There have been cases upon contracts by trustees to sell, which is the situation of assignees, where the court has said not that it will order the contracts to be cancelled, but that if the trustee has been negligent, not taking that care to preserve the interest of his cestui que trust which he ought to have done, it will not permit the party dealing with him to take advantage of that negligence: if he was dealing with one whom he knew to have a duty, and if that duty was plainly neglected, the F contract will not be enforced.

G But this case goes further, for it is a case where the defendant knew the fact of the wife's death, and where he must have known before he could get the contract completed, that they did not know it. It is a case where the creditors approved and consented to the contract, as it was laid before them; and consequently where the damages, if he were permitted to proceed at law, must be paid by them and not by the assignees. Has he then made out any title either to have the property under his agreement or to have damages out of the estate, for the non-performance of it. His agreement was to buy what was proposed to the creditors to be sold to him, which was the interest of the bankrupt in right of his wife. That could not mean a wife who was then dead, known by him to be dead, supposed by them to be living. F I think, therefore, that a relief ought to be given beyond the decree of the vice-chancellor and that the contract must be delivered up.

G It seems to me that the defendant must have been conscious that the assignees were dealing without sufficient knowledge, and that they were carrying to the creditors a contract the effect of which they did not understand, and that the creditors, who were to ratify it, did not understand it. This he knew and I think H that he is, therefore, not entitled to the benefit of the contract.

I should have given costs if it had been heard before me originally, but not against the decree.

Appeal allowed, delivery up of contract decreed, and purchase money to be returned with £5 per cent. interest.

OGILVIE v. FOLJAMBE

A

[ROLLS COURT (Sir William Grant, M.R.), July 22, 23, 25, 1817]

[Reported 3 Mer. 53; 36 E.R. 21]

Evidence—Document—Parol evidence as to effect—Explanation, not variation, of subject-matter — Auction — Auctioneer — Verbal declarations contradicting printed particulars of sale.

B

Parol evidence is admissible to explain the subject-matter of an agreement, although not to vary the terms. Consequently, verbal declarations of an auctioneer at the time of a sale are not to be received in contradiction of the printed particulars.

C

Sale of Land—Contract—Signature—Position in document.

Providing the name be inserted in an instrument in such a manner as to have the effect of authenticating it, the requirement of the Statute of Frauds with respect to signature is complied with and it does not matter in what part of the instrument the name is found.

D

Sale of Land—Title—Waiver—Purchaser proceeding with notice not to expect good title.

A purchaser may waive his right to a good title by going on with the agreement after he has full notice that he is not to expect a good title. This is, in such a case, a matter of notice and not of contract.

Notes. The Statute of Frauds, 1677, s. 4 (so far as it relates to contracts for the sale of land) has been replaced by s. 40 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 500). By s. 44 (3) of that Act (*ibid.*, p. 521) the assignee of a lease has no right to call for the title to the leasehold reversion but that section (by sub-s. (11), *ibid.*, p. 526) only applies so far as a contrary intention is not expressed in the contract.

E

Considered: *Evans v. Jackson* (1836), Donnelly, 147; *Cowley v. Watts* (1853), 22 L.J.Ch. 591. Distinguished: *Cox v. Middleton* (1854), 2 Eq. Rep. 631. Approved: *Caton v. Caton* (1867), L.R. 2 H.L. 127. Applied: *McMurray v. Spicer* (1868), L.R. 5 Eq. 527. Considered: *Shardlow v. Cotterell* (1881), 20 Ch.D. 90; *Ellis v. Rogers* (1885), 29 Ch.D. 661; *Plant v. Bourne*, [1897] 2 Ch. 281. Approved: *McGrory v. Alderdale Estate Co.*, [1918-19] All E.R. Rep. 1184. Referred to: *A.-G. v. Dixon* (1942), 1 Y. & C. Ch. Cas. 614; *Clive v. Beaumont* (1848), 1 De G. & Sm. 397; *Naylor v. Goodall* (1877), 47 L.J.Ch. 53; *Sheers v. Thimbleby* (1897), 76 L.T. 709; *Auerbach v. Nelson*, [1919] 2 Ch. 383.

F

As to verbal statements by auctioneer, see 2 HALSBURY'S LAWS (3rd Edn.) 80; and for cases see 3 DIGEST (Repl.) 18 et seq. As to signature in an agreement in writing, see 11 HALSBURY'S LAWS (3rd Edn.) 377; and for cases see 12 DIGEST (Repl.) 174. As to description of property in contract for sale of land, see 12 HALSBURY'S LAWS (3rd Edn.) 100 et seq. As to vendor's obligation as to title in sale of land, see 34 HALSBURY'S LAWS (3rd Edn.) 271 et seq.; and for cases see 40 DIGEST (Repl.) 36. As to uncertainty in terms as a defence to an action for specific performance, see 36 HALSBURY'S LAWS (3rd Edn.) 284 et seq.; and for cases see 30 DIGEST (Repl.) 400.

H

Cases referred to:

- (1) *Huddleston v. Briscoe* (1805), 11 Ves. 583; 32 E.R. 1215, L.C.; 44 Digest (Repl.) 29, 196.
- (2) *Stratford v. Bosworth* (1813), 2 Ves. & B. 341; 35 E.R. 349; 44 Digest (Repl.) 29, 197.
- (3) *Stokes v. Moore* (1786), 1 Cox, Eq. Cas. 219; 29 E.R. 1137; 30 Digest (Repl.) 401, 439.
- (4) *White v. Proctor* (1811), 4 Taunt. 209; 3 Digest (Repl.) 8, 60.

I

- A** (5) *Brodie v. St. Paul* (1791), 1 Ves. 326; 30 E.R. 368; 30 Digest (Repl.) 440, 821.
- (6) *Powell v. Edmunds* (1810), 12 East, 6; 104 E.R. 3; 3 Digest (Repl.) 18, 135.
- (7) *Rich v. Jackson* (1794), 4 Bro. C.C. 514; 6 Ves. 334, n.; 29 E.R. 1017, L.C.; 30 Digest (Repl.) 410, 538.
- B** (8) *White v. Foljambe* (1805), 11 Ves. 337; 32 E.R. 1118, L.C.; 40 Digest (Repl.) 176, 1388.
- (9) *Deverell v. Lord Bolton* (1812), 18 Ves. 505; 34 E.R. 409, L.C.; 40 Digest (Repl.) 188, 1517.
- (10) *Lord Gallway v. Mathew and Smithson* (1808), 10 East, 264; 103 E.R. 775; 36 Digest (Repl.) 465, 352.
- C** (11) *Gunnis v. Erhart* (1789), 1 Hy. Bl. 289; 126 E.R. 169; 3 Digest (Repl.) 18, 134.

Also referred to in argument:

- Fowle v. Freeman* (1804), 9 Ves. 351; 32 E.R. 638; 40 Digest (Repl.) 36, 191.
- Saunderson v. Jackson* (1800), 2 Bos. & P. 238; 126 E.R. 1257; 12 Digest (Repl.) 155, 991.
- D** *Daniels v. Davison* (1809), 16 Ves. 249; 33 E.R. 978, L.C.; 20 Digest (Repl.) 347, 757.
- Hick v. Phillips* (1721), Prec. Ch. 575; 24 E.R. 258; 44 Digest (Repl.) 49, 351.
- Clinan v. Cooke* (1802), 1 Sch. & Lef. 22, 33; 12 Digest (Repl.) 182, *706.
- Powell v. Edmunds* (1810), 12 East, 6; 104 E.R. 3; 3 Digest (Repl.) 18, 135.

E **Bill** by the plaintiff, the vendor, for specific performance of an agreement contained in letters between the parties to purchase a leasehold house by the defendant, the purchaser; and in the alternative for a declaration that the plaintiff was not bound to show the title of the original lessor, or if he were, that he had shown all that was necessary to establish a good title. The defendant died before putting in his answer to the bill and the suit was revived against his personal representatives.

F The plaintiff being possessed of a leasehold house in Grosvenor Place, by virtue of a lease from Earl Grosvenor for eighty-nine years from Lady Day, 1800, to Thomas Bannister, at a rent of £31 10s., and of an underlease from Bannister to the plaintiff for eighty-six years and a quarter from Christmas, 1802, at the same rent, subject to a mortgage for £12,000 to Coutts, in June, 1814, entered into a treaty for sale thereof to the defendant, which treaty having been broken off, the premises were put up to sale by auction on June 8, 1814, and bought in for the plaintiff. The printed particulars of sale, a copy of which the defendant had been furnished previous to the sale, contained a full description of the premises, and of the tenure under which they were held; and one of the conditions was:

G "That, on July 24, the vendor should execute the conveyance, with a good title to the estate; such title to originate and be derived from the lease under which the premises were held by the vendor; and the purchaser should not be entitled to call for the production of, or to inquire into, the title of the lessor."

H After the auction was over, the auctioneer, according to his own statement in evidence, furnished the defendant with another copy of the printed particulars, informing him that the plaintiff had lowered his price for the premises, and at the same time observing, that if the defendant should purchase, it must be according to the description, and under the conditions contained in the printed particulars, except as to auction duty; upon which the defendant inquired whether it would make any difference if he should write on the subject to the plaintiff or to the auctioneer, and was informed that it would be the same thing. Subsequently, some discussion took place between the plaintiff and the defendant, in which the former agreed to abate his price from £16,000, the sum first asked, to £14,000, and, the defendant having expressed a desire that the mortgage to Coutts should be suffered

to continue on the security of the premises, the plaintiff wrote him the following letter, dated June 26, 1814:

["The plaintiff] has the pleasure to acquaint [the defendant] that Mr. Coutts agrees to allow the mortgage to continue for a year, if [the defendant] will be so good as to call and promise not to exceed that time without further arrangement.—[The plaintiff] has, by the advice of Mr. Hermon, the auctioneer, reduced the price of the house £2,000, and he is confident that in a year or two it would sell from £2,000 to £4,000 more than he offers it at to [the defendant].—And, besides this advantage to [the defendant], he requests him to consider, that the rise of the funds gives a purchaser with a year's credit an additional advantage of £20 per cent. At least [the plaintiff], after the fullest consideration, and with every wish to conclude an agreement, cannot come down lower than £14,000 for the house and fixtures of every kind, . . . The defendant agreeing to take the window curtains, carpets . . . by valuation. In his instructions to [the auctioneer] yesterday, [the plaintiff] had required that [the defendant] should enter from Midsummer, allowing [the plaintiff] a month to clear. He will further give [the defendant] an option to enter, Aug. 1, Sept. 1, or Sept. 29 [the plaintiff] paying up interest, rent, and taxes, to the day [the defendant] names."

To this letter the defendant returned an answer, the same day, in the following terms:

"[The defendant] is extremely obliged to [the plaintiff] for his note, and for the very liberal and accommodating terms which he has proposed, and, in consequence of it, although [the defendant] is still of the same opinion as to the value of [the plaintiff's] house, according to the times, he will not trouble [the plaintiff] with any further discussion, but agree to the terms first proposed—to give £14,000 for the premises, including fixtures of every description. [The plaintiff] to pay the interest of the £12,000 to Sept. 29, and the taxes, and to have that time to remove. . . . [The defendant] will have the honour of calling on [the plaintiff] at half-past eleven tomorrow, if not inconvenient to him."

The arrangement with Mr. Coutts was afterwards completed on the terms desired by the defendant.

It was also in evidence that the defendant gave directions to the auctioneer to take measures for disposing of the house he then lived in, in consequence of his having agreed for the purchase from the plaintiff. The plaintiff's solicitors immediately afterwards prepared, by his directions, the memorandum of an agreement, upon the terms concluded on, and which ended by making the defendant expressly agree

"not to require any further or other title, or evidence of title, to the premises, than the existing lease, and any assignment or other disposition that might have been made thereof."

The plaintiff signed one part of this agreement, and sent a counterpart for the signature of the defendant, to the defendant's solicitors, to whom the plaintiff's solicitors afterwards, on Sept. 9, sent an abstract of the plaintiff's title, beginning with the original lease from Lord Grosvenor, and also copies of the abstract of Lord Grosvenor's title, stating, however, in an interview between the solicitors of the respective parties on Sept. 20, that they did not consider the plaintiff bound to produce Lord Grosvenor's title, but that, having procured copies from his Lordship's solicitors, they had sent them for the satisfaction of the defendant, and without prejudice; and subsequently, by letter, they expressly denied the obligation to do so. On the other hand, the defendant's solicitors objected to the agreement which had been prepared, on the ground (among others) of its containing no stipulation for the production of the lessor's title; insisting upon having such stipulation inserted; which being refused by the plaintiff, the defendant declined

A to execute the same, and took no further steps towards the completion of the purchase.

B On Sept. 29, the day for completing the contract, notice was given by the plaintiff's solicitors that the plaintiff was ready to carry the agreement into execution; and the plaintiff afterwards filed his bill for a specific performance and the alternative declaration. The defendant died before putting in his answer to this bill, and the suit was revived against his personal representatives, who contended that the treaty by private contract was wholly distinct from the conditions of sale by auction; alleging that the deceased always considered the correspondence between him and the plaintiff as mere treaty, to be reduced into an agreement, and that he never had it in contemplation to make a purchase of such magnitude without having a good and marketable title to the premises; and further submitting that, if any agreement whatever existed, it could only be derived out of the correspondence; and that, if a sufficient agreement was constituted by the correspondence, in such case the plaintiff was bound to produce his lessor's title. They denied any special agreement on the part of the deceased to take the vendor's title without such production; insisted that, if a written agreement were to be considered as so constituted, yet any conversation between the auctioneer and the deceased would not be allowed to explain, add to, or vary the same; but nevertheless submitted whether or not, and how far, such letters could be considered as admitting the alleged agreement.

C *Sir Arthur Piggott, Cooke and Farrer* for the plaintiff, the vendor.

D *Sir Samuel Romilly and Bernal* for the defendants, personal representatives of the deceased defendant, purchaser.

E **SIR WILLIAM GRANT, M.R.**—Two questions have been made in this case: first, whether there is a complete agreement between the parties; secondly, supposing there is, whether the defendants are entitled to the usual general reference with respect to the title.

F As to the first, the agreement, supposing it to be properly signed, is reduced to sufficient certainty by the two letters of June 26, 1814. I see nothing that remained to be adjusted between the parties—nothing that required explanation—nothing to be the subject of further treaty or correspondence. The subject-matter of the agreement is left, indeed, to be ascertained by extrinsic evidence; and, for that purpose, such evidence may be received. The defendant speaks of "The plaintiff's house," and agrees "to give £14,000 for the premises;" and parol evidence has always been admitted, in such a case, to show to what house, and to what premises, the treaty related. In whatever sense the defendant may have used the word "first," it creates no ambiguity as to his meaning; for he distinctly specifies what the terms are to which he does agree. The plaintiff's further offer of throwing certain articles of ornamental furniture into the bargain seems indeed to be accompanied with the condition of the defendant taking the carpets, etc., at a valuation.

G But that did not at all affect the rest of the agreement. It was merely an offer, which the defendant had the option either to accept or decline; and, when he declined it, the business was left in the same state as if that additional offer had not been made. As to the mortgage, the defendant appears to have rested satisfied with the information the plaintiff had given him as to Messrs. Coutts's readiness to continue it for a year, and, therefore, thought it unnecessary to stipulate anything

I further than that the interest should be paid to Sept. 29. It would be a strange objection on his part, to say, I ought not to have been so satisfied, but should have declined concluding the agreement till I had a direct assurance from Messrs. Coutts themselves that they would give the required indulgence.

I hardly know an instance, in which an agreement was to be collected from correspondence, where it has been so clearly made out as it is in this case. It is impossible to say that, in *Huddleston v. Briscoe* (1), the parties had expressed themselves in such explicit terms as are to be found in the two letters of June 26. Yet LORD ELDON, L.C., agreed with me in opinion that from the correspondence an agreement was to

be collected. *Stratford v. Bosworth* (2) does not bear up this case: because there was a material term in the treaty, as to which the parties had come to no agreement. The vendor proposed that all expenses should be borne by the purchaser, and to that proposal the purchaser had never assented. But here, there is nothing about which the parties differ. There is no dispute, either as to the subject-matter of the agreement, as to its terms, or as to the time of its completion. A

Another question is whether, taking the agreement to be sufficiently explicit in terms, it has the signature which is required by the statute [Statute of Frauds, 1677]. It is admitted that, provided the name be inserted in such manner as to have the effect of authenticating the instrument, the provision of the statute is complied with, and it does not much signify in what part of the instrument the name is to be found. In *Stokes v. Moore* (3), the objection was that this authentication was wanting, the name being introduced incidentally in the middle of the paper, and referring, in grammatical construction, only to a single term in the conditions. There was no objection on the score of the Christian name being wanting; but the ground of the decision was that the name, being introduced where it was, did not govern the entire agreement. In *White v. Proctor* (4), the Court of Common Pleas held that the auctioneer's writing down "Mr. Stokes" in his book as the purchaser was a sufficient signature within the statute. Here, the name begins the note, and governs all that follows. I am, therefore, of opinion that there is in this case an agreement reduced to a certainty, with such a signature as is required by the statute. B C D

As to the second question, it does not appear to me to be decided or affected by any of the cases which have been cited. In *Brodie v. St. Paul* (5), the point was that the whole substance of the agreement must be in writing. And the agreement in that case was uncertain and incomplete, as it did not specify which of the covenants contained in another instrument were to compose a part of it. It was by parol evidence that it was to be ascertained what covenants had, and what had not, been read, and therefore the essential terms of the agreement were to be ascertained by parol evidence. E

Other cases were cited to prove what is clearly established, viz., that parol evidence cannot be admitted to vary a written agreement. In *Powell v. Edmonds* (6), and in *Rich v. Jackson* (7), the parol evidence would clearly have had that effect; for, with respect to the first, an agreement to pay a certain sum for a lot of timber, without reference to the quantity, is different from an agreement to pay that sum, on condition only that a given quantity of timber was contained in the lot. In *Rich v. Jackson* (7) the written agreement only expressed that a certain rent was to be paid for the lease agreed to be taken. The parol evidence would have added a stipulation that the lessee should pay the land tax. This would, in substance, have amounted to a different agreement, being for an increased rent. But here the controversy between the parties is altogether collateral to the agreement. No term in the written agreement is sought to be varied or added to. The right to a good title is a right not growing out of the agreement between the parties, but which is given by law. The defendant insists on having a good title, not because it is stipulated for by the agreement, but on the general right of a purchaser to require it; and the answer is, he has waived it, having chosen to go on with and conclude the agreement after he had full notice that he was not to expect it. I take this to be matter of notice, and not of contract; and so LORD ELDON, L.C., treats it in *White v. Foljambe* (8) and *Deverell v. Lord Bolton* (9). He says that if a vendor of a leasehold interest means to sell without production of his lessor's title, he ought to declare it. Here, Mr. Ogilvie has declared that his landlord's title is not to be produced; and is he to be left in the same situation as if he had been wholly silent on the subject? If he had given no notice, all that the defendants would have been entitled to would be a reference as to title; and that is what they require now that notice has been given. This would, therefore, be to exclude the effect of notice, and of the distinction made by those decisions, altogether. F G H I

A It is impossible to have more precise and definite notice than that which has been given to the defendant. Not only are the particulars of sale before him at the time of the auction; but, after the auction, a second copy of the particulars are delivered to him, accompanied with an express intimation that he is to treat upon the footing of the terms therein contained. It is matter of everyday's practice that a party may, by his acts and conduct, waive a right which he possesses, and that
B this may be done without its being reduced to the shape of a specific contract. The exemption of common carriers from their legal liability, is effected by notice, without any express contract. So also the authority of one partner to bind another may be limited by notice, as in *Lord Gallway v. Mathew and Smithson* (10). And the notice itself needs not to be in writing. In *Gunnis v. Erhart* (11), where the
C Court of Common Pleas determined—and which determination has been very properly adhered to ever since—that the verbal declarations of an auctioneer at the time of sale shall not be received as evidence to contradict the printed particulars, the court did not determine that there might not be room for the admission of such evidence where the purchaser has personal information given him of a mistake in the particulars: see *SUGDEN ON VENDORS AND PURCHASERS* (5th Edn.) at p. 107. An encumbrance is, pro tanto, a defect of title. But, suppose
D the letters which constitute this agreement had taken no notice of the ground-rent, it would be quite impossible to maintain that the defendant was to have been indemnified against that encumbrance, when it was expressly stated in the printed particulars. Even in cases where there has been a covenant against encumbrances, it has been sometimes doubted whether that covenant would extend to protect a purchaser against encumbrances of which he had express notice. Suppose
E the plaintiff had stated in his particular that he would produce his lessor's title, and the agreement itself had been silent with respect to it, could he have been allowed to agitate the question as to the obligation of the vendor of a lease to produce the lessor's title? I apprehend, he would not. He would have been bound by the representation, on the footing of which the treaty proceeded. Why
F is the purchaser to claim against that representation which is made to him, and on the footing of which he is contented to treat? It is to be presumed that he considers, in the price, the difference between the one kind of title and the other.

I am, therefore, of the opinion that, although the defendants have a right to see whether the plaintiff himself has a title, the reference ought to exclude any inquiry into the title of the lessor. And I declare, that the agreement contained in
G the letters, bearing date respectively June 26, 1814, ought to be specifically performed and carried into execution, and the plaintiff not to be required to produce the title of the lessor (the Earl of Grosvenor) and his trustees to grant the indenture of lease in the pleadings mentioned.

Judgment for plaintiff.

HAWKSHAW v. PARKINS AND ANOTHER

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), July 21, 23, 1819]

[Reported 2 Swan. 539; 36 E.R. 723]

Guarantee—Discharge—Release of principal debtor by one creditor—Release not executed by other partner.

Equitable relief in the form of an injunction to restrain proceedings at law and an order for delivery up of a bond in favour of two partners was granted to a surety where the principal debtor had been released by one of the partners on behalf of both, but the other had not executed the release.

Notes. The power of a partner to bind the firm is stated in s. 5 of the Partnership Act, 1890: 17 HALSBURY'S STATUTES (2nd Edn.) 584.

Applied: *Cooper v. Evans* (1867), 36 L.J.Ch. 431.

As to implied authority of one partner to bind firm, see 28 HALSBURY'S LAWS (3rd Edn.) 505 et seq. As to rights of surety on discharge of principal debtor, see *ibid.*, vol. 18, p. 518; and for cases see 36 DIGEST (Repl.) 460 et seq., and 26 DIGEST (Repl.) 199 et seq.

Cases referred to:

- (1) *Elliot v. Davis* (1800), 2 Bos. & P. 338; 126 E.R. 1314; 7 Digest (Repl.) 187, 198.
- (2) *Harrison v. Jackson* (1797), 7 Term Rep. 207; 101 E.R. 935; 36 Digest (Repl.) 471, 410.

Also referred to in argument:

Bower v. Swadlin (1738), 1 Atk. 294; 26 E.R. 188, L.C.; 7 Digest (Repl.) 242, 797.

Demurrer to a bill filed by the plaintiff for an injunction to restrain the defendants from proceeding against him at law on a bond for £500 to secure payment to the defendants of the debt of one Daniel Rencher to the limit of £250 executed by Rencher as principal and by the plaintiff as surety, and for an order for delivery up of the said bond for cancellation.

Rencher was a coal merchant and had been engaged in regular dealings with the defendants who traded in partnership. In 1810 he induced the plaintiff to join in a joint and several bond to secure his debts to the defendants which was executed on May 1, 1810. In 1816 Rencher, being in financial difficulties, made a composition with his creditors, including the defendants, in pursuance whereof, by a deed dated Aug. 27, 1816, Rencher conveyed all his estate and effects to G., a creditor, in trust for himself and the other creditors of Rencher in proportion to the amount of their debts, and G. and the other creditors accepted the assigned premises, estate and effects in full satisfaction of their debts, releasing Rencher therefrom and from all actions in respect of them or of any other matter prior to the date of the deed of composition. That deed was executed by the defendant Thompson on behalf of himself and the defendant Parkins, but Parkins himself did not execute it, and he began an action on the bond at common law against the plaintiff. The plaintiff, by the present bill, alleged that the release by one partner was a sufficient discharge of him in equity. The defendants demurred to the bill generally, submitting that on the facts alleged in the bill the plaintiff had a defence at law.

Wetherel for the plaintiff.

Seton for the defendant.

LORD ELDON, L.C.—When a bond is prepared as the joint bond of two persons, though formerly if executed by one only, being intended to be executed by both, it was considered as the bond of neither, it has been lately and repeatedly held to be the bond of him who executed it: *Elliot v. Davis* (1). The question then here would be whether this release, if not valid against both the partners is valid against

A one. If so, the parties are right in coming into equity, because the release, though not good against both, changes the nature of the property.

B THE LORD CHANCELLOR asked whether, if two partners have a demand against a principal and a surety by bond, and one, professing to act for the other as well as himself, signs, seals and delivers a release, that release is at law valid against himself, if void against his partner? The Solicitor-General as amicus curiæ stated that he had never known the point occur in practice, but thought that the release might be pleaded; that a deed amounting to a mere acceptance of terms of composition, executed by one partner, is not binding on the rest, but that a release so executed binds all, the release of a joint obligation by one being at law an extinguishment of the debt.

C LORD ELDON, L.C.—When courts of law have held that a bond which was intended to be executed by two as a joint bond, being executed by one is valid as his bond, why is this release not valid? The bill prays an injunction against actions on the surety bond. In *Harrison v. Jackson* (2), the question depended in great measure on the nature of the deed. I take it that that was a deed by which one partner, signing, sealing and delivering for himself and his partners, undertook to make a grant; the effect of such a deed is very different from the effect of a release.

D It is common for suitors to apply here to be discharged from bills of exchange from which they might be discharged at law, the original jurisdiction being here. Very many injunctions have been granted to restrain proceedings on bills of exchange, where time given would have afforded a good defence at law on the rule that sureties are discharged by time given to the principal. We had bills in this court before that doctrine prevailed at law. The fact that that doctrine now constitutes a legal defence is no reason why the equitable jurisdiction of this court should not be maintained.

E July 23, 1818. LORD ELDON, L.C.—The case is no more than this. The plaintiff's bill states that he executed a bond in the penalty of £500 as surety for the payment of £250, the obligees being partners, and that all the creditors of the principal, including the obligees in the bond, agreed to accept an assignment of his effects, and to give a release: that is the substantive charge in the bill. It then states that the release was executed by the creditors, but that the mode of release by these two creditors, the obligees, was that one only released, signing and sealing the deed for himself and his partner; it proceeds to allege that the deed being executed by only one partner, the plaintiff cannot defend himself at law, and prays that it may be declared a good discharge in equity against the surety.

F The case was argued before me on the question whether this was a valid legal release; but without adverting to that question, and supposing that it would not be valid at law, still the bill has charged that the defendants agreed to execute a release, and that an assignment was made in performance of that agreement; that will sustain the agreement in equity if not in a court of law. It was contended that the plaintiff could not support this bill if he had a legal defence. I cannot accede to that argument. It has always been held here that time given to the principal releases the surety; the recent adoption of that doctrine by courts of law will not exclude the concurrent jurisdiction of this court. Another circumstance is that the bill prays relief which cannot be obtained at law, the delivery of the bond to be cancelled. I am, therefore, of opinion that the demurrer must be overruled.

I
Demurrer overruled.

VOOGHT v. WINCH

[COURT OF KING'S BENCH (Abbott, C.J., Bayley and Holroyd, JJ.), Trinity Term, 1819]

[Reported 2 B. & Ald. 662; 106 E.R. 507]

Estoppel—Estoppel by record—Verdict obtained in former action—Effect as evidence under general issue.

A verdict obtained by a defendant in a former action which, if pleaded in bar, would be an estoppel, is not conclusive evidence against the plaintiff when given in evidence under the general issue, but is only evidence to go to the jury.

Water—River—Public navigable river—Obstruction to navigation for twenty years—Effect.

Per ABBOTT, C.J.: If it be admitted that a river is a public navigable river and that all His Majesty's subjects had a right to navigate it, an obstruction to such navigation for a period of twenty years would not have the effect of preventing His Majesty's subjects from using it as such.

Notes. Considered: *Stafford v. Clark* (1824), 2 Bing. 377. Applied: *Doe v. Huddart* (1835), 2 Cr. M. & R. 316. Referred to: *Chad v. Tilsed* (1821), 2 Brod. & Bing. 403; *R. v. Montague* (1825), 4 B. & C. 598; *Carpenter v. Buller* (1841), 8 M. & W. 209; *Young v. Raincock* (1849), 7 C.B. 310; *Wilkinson v. Kirby* (1854), 2 C.L.R. 1387; *Feversham v. Emerson* (1855), 11 Exch. 385; *Campbell v. Loader* (1865), 11 Jur. N.S. 286.

As to rights of navigation in tidal waters, see 39 HALSBURY'S LAWS (3rd Edn.) 533 et seq.; and for cases see 44 DIGEST 119 et seq. As to necessity for pleading estoppel, see 15 HALSBURY'S LAWS (3rd Edn.) 202, 203; and for cases see 21 DIGEST (Repl.) 311 et seq.

Cases referred to:

(1) *Bird v. Randall* (1762), 3 Burr. 1345; 1 Wm. Bl. 387; 97 E.R. 866; 34 Digest (Repl.) 214, 1508.

(2) *Outram v. Morewood* (1803), 3 East, 346; 102 E.R. 630; 21 Digest (Repl.) 256, 372.

(3) *Goddard's Case* (1584), 2 Co. Rep. 4 b; 76 E.R. 396; *sub nom. Denton and Goddard's Case* 3 Leon. 100; 21 Digest (Repl.) 329, 825.

(4) *Trevivan v. Lawrence* (1704), Holt, K.B. 282; 3 Salk. 151; 87 E.R. 1003; *sub nom. Treviban v. Lawrence*, 2 Ld. Raym. 1036, 1048; *sub nom. Trevivan v. Lawrence*, 6 Mod. Rep. 256; *sub nom. Trevivan v. Lawrence*, 1 Salk. 276; 21 Digest (Repl.) 256, 370.

Also referred to in argument:

R. v. St. Pancras (Inhabitants) (1794), Peake, 219, N.P.; 22 Digest (Repl.) 276, 2785.

Strutt v. Bovingdon (1803), 5 Esp. 56, N.P.; 21 Digest (Repl.) 257, 373.

Kitchen v. Campbell (1772), 3 Wils. 304; 95 E.R. 1069; *sub nom. Hitchin v. Campbell*, 2 Wm. Bl. 779; 21 Digest (Repl.) 282, 536.

Rule Nisi obtained by the defendant to enter a nonsuit and for a new trial of an action for wrongfully diverting water from a certain stream which would otherwise have flowed to the plaintiff's mill.

The plaintiff's mill, the Abbey Mill, West Ham, in Essex, and the defendant's premises, which consisted of a wharf, etc., were situate on a stream called Channel Sea River. The plaintiff's mill was lower down the stream than the defendant's wharf, and between them was situate Potter's Ditch, which connected Channel Sea River with the water-works river, which last again was connected with the river Lee. The declaration stated that the defendant, in the summer of 1814, in order to enable his barge to pass to his mill had employed persons to deepen and widen

A Potter's Ditch, and that, from that time, the plaintiff's mill had ceased to have its usual quantity of water. The plaintiff's witnesses represented that, before that time, Potter's Ditch was not navigable for barges; one of the defendant's witnesses stated that barges had passed along Potter's Ditch for the last fifty years. The defendant also gave in evidence the record of a judgment obtained in this court in a former action between the same parties and for the same cause of action.

B That action was commenced in Hilary Term, 1817. The declaration was substantially the same as in this. The defendant there pleaded not guilty, and the jury found a verdict for him. It was insisted at the trial that that verdict was conclusive evidence against the plaintiffs, and that it operated as an estoppel. The trial judge received it in evidence but refused to nonsuit the plaintiff, giving liberty to the defendant to move to enter a nonsuit. The jury found a verdict for the plaintiff.

C A rule nisi having been obtained on this ground, and also for a new trial on the ground of a misdirection by the trial judge, it now appeared from the report that the judge had directed the jury that, in the case of all streams of water the use of which furnished beneficial enjoyment to any individual, the material thing to be attended to was what had been the actual possession and enjoyment by such person for the last twenty years; and that, if water had in fact been enjoyed during that period to a certain extent of supply, or at a certain level, no private person was at liberty to do any act which altered that state and condition for the purpose of improving his own estate; that rule applied equally to all streams, whether navigable or not. He added that he had left it to the jury to consider on the evidence whether the stream called Channel Sea River was navigable, and in what way, whether as a public navigable river or for the convenience of the adjoining occupiers; that, whether navigable or not, each party must use the water in the state in which it was found to be for the space of twenty years invariably; and that a certain benefit so long enjoyed could not afterwards be disturbed.

E Gurney, Curwood and Bolland for the plaintiff.

F Marryat, Serjeant Lawes and Comyn for the defendant.

ABBOTT, C.J.—I am of opinion that there ought to be a new trial in this case, but that there ought not to be judgment of nonsuit. The learned judge left it to the jury, on the evidence, to consider whether the stream called Channel Sea River was navigable, and in what way, whether as a public navigable river or for the convenience of the adjoining occupiers; and he further added that, whether navigable or not, he thought that each party was bound to use the water in the state in which it was found to be for the space of twenty years invariably, and that a certain benefit so long enjoyed could not afterwards be disturbed. In that direction, it appears to me, the learned judge was mistaken, for, if it be admitted that this is a public navigable river and that all His Majesty's subjects had a right to navigate it, an obstruction to such navigation for a period of twenty years would not have the effect of preventing His Majesty's subjects from using it as such. It has been said that the evidence shows plainly that this never had been a navigable river; that fact, however, is not found by the jury and I cannot now decide it. I find on the report that the jury were misdirected in point of law; and it is impossible for me to say what weight that direction had on their minds and, therefore, I think that there ought to be a new trial.

I On the second point, I am of opinion that the verdict and judgment obtained for the defendant in the former action was not conclusive evidence against the plaintiff on the plea of not guilty. It would, indeed, have been conclusive if pleaded in bar to the action by way of estoppel. In that case the plaintiff would not be allowed to discuss the case with the defendant and for the second time to disturb and vex him by the agitation of the same question. But the defendant has pleaded not guilty, and has thereby elected to submit his case to a jury. If the former verdict was proper to be received in evidence by the learned judge, its effect must

be left to the jury. If it were conclusive indeed, the learned judge ought immediately to have nonsuited the plaintiff, or to have told the jury that they were bound in point of law to find a verdict for the defendant. It appears to me, however, that the party, by not pleading the former judgment in bar, consents that the whole matter shall go to a jury and leaves it open to them to inquire into the same on evidence, and they are to give their verdict on the whole evidence then submitted to them. I am aware that, in *Bird v. Randall* (1), LORD MANSFIELD is reported to have said that a former recovery need not be pleaded but will be a bar when given in evidence. I cannot, however, accede to that, for the very first thing I learnt in the study of the law was that a judgment recovered must be pleaded; that has so strongly engrafted itself on my mind as a general principle, that nothing I have heard in argument this day has shaken it. I am, therefore, of opinion that there ought not to be a nonsuit.

BAYLEY, J.—I am of the same opinion. I think that we are not warranted in saying that there was not evidence, at least to go to the jury, to say whether this was not a navigable river; and if it was a navigable river, then an obstruction for twenty years is not a bar to a public right. The direction of the learned judge, therefore, on that point cannot be supported and, consequently, there must be a new trial.

It seems to me that the other question admits of no fair doubt when you consider the issue raised on the pleadings. An action is here brought, as it is alleged, for the same cause in respect of which a former action had been brought, and in which a verdict was obtained by the defendant. A defendant ought not, in point of law, to be twice vexed for the same cause of action; and he would have had a right, if he had thought fit, to have pleaded the former verdict by way of estoppel and thereby have shown that the plaintiff was not at liberty to try that question a second time, which had been tried before and decided against him. Instead, however, of putting himself on that estoppel, he merely says that he is not guilty of the offence imputed to him; and, on that issue, the jury are to try, not whether the plaintiff is estopped from trying the question, but whether the defendant be guilty or not. On that issue, the defendant may prove that the act imputed was not done by him and that another jury were of opinion that he was not guilty; and for that purpose he may give in evidence the judgment in the former cause, for the consideration of the second jury. The question, however, for the second jury (when the defendant has chosen to plead the general issue) is whether the defendant be guilty or not. And the question raised on that issue in an action on the case is whether the plaintiff had or had not any cause of action at the time of the commencement of the suit.

The judgment for the defendant in a former action for the same cause does not necessarily prove that the plaintiff has no cause of action. It decides nothing unless by way of estoppel. In *Outram v. Morewood* (2), where this subject was very fully considered, LORD ELLENBOROUGH, C.J., in giving the judgment of the court, takes this distinction, and states expressly that a former judgment, if properly pleaded by way of estoppel, would be conclusive, but if only offered in evidence it would not be so. For these reasons, I am of opinion, that, on this issue, the judgment in the former verdict was evidence only to go to the jury.

HOLROYD, J.—If the place in question was ever a public navigable river, I apprehend that its ceasing to be used as such for twenty years and being, during that time, in a condition which is inconsistent with its being used as a public navigable river, would not extinguish the public rights if they did exist previously to that time. An Act of Parliament is the only means by which such a public right can be determined. As there was, therefore, evidence for the consideration of the jury whether this had been a public navigable river, and as the learned judge told them that, if it were a public river, still that twenty years' possession was to be binding on the rights of the parties, it appears to me that there must be a new trial.

A With respect to the other question, I think that there ought not to be a nonsuit. There were two modes, by either of which the defendant might defend himself. There having been a former action in which he had succeeded, he might have alleged that he was not to be called on to defend himself again for the same cause. If he chooses to adopt that mode of defence, he must plead it in bar and say that the other party is not at liberty to call on him to answer again that which he had before called on him to do, when a verdict was given in his favour. If, however, he declines that mode of defence and submits to answer for the cause of action alleged, and defends himself by saying that the plaintiff has no ground of action, he then leaves the question to the jury and they are to try, not whether there was a former action for the same cause, but whether the plaintiff has such a ground of action as he alleges in his present declaration. A party may have matter which he may either give in evidence, or which, if pleaded, would be an estoppel; but when he puts it to the jury to find what the fact was, it is inconsistent with the issue which he has joined for him to say that the jury are estopped from going into the inquiry. He may, however, use the former verdict as evidence, and pregnant evidence, to guide the jury who are to try the second case to a conclusion in his favour. But if, notwithstanding the prior verdict and judgment, the jury think that the case is with the plaintiff, they are not estopped from finding the verdict accordingly.

In *Goddard's Case* (3), the plaintiff, as administrator of Newton, had brought debt on bond made to the intestate bearing date April 4, 1582. The defendant pleaded that the intestate died before the date of the bond, and so concluded that the writing was not his deed, on which they were at issue. The jury found that the defendant did deliver it as his deed July 30, 1581, and found the tenor of the deed verbatim, that it was dated April 4, 1582, that the intestate was living July 30, 1581, but that he died before the date of the bond, and prayed the advice of the court whether this was the defendant's deed; and it was adjudged his deed. The reason given is

F "that although in pleading the obligee cannot allege the delivery before the date, because he is estopped to take an averment against anything expressed in the deed, yet the jurors, who are sworn to say the truth, shall not be estopped, for an estoppel is to conclude one to say the truth, and, therefore, jurors cannot be estopped, because they are sworn to say the truth."

G In *Trevivan v. Lawrance* (4), it was held that, if a party will not rely on the estoppel when he may but takes issue on the fact, the jury shall not be bound by the estoppel, for they are to find the truth of the fact which is against him; and in *BULLER's Nisi Prius*, p. 298, it is laid down that the jury cannot find anything against that which the parties have affirmed and admitted of record, though the truth is contrary; but in other cases, though the parties be estopped to say the truth, the jury are not; as in *Goddard's Case* (3), where the bond was dated nine months after the execution and after the death of the obligor.

H I think, therefore, that on principle as well as on authority, the former judgment was not conclusive against the plaintiff on this issue, and that the learned judge, therefore, did right in receiving the evidence, and suffering the trial to proceed. The rule, therefore, should be absolute for a new trial only, but not for a nonsuit.

Rule absolute for new trial.

WOODS AND ANOTHER v. RUSSELL

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), June 26, 1822]

[Reported 5 B. & Ald. 942; 1 Dow. & Ry. K.B. 587; 106 E.R. 1436]

Bankruptcy—Property in reputed ownership of bankrupt—Unfinished ship—Ship registered in purchaser's name prior to bankruptcy of builder.

A. a ship-builder, contracted with B. to build a ship for him (B.), and to complete her in April, 1819. B. was to pay for her by four instalments, the first when the keel was laid, the second when at the light plank, and the third and fourth when the ship was launched. Before June 25, 1819, the ship was measured with A.'s privity, to the intent that B. might get her registered in his name. On June 25 A. signed the usual certificate of her building; on the following day the ship was registered in B.'s name; and on the same day the third instalment was paid. On June 30 A. committed an act of bankruptcy on which a commission afterwards issued. On July 2, the ship not being then completed or launched, B. and a crew hired by him took possession of the ship and a rudder and cordage, the former of which was made by A., and the latter had been bought by him for the express purpose of completing the ship.

Held: In an action of trover by A.'s assignees in bankruptcy for the ship, rudder and cordage, (i) the legal effect of A.'s having signed the certificate to enable B. to have the ship registered in his name was to vest the general property in the ship in B. from the time the registry was completed, and, as the rudder and cordage were made and bought by A. specifically for the ship, they were to be considered as parts of the ship and the property in them also vested in B.; (ii) the property was not in the possession of the bankrupt as reputed owner within the Bankrupts Act, 1623 [now s. 38 (c) of Bankruptcy Act, 1914: 2 HALSBURY'S STATUTES (2nd Edn.) 373]; (iii) although the general property in the ship was vested in B., yet, as A. had not parted with the possession and as he would have had a lien on the ship for the amount of the fourth instalment if he had completed it, B.'s taking possession of the ship without tendering the fourth instalment, or as much thereof as was due, was wrongful and consequently the plaintiffs were entitled to recover from B. the amount of the fourth instalment, provided the expense necessary for the completion of the ship did not amount to that sum, or so much thereof as would remain due after defraying such expense.

Notes. Distinguished: *Bishop v. Crawshay* (1824), 3 B. & C. 415; *Atkinson v. Bell* (1828), 8 B. & C. 277. Applied: *Carruthers v. Payne* (1828), 2 Moo. & P. 429; *Clarke v. Spence* (1836), 4 Ad. & El. 448. Considered: *Laidler v. Burlinson* (1837), 2 M. & W. 602. Distinguished: *Beale v. Moulds* (1847), 10 Q.B. 976. Considered: *Spanish and Portuguese Screw Steam Shipping Co. v. Bell*, *Wood v. Bell* (1856), 25 L.J.Q.B. 148; *Wood v. Bell* (1856), 6 E. & B. 355. Considered and Applied: *Holderness v. Rankin* (1860), 28 Beav. 180. Distinguished: *Anglo-Egyptian Navigation Co. v. Rennie* (1875), L.R. 10 C.P. 271. Considered: *Re Lindsay, Ex parte Lambton* (1875), 10 Ch.D. 405; *Clarke v. Millwall Dock Co.* (1885), 53 L.T. 316. Approved: *Seath v. Moore* (1886), 11 App. Cas. 350. Considered: *Re Blyth Shipbuilding and Dry Docks Co.*, [1926] All E.R. Rep. 373. Referred to: *Acraman v. Morrice* (1849), 14 L.T.O.S. 292; *Turley v. Bates* (1863), 2 H. & C. 200; *Banbury and Cheltenham Direct Rail. Co. v. Daniel* (1884), 54 L.J.Ch. 265.

As to transfer of the property from seller to buyer in general, see 34 HALSBURY'S LAWS (3rd Edn.) 60 et seq.; and for cases see 5 DIGEST (Repl.) 814 et seq.

Case referred to:

- (1) *Mucklow v. Mangles* (1808), 1 Taunt. 318; 127 E.R. 856; 39 Digest (Repl.) 612, 1251.

A Also referred to in argument :

Groves v. Buck (1814), 3 M. & S. 178; 105 E.R. 577; 39 Digest (Repl.) 454, 71.

Towers v. Osborne (1722), 1 Stra. 506; 93 E.R. 664; 39 Digest (Repl.) 454, 67.

Hay v. Fairbairn (1818), 2 B. & Ald. 193; 106 E.R. 337; 42 Digest (Repl.) 646, 3995.

B *Robinson v. Macdonnell* (1816), 5 M. & S. 228; Holt, N.P. 612, n.; 105 E.R. 1034; 42 Digest (Repl.) 626, 3807.

Muller v. Moss (1813), 1 M. & S. 335; 2 Rose, 99; 105 E.R. 126; 5 Digest (Repl.) 853, 7164.

Oliver v. Bartlett (1819), 1 Brod. & Bing. 269; 3 Moore, C.P. 592; 129 E.R. 726; 5 Digest (Repl.) 856, 7199.

C **Action** of trover by the plaintiffs, the assignees of Alexander Paton, a bankrupt, to recover from the defendant a ship, a rudder, and a quantity of cordage, tried before BAYLEY, J., at the Northumberland Summer Assizes, 1820, when the jury under his direction, found a verdict for the plaintiffs, with damages to the amount of £68, being the value of the rudder and cordage only, subject to the opinion of the court on a Case.

D The following facts are taken from the judgment of ABBOTT, C.J. :

E Paton was a shipbuilder and in October, 1818, he entered into a written contract with the defendant to build and complete a ship for him and finish and launch her in April, 1819. The defendant was to pay for the ship by four instalments of £750 each; the first when the keel was laid, the second when they were at the light plank, and the third and fourth when the ship was launched. The payments were to be made by bills at two, four, six, and eight months. The first and second instalments were duly paid.

F In March, 1819, the defendant appointed a master who, from that time, superintended the building. In May, 1819, the defendant advertised the ship for charter and on June 16 chartered her, with Paton's privity, for a voyage from Newcastle to Newfoundland. Before June 26 the ship was measured and surveyed, with Paton's privity, to the intent that the defendant might get her registered in his name. On June 19 the master entered into the usual bond for delivering up the register. On June 25 Paton signed the usual certificate of her build, etc., and on June 26 the ship was registered in the defendant's name. On that day the defendant paid Paton the third instalment.

G Paton's certificate described the ship as launched but that was not the case, and Paton's people continued working on her and using his timber and materials till July 3. One of the master's apprentices was employed on board by his directions from the early part of June, and on June 30 the master ordered him to sleep on board; but on that same day Paton committed an act of bankruptcy, on which a commission afterwards issued. On July 2 the defendant and a crew he had hired took possession of the ship, and his servants, by his direction, took from Paton's yard and warehouse a rudder and cordage which Paton had bought for the ship. On July 4 the ship was launched. The fourth instalment was never paid. The ship was incomplete when the act of bankruptcy was committed and the expense of launching her was borne by the defendant.

H On these facts, the questions proposed to the consideration of the court were whether the plaintiffs were entitled to recover the value of the ship; or if not, whether they were entitled to recover the value of the rudder and cordage. Should the court be of opinion that they were entitled to neither, a nonsuit was to be entered. On these points only the Case was argued.

I *Littledale* for the plaintiffs.

Holt for the defendant.

Cur. adv. vult.

ABBOTT, C.J., delivered the judgment of the court, in which after stating the facts as set out above and the two points argued before him, he continued: It has

occurred to the court that a third question arises on the facts, which neither party could have intended to exclude, which is this: whether, if the plaintiffs are not entitled to recover the whole value of the ship, they may not be entitled to recover to the extent of so much of the fourth instalment as, if the defendant has the ship, he ought to pay. On the first and second questions, our opinion is in favour of the defendant; on the last, against him. A

This ship is built on a special contract, and it is part of the terms of the contract that given portions of the price shall be paid according to the progress of the work —, part when the keel is laid, part when they are at the light plank. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship and that, as between him and the builder, he is entitled to insist on the completion of that very ship, and that the builder is not entitled to require him to accept any other. B C

But this case does not depend merely on the payment of the instalments; so that we are not called on to decide how far that payment vests the property in the defendant because, here, Paton signed the certificate to enable the defendant to have the ship registered in his (the defendant's) name and by that act consented, as it seems to us, that the general property in the ship should be considered from that time as being in the defendant. The defendant had, at that time, paid half what the ship, when complete, would be worth. Paton could not be injured by having the general property in the ship considered as vested in the defendant, because he would still have a lien on the possession for the residue of the price. We think the legal effect of signing the certificate for the purpose of having the ship registered was, from the time the registry was complete, to vest the general property in the defendant. In order to register the ship in the defendant's name, an oath would be requisite that the defendant was the owner, and when Paton concurred in what he knew was to lead to that oath, must he not be taken to have consented that the ownership should really be as that oath described it to be? D E

Mucklow v. Mangles (1) seems to us to be clearly distinguishable from the present case, because the bargain there for building the barge does not appear to have stipulated for the advances which were made, and those advances do not appear to have been regulated by the progress of the work. The opinion of HEATH, J., appears to have been founded on the notion that the builder was not tied down to deliver that specific barge, but would have been at full liberty to have substituted any other he was building, and the builder had done no act expressing an unequivocal consent that the general property should be considered vested in the purchaser. The painting of the name on the stern, the only act there, pledged the builder to nothing; it expressed an intention that the barge should be Pocock's but it did no more. He might change that intention and obliterate the name. But the signing of the certificate, here, to the intent that the defendant might obtain a registry in his own name, was a consent that what was necessary to enable the defendant to obtain such registry should, as between them, be considered as complete and that, as the defendant would have to swear that he was sole owner of the ship, the ownership should be considered his. F G H

We are, therefore, of opinion that the plaintiffs who claim under Paton are bound equally with him; and, as this is not a case within the Bankrupts Act, 1623, the plaintiffs are not entitled to recover the general value of the ship.

As to the rudder and cordage, as they were bought by Paton specifically for this ship, although they were not actually attached to it at the time his act of bankruptcy was committed, they seem to us to stand on the same footing with the ship and that if the defendant was entitled to take the ship, he was also entitled to take the rudder and cordage as parts thereof. I

On the last question, however, we are of opinion against the defendant. Though the general ownership was vested in the defendant, the possession remained with Paton; and as the bills for the third and fourth instalments were to be given at the launching of the ship (when launched), Paton, had he completed the ship, would have

A had a lien on it till those bills were given; and as the defendant thought fit to take the ship before it was complete, after having given bills for the first three instalments only, we think he ought to have given a bill for so much of the fourth instalment as, according to the value of what remained to be done, Paton was entitled to receive. Further, that unless what remained to be done would be equal to the whole of the fourth instalment, his taking the ship without giving or tendering such a bill was a wrongful taking. We are, therefore, of opinion that according to the provision made in that respect in the case, it ought to be referred to Mr. Bainbridge and Mr. Clayton, and such third person as they shall appoint, to take an account of the want of materials stipulated to be provided by Paton not on board, and the fair expense of launching, and to enter the verdict accordingly. If the want of materials, and the expense of launching, shall amount to £750, the verdict to be entered for the defendant; if it shall amount to less than £750, a verdict for the difference to be entered for the plaintiffs.

Judgment accordingly.

ILOTT v. WILKES

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.),
January 24, 1820]

[Reported 3 B. & Ald. 304; 106 E.R. 674]

*Negligence—Defence—Volenti non fit injuria—Dangerous thing on premises—
Injury to trespasser with notice.*

Where a dangerous thing, such as [formerly] a spring gun, a bull, or a fierce dog is kept on premises, notice of its presence thereon being given to the public, a trespasser who is aware of the notice yet goes on the premises and suffers injury cannot maintain an action against the owner of the premises, for the maxim *volenti non fit injuria* applies and entitles the owner to succeed.

Notes. By s. 31 of the Offences Against the Person Act, 1861 (5 HALSBURY'S STATUTES (2nd Edn.) 798) setting a spring gun, mantrap, or other engine calculated to destroy human life or inflict grievous bodily harm was made an offence, but the present case remains an authority in the event of injury to a trespasser with notice resulting from the presence of other dangerous things lawfully on private land.

Distinguished: *Bird v. Holbrook* (1828), 4 Bing. 628. Considered: *Lynch v. Nurdin*, [1835-42] All E.R. Rep. 167; *Clark v. Chambers*, [1874-80] All E.R. Rep. 253; *Dann v. Hamilton*, [1939] 1 All E.R. 59. Referred to: *R. v. Mountford* (1835), 1 Mood. C.C. 441; *Jordin v. Crump* (1841), 8 M. & W. 782; *Brown v. Mallett* (1848), 5 C.B. 599; *Degg v. Midland Rail. Co.* (1857), 1 H. & N. 773; *Cleghorn v. Oldham* (1927), 43 T.L.R. 465; *Adams v. Naylor*, [1944] 2 All E.R. 21.

As to the defence of *volenti non fit injuria*, see 28 HALSBURY'S LAWS (3rd Edn.) 82-85; and for cases see 36 DIGEST (Repl.) 150-158.

Cases referred to:

- (1) *Deane v. Clayton* (1817), 7 Taunt. 489; 1 Moore, C.P. 203; 2 Marsh. 577; 129 E.R. 196; 46 Digest (Repl.) 394, 360.
- (2) *Brock v. Copeland* (1794), 1 Esp. 203; 2 Digest (Repl.) 379, 547.

Also referred to in argument:

- Jay v. Whitfield* (1817), cited in 3 B. & Ald. at p. 308; 106 E.R. 676; 46 Digest (Repl.) 421, 654.

Rule Nisi for a nonsuit obtained by the defendant in an action for injury caused to the plaintiff by his causing a spring gun to fire while he was trespassing on the defendant's land.

The declaration stated that the defendant was possessed of a wood called Chrishall Wood, in the county of Essex, over and along a certain part of which there was a right of way for the public on foot in the day and at other times, and that the defendant set a spring gun, charged with gunpowder and leaden shot, in a part of the wood near the right of way, with a wire communicating with the lock and other parts of the spring gun by the treading on or touching of which wire the gun could be let off and fired. The fourth count charged that the defendant suffered the spring gun to remain loaded in the wood without taking due and proper means to prevent persons in the wood from being injured thereby, by reason whereof the plaintiff, not knowing, and not being able to perceive where the wire was placed, in the day time unavoidably trod upon the wire, by which the gun was fired, and the plaintiff was injured. The defendant denied liability.

At the trial before GARROW, B., at the Summer Assizes for the county of Essex, 1819, the following facts were given in evidence. The defendant was the owner of Chrishall Wood, consisting of fifty or sixty acres, and by his order nine or ten spring guns were set there. Several boards were affixed containing notice to the public that such instruments were so placed. The plaintiff on the occasion in question accompanied by another person, went out in the day time to gather nuts, and proposed to his companion to enter Chrishall Wood. The latter, however, refused, unless the plaintiff would go first, and he then told the plaintiff that spring guns were set there. They both, however, entered the wood, and the plaintiff received the injury which was the subject of the action in consequence of treading on the wire communicating with the spring gun. The learned judge, considering that this involved the same question which was under the consideration of the Court of Common Pleas in *Deane v. Clayton* (1), directed the jury to find a verdict for the plaintiff, reserving to the defendant liberty to move to enter a nonsuit. The jury assessed the damages at £50, and found that at the time of the injury there was no footpath near the place in question; that the plaintiff was not in the exercise of any right of path, but was gathering nuts; and that he had knowledge and notice that spring guns were placed in the wood. A rule nisi for entering a nonsuit having been obtained in the last Michaelmas Term,

Adolphus, Dowling and Chitty for the plaintiff, showed cause against the rule.
Marryatt for the defendant.

ABBOTT, C.J.—We are not called upon in this case to decide the general question whether a trespasser sustaining an injury from a latent engine of mischief placed in a wood or in grounds where he had no reason to apprehend personal danger may or may not maintain an action. That question has been the subject of much discussion in the Court of Common Pleas, and great difference of opinion has prevailed in the minds of the learned judges whose attention was there called to it. Nor are we called upon to pronounce any opinion as to the inhumanity of the practice which in this case has been the cause of the injury sustained by the plaintiff. That practice has prevailed extensively and for a long period of time, and, although undoubtedly I have formed an opinion as to its inhumanity, yet at the same time I cannot but admit that repeated and increasing acts of aggression to property may perhaps reasonably call for increased means of defence and protection. I believe that many persons who cause engines of this description to be placed in their grounds do not do so with the intention of injuring anyone, but really believe that the notices they give of such engines being there will prevent any injury from occurring, and that no person who sees the notice will be weak and foolish enough to expose himself to the perilous consequences likely to ensue from his trespass.

In this case it is found by the jury that the plaintiff actually knew that spring guns were set in this wood. Sitting in a court of law, we cannot say that an action may be maintained against the defendant for doing an act like the one in question, if it be not in itself unlawful. The jury have found that the plaintiff (before he

A entered the wood) knew that engines like that by which he suffered in consequence of his trespass were placed there. To him, therefore, they ceased to be latent engines of mischief, and the degree of injury sustained cannot vary the case in principle. The court, therefore, cannot hold that this action is maintainable unless they are also prepared to say that any trespasser who should hurt himself by coming in contact in the dark with spikes or broken glass stuck on a wall, which at that time would be invisible, could maintain an action against the owners in a case where it appeared that he had had a previous opportunity of observing in broad daylight that such means of mischief were placed upon the wall. In that case I believe no lawyer will argue that an action could be maintained. I am not able to distinguish this case from that which I have put. Considering the present action merely on the ground of notice, and leaving untouched the general question as to the liability incurred by placing such engines as these where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained.

BAYLEY, J.- Nothing that falls from me shall have a tendency to encourage the practice which to a certain extent has prevailed of setting these engines for the protection of property, the consequence of which sometimes has been to cause great bodily injury to persons entirely ignorant of the existence of engines of this description. Such instruments may be undoubtedly placed without any intention of doing injury, for the mere purpose of protecting property by means of terror, and it is extremely probable that the defendant in this case will feel as much regret as any man for the injury which the plaintiff has sustained and that he will render to the party as much compensation as he ought, without compromising the question of law and without admitting it as a matter of obligation upon him that he is bound to make a compensation for the injury through the medium of a suit at law.

This is a case in which the plaintiff had notice that there were spring guns in the wood. The declaration states, that the plaintiff had no notice of the places or of the direction in which the guns themselves were placed or where the wires communicating with the guns were placed, but it is not necessary to give notice to the public that guns are placed in such particular spots in such particular fields, for that would deprive the property of the intended protection. It is sufficient for a party generally to say: "There are spring guns in this wood," and if another then takes upon himself to go into the wood knowing that he is in the hazard of meeting with the injury which the guns are calculated to produce, it seems to me that he does it at his own peril and must take the consequences of his own act. The maxim of law, *volenti non fit injuria*, applies, for he voluntarily exposes himself to the mischief which has happened. He is told that if he goes into the wood he will run a particular risk, for that in those grounds there are spring guns. Notwithstanding that caution, he says: "I will go into the wood, and I will run the risk of all consequences." Has he then any right, after he has been distinctly apprised of his danger, to bring an action against the owner of the soil for the consequences of his own imprudent and unlawful act? I think not, for he had no right to enter the wood; in so doing, he became a trespasser and a wrongdoer.

It has been said that these guns were wrongfully and unlawfully placed in the wood. Let us inquire whether it was unlawful or not. One of the tests of trying that question is this: Does the law punish a man for the mere act of putting these instruments upon his own premises? Is he indictable for it, for that is the criterion by which we are to judge of the legality of this act. If it could be made out as an abstract position of law that the defendant is liable to be indicted for setting spring guns in his premises, then, perhaps, whether he puts up notices or not, he might not have any defence, for, notwithstanding the notices, he would be liable for the consequences of an unlawful act. But if it cannot be shown that it is an unlawful act to set these spring guns, it seems to me that the defendant was at liberty to do it. At the same time he would be liable for a civil injury produced from want of caution on his part to guard against such an injury, for, although it may be lawful to

put these instruments on a man's own ground, yet as they are calculated to produce great bodily injury to innocent persons (for many trespassers are comparatively innocent) it is necessary to give as much notice to the public as you can, so as to put people on their guard against the danger. This declaration is founded upon the ground, that such is the law upon the subject, for the first count states that the defendant set the guns there without giving notice of their place and direction. Another count states that the guns were set there without giving proper notice where the wires which communicated with the guns were placed. Another count states that they were placed without sufficient and proper notice to all His Majesty's subjects. The declaration, therefore, assumes the law to be, not that the mere fact of placing these guns in a man's own ground is illegal and punishable by indictment, but that a party doing that act may be liable to an action provided he does not take due and proper means, by giving notice, to prevent the injury which those engines are calculated to produce.

Where a man, however, is actually apprised before he enters that the guns are there, he cannot afterwards complain that there has not been a proper and sufficient notice given. The case of a man keeping on his own premises a furious dog, or bull, is to a certain degree analogous to this. Suppose such a person were to give a notice that in his premises there is a furious bull and that it is dangerous for any person to enter, and a wrongdoer, who had read this notice, enters and the bull attacks him, it is clear that he could maintain no action for the consequences of his own act. So, also, if a trespasser enters into the yard of another, over the entrance to which notice is given that there is a furious dog loose, and that it is dangerous for any person to enter without one of the servants or the owner. If the wrongdoer, having read that notice, and knowing, therefore, that he is likely to be injured, in the absence of the owner enters the yard and is worried by the dog (which in such a case would be a mere engine without discretion), it is clear that the party could not maintain any action for the injury sustained by the dog, because the answer would be, as in this case, that he could not have a remedy for an injury which he had voluntarily incurred. If, indeed, the master had been upon the spot at the time and had seen the dog running towards the man, it would have been his duty to have done all in his power to prevent the animal from worrying him, and if he had not so done, the party injured might have had a right of action. I am, therefore, of opinion, on the ground of notice only, that this action is not maintainable.

HOLROYD, J. I am of opinion that this action is not maintainable on the ground that the plaintiff had notice that the spring guns were placed in the wood in question. I do not consider it necessary that he should have notice of the precise spot in which the spring guns were placed. It is sufficient, in the present case, that he had notice generally that they were placed in the ground in question. The mere act of placing spring guns in a man's own ground is not of itself unlawful. It is not an indictable offence, nor will it subject a party to an action, unless some injurious consequences result from it. If any such consequences result, it may perhaps form the subject of an action. Without giving any decided opinion upon that point, but assuming, for the present, that that would be so, it seems to me that a party having express notice that the spring guns were placed in a particular ground and entering upon that place as a trespasser stands in a very different situation, for, if the placing of the spring guns be not of itself an unlawful act and only becomes so in respect of the consequences which result from it, the party who so enters, with full knowledge of the danger, is himself the cause of the mischief that ensues, and falls within the principle of law, *volenti non fit injuria*, for, as he knew that the spring guns were placed there, he can have no right of action for an injury which resulted from his own act alone.

The only doubt which I have entertained during the course of the argument arises out of the maxim of law that a man cannot do that indirectly which he cannot do

A directly. I am now, however, satisfied that that principle has no application to the present case, where the plaintiff had express notice that the spring guns were placed on the premises into which he wrongfully entered, for in that case the act of firing off the gun, which was the cause of the injury, was his act, and not the act of the person who placed the gun there. If, indeed, a party who had no notice had gone into the grounds, although he would be a trespasser, the act of firing off
B the gun by his treading accidentally on the wires would not, in consequence of those wires being latent, be considered his own act, but he would be a mere instrument of producing that which resulted from a prior act done by another. If one person makes use of another, who is a mere instrument, to do any act, the thing done is the act, not of him who is merely the instrument, but of the person who uses him as such instrument. Thus, if a man induces a madman to inflict wounds
C upon the person of another from which death ensues, in point of law that is not considered the act of the madman, but the act of the person inciting him. The madman is considered a mere instrument and the other person, though not present at the time of the act done, is indictable for murder as a principal (although, generally speaking, to make a person a principal in murder he must be present at the time), the reason of which is that the act done is considered as the act of the person who causes it and he is considered as virtually present at the time of doing it and the madman as a mere instrument in his hands. So it is in a case where one person secretly mixes poison with food for the purpose of the poison being ignorantly taken in the food by another.

In the present case, in order to make the firing off of this gun the act of the person
E who placed it there we must consider him as doing indirectly the same thing as if he had taken up the gun at the time and shot the plaintiff, and we must consider the latter as a mere instrument and not as an actor, but, in my opinion, the plaintiff in this case was not an instrument, but an actor. If he had seen the wires and trod on them with the intention of firing off the gun, it is clear that that would have been his own act. Here, he entered the wood with full notice that those
F engines were placed there, and with the knowledge, therefore, that the danger was unavoidable. So far as he was concerned, the cause of the mischief could not be considered as latent, and the act of letting off the gun, which was the consequence of his treading on the wire, must be considered wholly as his act and not the act of the person who placed the gun there. If, indeed, the defendant had been present, had seen a trespasser enter, had the means of preventing the injury, and
G had not done all in his power to prevent it, unquestionably it might have been considered as proceeding from his own act, but in the present case he was absent and had not the means of averting the mischief. Therefore, the maxim of law that a man cannot do that indirectly which he cannot do directly is not applicable to the present case. Indeed, that maxim would equally apply to a case where a person kept a ferocious bull in his grounds where other persons were used to resort :
H see *Brock v. Copeland* (2). In such a case, if there was no notice and a trespasser was to enter and be gored, an action would lie for the injury, but, if public notice were given and it could be shown that the trespasser knew that such a dangerous animal was there and with that knowledge was hardy enough to run the risk, it is perfectly clear that he could support no action.

I I am, therefore, of opinion that this action is not maintainable, on the ground that the damage sustained has been produced by the plaintiff's own wilful act.

BEST, J.—The act of the plaintiff could only occasion mere nominal damage to the wood of the defendant. The injury that the plaintiff's trespass has brought upon himself is extremely severe. In such a case, one cannot, without pain, decide against the action. But we must not allow our feelings to induce us to lose sight of the principles which are essential to the rights of property. The prevention of intrusion upon property is one of these rights, and every proprietor is allowed to use the force that is absolutely necessary to vindicate it. If he uses more force than

is absolutely necessary, he renders himself responsible for all the consequences of the excess. Thus, if a man comes on my land, I cannot lay hands on him to remove him, until I have desired him to go off. If he will not depart on request, I cannot proceed immediately to beat him, but must endeavour to push him off. If he is too powerful for me, I cannot use a dangerous weapon, but must first call in aid other assistance. I am speaking of outdoor property and of cases in which no felony is to be apprehended. A

It is evident, also, that this doctrine is only applicable to trespasses committed in the presence of the owner of the property trespassed on. When the owner and his servants are absent at the time of the trespass, it can only be repelled by the terror of spring guns or other instruments of the same kind. There is, in such cases, no possibility of proportioning the resisting force to the obstinacy and violence of the trespasser as the owner of the close may and is required to do where he is present. B

There is no distinction between the mode of defence of one species of outdoor property and another (except in cases where the taking or breaking into the property amounts to felony). If the owner of woods cannot set spring guns in his woods, the owner of an orchard or of a field with potatoes, turnips, or any other crop usually the object of plunder cannot set them in such field. How, then, are these kinds of property to be protected at a distance from the residence of the owner in the night and in the absence of his servants? It has been said that the law has provided remedies for any injuries to such things by action. But the offender must be detected before he can be subjected to an action, and the expense of continual watching for this purpose would often exceed the value of the property to be protected. C

If we look at the subject in this point of view, we may find, among poor tenants who are prevented from paying their rents by the plunder of their crops, men who are more objects of our compassion than the wanton trespasser who brings on himself the injury which he suffers. If an owner of a close cannot set spring guns, he cannot put glass bottles or spikes on the top of a wall, or even have a savage dog to prevent persons from entering his yard. It has been said in argument, that you may see the glass bottles or spikes, and it is admitted that, D

if the exact spot where these guns are set was pointed out to the trespasser, he could not maintain any action for the injury he received from one of them. As to seeing the glass bottles or spikes, that must depend on the circumstance whether it be light or dark at the time of the trespass. E

But what difference does it make whether the trespasser be told the gun is set in such a spot or that there are guns in different parts of such a field, if he has no right to go on any part of that field? It is absurd to say you may set the guns provided you tell the trespasser exactly where they are set, because then the setting them could answer no purpose. BAYLEY, J., has illustrated this case by the question which he asked, namely: Can you indict a man for putting spring guns in his enclosed field? I think the question put by GIBBS, C.J., in *Deane v. Clayton* (1) (7 Taunt. at p. 530), a still better illustration, viz.: Can you justify entering into enclosed lands to take away guns so set? If both these questions must be answered in the negative, it cannot be unlawful to set spring guns in an enclosed field at a distance from any road, giving such notice that they are set as to render it in the highest degree probable that all persons in the neighbourhood must know that they are so set. Humanity requires that the fullest notice possible should be given, and the law of England will not sanction what is inconsistent with humanity. F

It has been said, in argument, that it is a principle of law, that you cannot do, indirectly, what you are not permitted to do directly. This principle is not applicable to the case. You cannot shoot a man that comes on your land because you may turn him off by means less hurtful to him, and, therefore, if you saw him walking in your field and were to invite him to proceed on his walk knowing that he must tread on a wire and so shoot himself with a spring gun, you would be liable to all the consequences that would follow. The invitation to him to pursue his walk is doing, indirectly, what, by drawing the trigger of a gun with your own hand, is G

A done directly. But the case is just the reverse if, instead of inviting him to walk on your land, you tell him to keep off and warn him of what will follow if he does not.

It is also said that it is a maxim of law that you must so use your own property as not to injure another's. This maxim I admit, but I deny its application to the case of a man who comes to trespass on my property. It applies only to cases where
 B a man has only a transient property, such as in the air or water, that passes over his land, which he must not corrupt by nuisance, or where a man has a qualified property as in land near another's ancient windows or in land over which another has a right of way. In the first case, he must do nothing on his land to stop the light of the windows, or in the second to obstruct the way. This case has been
 C argued, as if it appeared in it that the guns were set to preserve game, but that is not so; they were set to prevent trespass on the lands of the defendant. Without, however, saying in whom the property of game is vested, I say, that a man has a right to keep persons off his lands in order to preserve the game. Much money is expended in the protection of game, and it would be hard if, in one night, when the keepers are absent, a gang of poachers might destroy what has been kept at so much
 D cost. If you do not allow men of landed estates to preserve their game, you will not prevail on them to reside in the country. Their poor neighbours will thus lose their protection and kind offices, and the government will lose the support that it derives from an independent, enlightened, and unpaid magistracy.

Rule absolute.

BARING AND OTHERS v. CORRIE AND ANOTHER

[COURT OF KING'S BENCH (Abbott, C.J., Bayley and Holroyd, JJ.), November 13, 1818]

[Reported 2 B. & Ald. 137; 106 E.R. 317]

Agent—Mercantile agent—Broker—Right to sell in own name.

The character of broker is materially different from that of factor, and, therefore, where a broker sold goods without disclosing the name of his principal,

G **Held:** the broker acted beyond the scope of authority, and the buyer could not set-off a debt due from the broker to him against the demand for the goods made by the principal.

Agent—Mercantile agent—Factor—Possession of goods—Right to sell in own name.

H Per ABBOTT, C.J.: A factor is a person to whom goods are consigned for sale by a merchant residing abroad or at a distance from the place of sale, and he usually sells in his own name without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods and gives him authority to sell in his own name. But the broker is in a different situation; he is not trusted with the possession of the goods and he ought not sell in his own name. The principal,
 I therefore, who trusts a broker, has a right to expect that he will not sell in his own name.

Notes. Applied: *Carr v. Hinchliffe* (1825), 4 B. & C. 547; *Drakeford v. Piercy* (1866), 7 B. & C. 515. Considered: *Fairlie v. Fenton* (1870), L.R. 5 Exch. 169. Applied: *Pearson v. Scott* (1878), 9 Ch.D. 198. Approved: *Cooke & Sons v. Eshelby*, [1886-90] All E.R. Rep. 791. Referred to: *Warner v. McKay* (1836), 2 Gall. 86; *Milford v. Hughes* (1846), 16 M. & W. 174; *Fish v. Kempton* (1849), 7 C.B. 687; *Dresser v. Norwood* (1863), 11 W.R. 624; *Borries v. Imperial Ottoman Bank* (1873), L.R. 9 P.C. 38; *Montague v. Forwood*, [1893] 2 Q.B. 350.

As to classes of agent, see 1 HALSBURY'S LAWS (3rd Edn.) 150 et seq.; as to set-off by mercantile agents, see 34 HALSBURY'S LAWS (3rd Edn.) 402; and for cases see 1 DIGEST (Repl.) 324 et seq.

Cases referred to :

- (1) *Hern v. Nichols* (1701), Holt, K.B. 462; 1 Salk. 289; 1 Digest (Repl.) 682, 2427.
- (2) *Rabone v. Williams* (1785), 7 Term Rep. 360, n.; 101 E.R. 1020; 1 Digest (Repl.) 666, 2333.
- (3) *George v. Clagett* (1797), 7 Term Rep. 359; Peake, Add. Cass. 131; 2 Esp. 557; 101 E.R. 1019; 1 Digest (Repl.) 663, 2318.

Also referred to in argument :

Scrimshire v. Alderton (1743), 2 Stra. 1182; 93 E.R. 1114; 39 Digest (Repl.) 729, 2101.

Morris v. Cleasby (1816), 4 M. & S. 566; 105 E.R. 943; 1 Digest (Repl.) 326, 126.

Moore v. Clementson (1809), 2 Camp. 22; 1 Digest (Repl.) 666, 2338.

Action of assumpsit for goods sold and delivered. The defendants denied liability.

The plaintiffs, merchants in London, in June, 1815, employed Messrs. Coles, as their brokers, to sell for them a parcel of sugars. Coles & Co. sold the defendants the sugars on June 27, 1815, and on the same day delivered to the plaintiffs the following sale note :

"Sold for account of Messrs. Baring, Bros. & Co., to Messrs. W. and E. Corrie, fifty hogsheads Surinam sugar, at 85s."

Coles & Co. were merchants as well as brokers, and bought and sold largely on their own account, and had before the time of the sale of the sugars in question dealt with the defendants both in buying and selling on their own account, and in the course of such dealing had previously bought goods of the defendants, for which they had given them their acceptances for £2,700, which fell due on Aug. 25 and 26, 1815. At the time of the sale, Coles & Co. did not disclose to the defendants that they acted as brokers, but sold the sugars to them in their own names, and sent them the following note :

"Sold Messrs. Corrie & Co. fifty hogsheads Surinam sugar, at 85s. June 27, 1818."

The defendants afterwards, on July 10 or 11, 1815, received the following invoice, dated June 27, 1815, from Coles & Co. :

"Messrs. E. Corrie bought of Coles & Co., fifty hogheads Surinam sugar, at 85s. per cwt."

The prompt or time of payment of the sugars, according to the usual course of the sugar trade, was two months. Coles & Co., as sworn brokers, kept a book, in which they entered a memorandum of every contract made by them as such brokers, and among the rest was the memorandum of the sale of these sugars to the defendants, made at the time of sale :

"Bought of Baring, Bros. & Co., for account of Corrie & Co., fifty hogsheads Surinam sugar, at 85s."

The defendants never saw the book or memorandum, nor did they ever desire to see it till after the bankruptcy of Coles & Co., although they might at any time have seen it, by calling at the counting house. At the time of the sale, Coles & Co. were employed by the plaintiffs, as their brokers, not only to sell for them their imported goods, but also to receive from the buyers thereof the price when due, but they did not receive a del credere commission. Coles & Co. became bankrupts on July 14, 1815, and the prompt upon the sugars expired upon Aug. 27. On July 3, the defendants received from Coles & Co. the following order for the delivery of the sugars from the West India Docks, where they were landed and then lying :

A "To the principal storekeeper of the West India Docks. Deliver to the order of Messrs. W. and E. Corrie, the under-mentioned goods, imported in June, 1815, and entered by John Deacon per ship *Active*, Captain Mustard, from Surinam (prime dock rates thereon being paid), June, 1815, fifty hogsheads sugar. For Baring, Bros. & Co. (Signed) John Walker."

B John Walker was the custom-house clerk of the plaintiffs, and John Deacon, one of the partners in the house of Baring, Bros. & Co., and one of the plaintiffs in the cause.

C By the usage of the West India Docks, the sugars, or other produce imported, remained in the names of the importer, or person making the entry, until such time as some purchaser thereof chose to have the goods re-housed and entered in his name. In the meantime, and until such re-housing takes place, the order for delivery must be signed by the importer or his agent, whatever number of sales may have been made of them; and such order was made out for delivery to the first purchaser, unless the importer should have received a written direction from the first purchaser to make it out to some other person. That person, if he sold, endorsed over such order to his vendee, unless, as in the former cases, such vendee should in like manner, by order in writing, direct the endorsement to be made out to some other person. On Aug. 22, 1815, the following letter, bearing date July 27, was sent by the plaintiffs to the defendants, being five days before the prompt, upon the sugars expired:

"We request you will settle with Mr. Edward Kensington, for the amount of fifty hogsheads sugar, per *Active*, sold you by Coles & Co., on June 27, last."

E The defendants returned the following answer, dated Aug. 23:

"We are surprised at the directions contained in your letter, dated July 27 last, but only delivered to us yesterday, respecting fifty hogsheads sugar sold by Coles & Co., on June 27. We consider Coles & Co. as the proprietors of these sugars, and, therefore, the same will be settled for in account with them or their assignees."

F On July 14, 1815, when Coles & Co. became bankrupts, the defendants were the holders of their acceptances for £2,700.

At the trial before LORD ELLENBOROUGH, C.J., in 1816, a verdict was found for the plaintiffs, with £1,423 3s. 6d. damages, subject to the opinion of the court on a Case which stated the facts set out above, either the plaintiffs or the defendants being at liberty to turn the same into a special verdict.

G *Puller* for the plaintiffs.

Scarlett for the defendants.

ABBOTT, C.J.—If the defendants were to succeed in this case the effect would be that the goods of one man would be applied in discharge of the debt of another. I am not disposed to come to such a conclusion unless compelled to do so by authorities which I do not find in this case. It is said that where a loss is to fall on one of two innocent parties by the deceit of a third, that it should fall on him who employs and puts a trust and confidence in the deceiver. But this rule is by no means universal. Suppose a factor, who is entrusted with the possession of goods, pledges the goods, the real owner may recover them in trover against the person with whom they are pledged. So, also, if a master trusts his servant with plate or other valuables, and the servant sells them, still, unless they are sold in market overt, the master may recover them from the innocent purchaser.

I These exceptions show that the principle is by no means universal. But in this case has there been any negligence on the side of the plaintiffs? or rather has there not been great negligence on the side of the defendants? Coles & Co., it appears, acted in the double capacity of merchants and brokers; and that fact was well known to the defendants. The distinction between a broker and factor is not merely nominal, for they differ in many important particulars. A factor is a person to

whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation; he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name. In all the cases cited the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not. And at all events they knew that he had a right to sell the goods. But the case of a broker is quite distinguishable. The plaintiffs in this case have only reposed the usual confidence which every merchant must place in his broker, and if the defendants should succeed, it would not be safe for any merchant ever hereafter to employ a broker: for the latter might, by delivering to the buyer a false note, defeat the rights of his principal altogether.

It is argued, indeed, that there are other facts in this case from which it is to be inferred that the plaintiffs reposed a more than usual confidence in Coles & Co., and for this purpose that part of the case was relied upon which states that they were employed by the plaintiffs as their brokers, not only to sell for them the several goods imported into this country, but also to receive, when due, the price of such goods from the buyers. But inasmuch as this fact applies only to the receipt of the price of goods sold by them as brokers, it seems to me that that fact does not alter the case. But in what situation did the defendants stand in respect to Coles & Co., and what did they omit to do? They knew that Coles & Co. acted both as brokers and merchants, and if they meant to deal with them as merchants, and to derive a benefit from so dealing with them, they ought to have inquired whether in this transaction they acted as brokers or not; but they make no inquiry. They had the name of the ship in which the goods had been imported, and they might have made inquiries into the circumstances of the case, if they had not chosen to remain in ignorance. There is, therefore, a clear omission on their part, and they do not stand in a situation so completely free from blame as the plaintiffs do.

There is another circumstance, which shows that if they did not know that Coles & Co. were acting as brokers in this case it was because they chose not to know it. It appears that they received a sale note, and were not required to sign a bought note. Without entering into the question whether or not, under such circumstances, the bargain could be enforced, it is quite sufficient to say, that the ordinary course of dealing was not pursued, and that enough appears to show that the defendants negligently abstained from making those inquiries which they ought to have made. I think, therefore, that they ought not to be allowed the set-off which is claimed; and my opinion is founded on the difference between the characters of factor and broker, and on the plain distinction between the cases cited and this. For even admitting it to be true that where two persons, equally innocent, are prejudiced by the deceit of a third, the person who has put the trust and confidence in the deceiver should be the loser, I think the defendants are the persons who have in this case placed a more than usual confidence in Coles & Co., and that they must bear the loss occasioned by the act of the latter.

BAYLEY, J.—I am entirely of the same opinion. This is an action brought by a merchant, to recover the price of his own goods, and he ought, therefore, to succeed, unless payment, or something equivalent to it, appears to have taken place. The demand, however, is resisted on the ground that the defendants, who were buyers of the goods, did not purchase them of the plaintiffs, but of Coles & Co., and that they have a counter-demand against them, which they are entitled to set-off against the price of the goods. A proprietor, generally speaking, is entitled to receive the price of his own goods, unless, by improper conduct on his part, he

A has enabled some other person to appear as proprietor of the goods, and, by that means, to impose on a third person without any fault on the part of that person. That is the true meaning of the rule laid down in *Hern v. Nichols* (1).

There arise then three questions. First, did the plaintiffs enable Coles & Co. to appear as proprietors of the goods, and to practise a fraud upon the defendants? secondly, did Coles & Co. actually practise a fraud? and thirdly, did the defendants
B use due care and diligence to avoid such fraud? All these questions must, under the circumstances of this case, be answered against the defendants. It appears that Coles & Co. were both brokers and merchants, and that they on June 27, 1815, were empowered to sell the goods in question. They delivered to the plaintiffs a sold note exactly in the proper form, supposing them to have sold in their character of brokers; and they delivered to the defendants a bought note, exactly suited to
C the case of their having sold as brokers, without having disclosed the name of the seller. If it were even doubtful whether Coles & Co. sold as merchants or not, there was at least enough to have induced the defendants to make inquiry. For, supposing them to sell in their character of brokers, it was not necessary for them to take a counter-note from the defendants; but, if they had sold as merchants, that would be necessary. When, therefore, they delivered only a sale note, and required none
D in return, that ought to have raised a strong presumption in the minds of the defendants that the sale was in their character of brokers. There is nothing inconsistent in that view of the case, for Coles & Co. do not say that they sell the goods as their own, and the defendants ask no questions on that subject.

Then, on July 3, comes the delivery order signed by the plaintiffs: at that time, therefore, the defendants must have known that the plaintiffs were parties concerned, and might have satisfied any doubts which they entertained upon the subject. It is besides to be observed that the plaintiffs did not trust the brokers with either the muniments of their title, or the possession of the goods, as was done
E both in *Rabone v. Williams* (2) and *George v. Clagett* (3). There is another circumstance by which the defendants might easily have ascertained whether Coles & Co. acted as brokers or not. According to the usual course of dealing, a broker is bound to put down in his book an account of the sales made by him in that capacity, and in fact that was done in this case; so that if the defendants had asked to see the book, they would instantly have discovered whether Coles & Co. acted as brokers or not.
F

I think, therefore, that it appears from these circumstances, the plaintiffs did not by their conduct enable Coles and Co. to hold themselves out as the proprietors of these goods, and so to impose on the defendants; that the defendants were not imposed upon, and even supposing that they were, that they must have been guilty of gross negligence. Besides, when Coles & Co. stood at least in an equivocal situation, the defendants ought, in common honesty, if they bought the goods with a view to cover their own debt, to have asked in what character they sold the goods
G in question. I, therefore, cannot think that the defendants believed, when they bought the goods, that Coles & Co. sold them on their own account; and if so, they can have no defence to the present action. The course of dealing, it appears, was for the brokers to receive for the plaintiffs the price when due; if, therefore, the defendants had remained ignorant of the state of things, till after that period had arrived, the case might have been different; but, before that time arrived, it
H appears that they were distinctly informed that the plaintiffs were the proprietors of the goods. There must, therefore, be judgment for the plaintiffs.
I

HOLROYD, J.—I am of opinion that the defendants have not any right of set-off in this case. A factor, who has the possession of goods, differs materially from a broker. The former is a person to whom goods are sent or consigned, and he has not only the possession, but in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority: and it

may be right, therefore, that the principal should be bound by the consequences of such sale; among which, the right of setting-off a debt due from the factor is one. But the case of a broker is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorise him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound. But it is said that by these means the broker would be enabled by his principal to deceive innocent persons. The answer however is obvious, that that cannot be so unless the principal delivers over to him the possession and indicia of property. The rule stated in *Hern v. Nichols* (1) must be taken with some qualifications; as for instance, if a factor, even with goods in his possession, acts beyond the scope of his authority, and pledges them, the principal is not bound: or if a broker, having goods delivered to him, is desired not to sell them, and sells them, but not in market overt, the principal may recover them back. The truth is, that in all cases, excepting where goods are sold in market overt, the rule of caveat emptor applies. I think, therefore, that this case differs materially from the cases cited, which are those of principal and factor, and that, therefore, this claim of set-off cannot be allowed.

Judgment for plaintiffs.

EDWARDS v. M'LEAY AND OTHERS

[ROLLS COURT (Sir William Grant, M.R.), July 19, 1815]

[Reported Coop. G. 308; 35 E.R. 568]

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), July 11, 1818]

[Reported 2 Swan. 287; 36 E.R. 625]

Sale of Land—Title—Defective title—Misrepresentation as to part—Non-disclosure of defect relating to remaining part of property—Conveyance set aside and repayment of purchase-money and expenses.

An estate having been sold and conveyed and some part of it, which was material to the enjoyment of the rest, being subject to a defect of title known to the purchaser, but not disclosed by the abstract and unknown to the purchaser, the contract was rescinded and the vendors were ordered to repay the purchase money with all costs and expenses incident to the purchase and conveyance.

Notes. Applied: *Attwood v. Small*, [1835-42] All E.R. Rep. 258. Distinguished: *Wilde v. Gibson*, [1843-60] All E.R. Rep. 494; *Edwards Wood v. Marjoribanks* (1858), 3 De G. & J. 329. Applied: *Turner v. West Bromwich Union Guardians* (1860), 3 L.T. 662; *Mostyn v. West Mostyn Coal and Iron Co.* (1876), 1 C.P.D. 145. Followed: *Hart v. Swaine* (1877), 7 Ch.D. 42. Considered: *Carlish v. Salt*, [1906] 1 Ch. 335. Referred to: *Hughes and Hamilton v. Gordon* (1819), 1 Bli. 287; *Perkins v. Ede* (1852), 16 Beav. 193; *Slim v. Croucher* (1860), 8 W.R. 347.

As to misrepresentation as to quality in sale of land, see 34 HALSBURY'S LAWS (3rd Edn.) 215; and for cases see 40 DIGEST (Repl.) 389 et seq.

Cases referred to:

(1) *Urmston v. Pate* (1794), 4 Cru. Dig. 390; 40 Digest (Repl.) 382, 3062.

(2) *Bree v. Holbeck* (1781), 2 Doug. K.B. 654; 99 E.R. 415; 32 Digest (Repl.) 604, 1878.

Appeal by the defendants against a decree of SIR WILLIAM GRANT, M.R., *infra*, setting aside a conveyance and for a return of the purchase-money and all expenses,

A in a bill by the plaintiff, the purchaser of an estate who had had the conveyance made to him, against the defendants, the vendors, to set aside the conveyance and recover the purchase-money and all expenses, on the ground of misrepresentation with regard to the title of part of such estate.

B In May, 1811, the defendants representing themselves to be seised or entitled in fee-simple, or to have full power and authority to dispose of the fee-simple and inheritance of a messuage, stables, coach-house, lands, and hereditaments, at Clapham, contracted to sell the same to the plaintiff for £5,390; and by deeds of May 24 and 25, 1811, the same were conveyed to him. The plaintiff afterwards laid out a considerable sum of money in repairs upon the house and premises. Soon after the completion of the purchase, he discovered that part of the forecourt, and of the driveway or road leading up to the house; together with the whole of the ground upon which the coach-house and stables stood, had been formerly part of Clapham Common; and were in 1781, enclosed and taken from the common. The bill charged that the defendants were aware of the above circumstance, and not having disclosed the same to the plaintiff, were guilty of a gross fraud and imposition upon him, and that the plaintiff could not have discovered it from the abstract; and the bill, therefore, prayed that the contract might be declared void; and that the defendants might be compelled to repay to the plaintiff his purchase-money, and what he had laid out on the premises with interest.

C It appeared in evidence for the plaintiff, that the first enclosure of part of the common was in or about 1781, by Thornton, the then proprietor of the house. In 1808 Thornton sold to the defendants. By their answer they asserted that it was since the filing of the bill that they, for the first time, had heard that the ground on which the coach-house and stables stand, did formerly constitute part of the common. But they admitted that at the time of making the agreement with the plaintiff, that they had heard it rumoured in the parish of Clapham, that the piece of ground on which four houses, being no part of the said messuage and hereditaments sold to the plaintiff, were built, had been part of the common. It appeared that the ground upon which the four houses stood, was adjoining to that part of the premises bought by the plaintiff, which had formerly been part of the common. When the defendants purchased, the whole was lying together in one plot; but they divided off the piece on which the four houses were built, selling the rest only to the plaintiff.

E F By the evidence of Copland, a witness, it appeared that in May and June, 1811, there were three vestry meetings held at Clapham, that he was present, and that the meetings were for the purpose of entering into consideration respecting a claim made by the parish to the piece of waste or common on which the four houses stood, and to the piece of waste or common on which the stable and coach-house stood; and that he attended at the desire of Malcolm and defendant Prescott, to let them know what passed at the meetings, and that he learned that part of the driveway, and that the stable-yard, and ground, on which the coach-house and stables were built, had been originally enclosed from Clapham Common. He communicated to Malcolm and Prescott the claim of the parish to the land, and that the parishioners intended to perambulate the boundaries of the parish to ascertain and discover trespasses committed on the common by the erections and enclosure, and by other enclosures. Malcolm and Prescott in reply, told the witness that the ground forming the stable-yard, part of the drive or carriage-way, and on which the coach-house and stables, and the four houses are erected, and a field enclosed by a brick wall to a house in the occupation of Franks, was once part of the common; but that the same had been enclosed so many years, the parish could do nothing with it, and that the same was as good a freehold as the other parts of the estate. The witness stated that he was present on Holy Thursday, 1811, when the boundaries of the parish were perambulated, and that the perambulators crossed or passed over, and on the outside of the coach-house, and stables and stable-yard, and part of the forecourt of the premises; in a few days afterwards he informed the defendant

Prescott, what the perambulators had done, who told him that they had done wrong by going over the walls, and going through the stable-yard, and part of the front court of the premises. A

On the part of the defendants a witness, one Willshire, stated that in 1811, he had a conversation with the plaintiff's father, who said that it was very much to be lamented that the defendants had erected the four houses, as they had certainly injured the house which he had bought for and on the part of the plaintiff; and also that he understood the same had given great umbrage to the people of Clapham, who said they were built on the waste. The witness was at the time of the conversation employed as a surveyor by the plaintiff, to prepare plans of the messuage and lands to be inserted in the plaintiff's deed of conveyance. B

Leach and Spranger for the plaintiff.

Hart and Shadwell for the defendants. C

Cur. adv. vult.

July 19, 1815. **SIR WILLIAM GRANT, M.R.**, read the following judgment.—This is a bill of rather an unusual description. [His LORDSHIP read the bill, and continued]: It cannot certainly be contended that by the law of this country, the insufficiency of a title, even when producing actual eviction, necessarily furnishes a ground for claiming restitution of the purchase-money. By the civil law it was otherwise. By our law a vendor is, in general, liable only to the extent of his covenants. But it has never been laid down, that on the subject of title, there can be no such misrepresentation as will give the purchaser a right to claim a relief to which the covenants do not extend. In *Urmston v. Pate* (1) there was no ingredient of fraud. Both parties misapprehended the law. The vendor had no knowledge of any fact which he withheld from the purchaser. In *Bree v. Holbeck* (2), it did not at all appear that the party knew that the mortgage which he assigned was a forgery. LORD MANSFIELD says (2 Doug. K.B. at p. 657): D

"If he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different." E

And the plaintiff had leave to amend his replication, in case upon inquiry, the facts would support a charge of fraud. Whether it would be a fraud to offer as good a title which the vendor knows to be defective in point of law, it is not necessary to determine. But if he knows and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser. What then is the case made by this plaintiff? He states that the vendors represented themselves to be seised or entitled in fee-simple, or to have full power and authority to dispose of the fee-simple and inheritance of the whole and every part of the premises offered to him for sale without exception, as to any part whatsoever thereof; whereas, in truth, there was a considerable part of those premises to which the vendors had no title, or at least no other title than was derived from a possession, from about 1781, of what had been a portion of the waste or common of the Manor of Clapham. He asserts that the vendors knew that the part in question was an enclosure from the common—that they did not disclose the fact to him, and that he could not discover it from the abstract. He also asserts that this part of the purchased premises is material to the convenient enjoyment of the rest. The defendants admit that they did make such representation as it stated, with respect to the whole of the premises—they say they do not believe that any of those premises ever did compose part of the common; but supposing the fact to be otherwise, they deny that such fact was within their knowledge. They admit that no such fact appeared on the abstract, and they also admit the part in dispute to be material to the convenient enjoyment of the rest of the premises sold. F

The points then on which the parties are at issue, are only these two. Was this at any time a part of the common? Was it known by the defendants so to have been? I say these are the only two points, because I do not find it asserted in the answer that, supposing the ground in question to have been really taken G H I

A from the common, the defendants have acquired, or have any means of making, a good title to it.

As to the first, I think it very fully proved that down to about 1781, this piece of ground made a part of the common. Whether a little sooner or a little later is not very material; but it seems sufficiently ascertained that it was in that year that Mr. Thornton, the then owner of the house bought by the plaintiff, for the first time separated this spot from the rest of the common. According to the usual progress of an encroachment it was first enclosed with a slight fence or low paling, a passage across it being left open; the fence or paling was afterwards raised; and finally the whole encroachment was surrounded with a brick wall. On the other side it is not attempted to be shown, that, prior to 1781, this ground was in any way appurtenant to the adjoining house, or had been in the exclusive occupation of any person whatever.

As to the second point there is a considerable body of evidence, partly direct and partly circumstantial, tending to show that Mr. Prescott, one of the vendors, and who acted for the rest, must have known that this had been common, and had at different times been claimed by the parish as such. It appears that he was an inhabitant of the parish from 1787; that there was a parochial committee established in 1796 for the purpose of watching and guarding against encroachments on the common; that Mr. Prescott was an active member of such committee, and usually attended their meetings; that in the book kept of the proceedings of such committee, he is marked as present on June 1, 1801, on which day the following resolution is entered :

E "Resolved, that it is the opinion of this committee, that the part of the common taken in by Mr. Thornton, from the house occupied by Mr. Collick to Acre Lane, be continued to the purchaser of his estate on his making application to the vestry for the same after the sale, on signing the book as an acknowledgment, and paying a shilling a year to the parish; the lord of the manor also signing his assent."

F It is stated that Mr. Prescott must have been at the meeting on that day; otherwise his name would not have been entered. But whether he was actually present when this resolution passed, nobody can at this distance of time distinctly recollect. It appears by the plan, and by the evidence, that the ground in question in this cause answers the description of that mentioned in the resolution as lying between the house then occupied by Mr. Collick (now by Mr. Franks) and Acre Lane. It further appears, that before the agreement with the plaintiff, some persons to whom the defendants had leased or sold that part of the ground, enclosed from the common, which lay nearest to the corner of Acre Lane, had begun to erect four houses thereon; that complaints had been addressed to Mr. Prescott by different persons on the subject of these erections, as being made on part of the common; and the defendants themselves admit in their answer, that they had heard it rumoured in the parish that the piece of ground on which the four houses were built had been part of the common. If I rightly understand the evidence, it was by the defendants that the ground on which the four houses were built was first separated from the rest of the ground taken in from the common.

I It is further proved by a Mr. Copeland, that he was employed by Mr. Prescott and a Mr. Malcolm, another of the vendors (who is since dead) to attend some vestry meetings held in May and June, 1811, relative to this encroachment, in order that he might communicate to Prescott and Malcolm what should pass at those meetings; and that he accordingly informed them that the parishioners claimed all the ground in question as being taken from the common, and that they intended to perambulate the boundaries of the parish to ascertain what trespasses had been committed on the common. He says, that on his making this communication, Malcolm and Prescott told him that all this ground had once been part of the common, but that the same had been enclosed so many years, the

parish could do nothing with it. It appears that the parishioners did, on May 23, 1811, make their perambulation, and that Mr. Prescott inquired and was informed as to the course taken by the perambulators, which was such as to include the whole of the ground in question in what they claimed as common belonging to the parish. What is the result of all this evidence? not indeed that Mr. Prescott knew, of his own knowledge, that this had been part of the common, or that he had, with his own eyes, seen the encroachment made, but that he had so much information on the subject as made it altogether improper and unfair to represent to a purchaser, as it is admitted he and the other vendors did, that they were seised or entitled in fee-simple, or had full power and authority to dispose of the fee-simple and inheritance of the whole and every part without exception of the premises which they offered to the plaintiff for sale. Be it that he entertained the opinion, which he and Mr. Malcolm expressed to Mr. Copeland, that after such a length of time the parish could not support the claim which they were then making; did he or could he believe that he and the other vendors had the same good and unexceptionable title to this spot, as against all the world, that they appeared to have had in the ancient part of the estate? And supposing some of the information to have been acquired, as perhaps it was after the representation had been made, was it fair to allow the purchaser to proceed to complete his contract on the faith of a representation, which the vendors at the time of such completion knew to be substantially untrue? The suppressed facts, if disclosed, would at all events have influenced the price, even supposing the purchaser might have been willing to run a risk with regard to the title. It was contended at the Bar that the plaintiff's father, who acted as his agent in the purchase, had notice, though not from the defendants, that this ground had been a part of the common. This is grounded on a passage in the evidence of a Mr. Willshire, who says that some time in or about June, 1811, Thomas Edwards, the father of the plaintiff, in conversation with the deponent, said, that it

"was very much to be lamented that the defendants had erected the four houses at the corner of Acre Lane, as they had certainly injured the house he had bought; and also that he understood the same had given great umbrage to the people of Clapham, who said they were built on the waste."

This, it is to be observed, relates entirely to the ground on which the four houses were built. It is a little extraordinary that the defendants, who contend that the rumour which they admit they had heard about this part of the ground being taken from the waste excited in their minds no suspicion that the ground included in the plaintiff's purchase had ever made part of such waste, should yet insist that the very same degree of information possessed by the plaintiff's father, was to him full notice of a fact which they were unable to infer from such information. But it is still more extraordinary, when we consider the very different degrees of knowledge which the two parties possessed on the subject. The defendants, when they made their purchase, found the whole of the ground which is now proved to have been taken from the common, lying together in one plot. They divided off the piece on which the four houses were built. When they, therefore, heard it asserted that this piece had been taken from the common, they might reasonably enough doubt whether the whole was not in the same predicament. But a stranger, who never had seen the ground but in this divided state (which as far as appears was the plaintiff's case) would have no reason to suspect that what was asserted with respect to one division must equally apply to another, from which it was apparently altogether distinct. Willshire, the plaintiff's surveyor, admits he did not tell the plaintiff that this was a division recently made, or give him any information from which he could collect that the assertion, if true as to one part, must equally apply to the whole. The only other objection which the defendants make to the relief sought by the bill is that the plaintiff is premature in his application, inasmuch as he has not yet been evicted, and may perhaps never be evicted. But I apprehend

A that a court of equity has quite ground enough to act upon, and that it ought now to relieve the plaintiff from the consequences of the fraud practised upon him. It may be true that the commoners are barred by having acquiesced for more than twenty years in the enclosure. But the lord of the manor will not be conclusively barred till sixty years shall have elapsed. I have already observed that the defendants do not pretend that there is any circumstance from which a title in them can be inferred, supposing the fact established that this made part of the common. B Though the lord of the manor may never assert his right, is the plaintiff to be compelled to remain for twenty-five years longer in a state of uncertainty whether on any day during that period he may not have the convenience of his habitation entirely destroyed. I apprehend the court is bound to relieve him from that state of hazard into which the misrepresentation of the defendants has brought him.

C There must, therefore, be a decree for setting aside the sale, and repaying the purchase-money with costs. The defendants must likewise pay to the plaintiff all the expenses he has been put to, relative to the sale; and he must have an allowance for any money he laid out in repairs during the time he was in possession.

From this decree the defendants appealed.

D *Hart and Shadwell* for the defendants.
Sir Samuel Romilly and Spranger for the plaintiff.

July 11, 1818. LORD ELDON, L.C.—Having read the pleadings, I am entirely of opinion that, though it may be necessary to state with more precision the subject of inquiry relative to repairs and improvements, the decree is substantially right. E Nothing was done by the plaintiff after he knew the defect of the title; he certainly could have claimed no allowance even for subsequent repairs. The case resolves itself into this question, whether the representation made to the plaintiff was not, in the sense in which we use the term, fraudulent? I am not apprised of any such decision, but I agree with SIR WILLIAM GRANT, M.R., that if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, the court will rescind the contract. In principle, F therefore, the decree is right, though it seems to have gone too far on the subject of repairs and improvements. Its terms must be made conformable to the prayer of the bill; striking out the word “improvements,” and leaving the word “repairs,” I give the plaintiff all that he has asked by his bill, and I cannot give him less.

Appeal dismissed (decree slightly varied).

WOOD v. GRIFFITH

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), February 10, 11, 12, 1818]

[Reported 1 Swan. 43; 1 Wils. Ch. 34; 36 E.R. 291]

Arbitration—Award—Enforcement—Specific performance.

The specific performance of the award of an arbitrator may be decreed in equity on the principle that the award only ascertains the terms of a previous agreement between the parties. Although the illegality of acts of which it directs the execution will afford a ground for refusing to decree performance, the court, considering an award as the decision of judges chosen by the parties, will not examine whether it is unreasonable.

Arbitration—Award—Construction—Construction rendering certainty and finality of award to be favoured by court.

In construing an award it is the duty of the court to favour that construction which renders the award certain and final.

Sale of Land—Vendor selling fee, but possessing only term—Right of purchaser to compel vendor to convey term.

If a person possessed of a term contracts to sell the fee he cannot compel the purchaser to take, but the purchaser can compel him to convey, the term, and the court will arrange the equities between the parties.

Sale of Land—Interest in land—Equitable interest under contract—Rights acquired by vendee—Champerty.

An equitable interest under a contract of purchase may be the subject of sale. A person claiming under that contract becomes in equity a trustee of his equitable interest for his vendee who acquires the same rights which he had to the benefits to be derived under the primary contract. Such sub-contracts are not within the doctrine of champerty and maintenance.

Notes. Followed: *Selby v. Whilbread*, [1917] 1 K.B. 736. Referred to: *Hawke-worth v. Brammall* (1840), 5 My. & Cr. 281; *Cockell v. Taylor*, *Collett v. Preston*, *Preston v. Collett* (1852), 15 Beav. 103; *Nichols v. Hancock* (1855), 7 De G. M. & G. 300; *Blackett v. Bates* (1865), 2 Hem. & M. 610; *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (1876), 2 App. Cas. 186; *James v. Kerr* (1889), 40 Ch.D. 449; *Bremer Oeltransport G.M.B.H. v. Drewry*, [1933] All E.R. Rep. 851.

As to champerty as a defence, see 1 HALSBURY'S LAWS (3rd Edn.) 41 et seq. As to enforcement of an award in arbitration, see 2 HALSBURY'S LAWS (3rd Edn.) 50 et seq.; and for cases see 2 DIGEST (Repl.) 716 et seq. As to effect of an equitable assignment, see 4 HALSBURY'S LAWS (3rd Edn.) 511 et seq.; as to transfer of benefit of contract for sale of land, see 36 HALSBURY'S LAWS (3rd Edn.) 304; as to specific performance of an award in arbitration, see 36 HALSBURY'S LAWS (3rd Edn.) 278; and for cases see 40 DIGEST (Repl.) 218.

Appeal by the defendant, in a bill by the plaintiff for specific performance of an award in arbitration, against an order of SIR WILLIAM GRANT, M.R., decreeing that the defendant was bound to perform his part of the award by joining with the plaintiff in the sale of all their estate, right and interest to and in the East Mark estate; and that the defendant should join in signing an authority to the auctioneers to sell such estate.

By articles of agreement, dated Nov. 15, 1797, Michael Hicks Beach, with the consent of other persons interested, agreed to sell to the defendant, for £23,000, an estate called the East Mark estate; and by an endorsement on the articles, the defendant declared that the purchase was made for the equal benefit of himself and the plaintiff. In the same year possession was taken under the contract, and £5,000 was paid by the plaintiff on account of the purchase-money. In 1799 a further £2,000 was paid by him; and in 1800 a lease of the estate was executed by the plaintiff and the defendant to George Webb Hall, for a term of twenty-one years, at

A a rent of £1,170. On Jan. 24, 1806, Beach and the other vendors filed a bill in the Court of Exchequer against the plaintiff and the defendant and Hall, praying the specific performance of the contract for the purchase of the estate, and in that cause the court directed the usual reference to the deputy remembrancer to inquire whether the vendors could make a good title. Disputes having arisen between the
B plaintiff and the defendant concerning the management of the estate, and their respective rights and interests therein, and various suits having been instituted by them against each other, on July 4, 1806, by an order made in a cause then depending between them in the Court of King's Bench, all matters in dispute between the parties were referred to arbitration.

C By his award, dated Mar. 9, 1809, the arbitrator, after declaring, among other things, that £1,250 was due from the defendant to the plaintiff, and directing payment thereof on June 15 next, unless it should have been previously paid, out of the defendant's share of "the purchase-money to arise by the sale of the said estate hereinafter directed to be sold," proceeded in the following words:

D "I further declare and award, that all the right, title, and interest of the [plaintiff and defendant] in the East Mark estate ought to be forthwith sold, and that the [plaintiff and the defendant] are to be equally interested in and liable to all benefit or loss which may ultimately arise or happen from such sale. And inasmuch as the [vendors] have, by their bill filed in the Court of Exchequer as hereinbefore mentioned, prayed that in default of immediate payment by the [plaintiff and the defendant] of what should be found due to the [vendors] for principal and interest on the residue of the . . . £23,000 the . . . estate,
E or a competent part thereof, might be immediately sold under the decree of the . . . court, to raise the amount of what should be found due: I do further award and direct, that the [plaintiff] do . . . cause a motion to be made praying the . . . court to direct a sale of the East Mark estate in one lot, by public auction, before the deputy remembrancer, . . . ; but with liberty for the [plaintiff and the defendant] respectively to bid for the same at such sale. And
F I direct the [defendant] to consent to such application; or, in case the [vendors] . . . shall in the meantime apply to the . . . court to direct such sale, I award and direct the [plaintiff and the defendant] respectively to consent thereto; and in either of the said cases, I direct them the [plaintiff and defendant] respectively to consent, that if he shall be declared the purchaser of the . . . premises at such sale, he will accept such title thereto as the [vendors] shall
G be able to make thereto; and that he shall pay his purchase-money and complete his purchase forthwith."

H The arbitrator then directed the distribution of the purchase-money, in case the Court of Exchequer should order such sale, first in satisfaction of the sum due to the vendors, then of the advances made by the plaintiff and afterwards in equal moieties between the plaintiff and defendant and continued as follows:

I "But in case the . . . Court of Exchequer . . . shall not think fit to direct a sale of the . . . estate, then I direct that they the [plaintiff and the defendant] shall, within fourteen days after the . . . court shall have signified such its determination thereon, join in giving a proper authority in writing, for Messrs. Hoggart and Phillips . . . auctioneers, to sell all the estate, right, title, and interest of them the [plaintiff and defendant] to and in the . . . premises by public auction, within six months after such authority shall be given, at which sale they the [plaintiff and defendant] respectively are to be at liberty to be bidders: and the moneys for which such estate, right, title, and interest to and in the . . . premises shall be sold at such sale, shall, after payment of all incidental expenses, be applied in the same manner as is hereinbefore directed respecting the surplus of the purchase-money of the . . . estate, if sold under the directions of the Court of Exchequer, after satisfying the payments which the . . . court shall direct to be made thereout as aforesaid. And in either of the

cases aforesaid, I award and direct that they the [plaintiff and the defendant] respectively do execute all proper and necessary conveyances of the . . . premises, and every part thereof, and of their respective rights and interests in and to the same, to the purchaser or purchasers thereof, and do all acts necessary to carry such sale into effect. But if in either of the cases aforesaid it shall appear that the [vendors] cannot make a good and sufficient title to the . . . premises, or any part thereof, or if for any other reason the . . . contract for the sale of the . . . estate, as between the . . . last-mentioned parties and the [plaintiff and the defendant] cannot be carried into execution, then, inasmuch as the [vendors], and their trustees, are not parties to this reference, it does not appear to me that I can make any specific award concerning the East Mark estate: But I award and direct, that if upon the completion of any sale of the . . . estate, or of the interest of the [plaintiff and defendant] therein, as hereinbefore directed, or upon the vacating or rescinding the . . . purchase contract, for want of a good title, or otherwise as aforesaid, the [plaintiff] shall not receive from the net produce of such sale, or from the [vendors], or the . . . trustees, or out of the . . . Court of Exchequer, or otherwise, the whole of the . . . sums of £5,000 and £2,000, so advanced by him as aforesaid, with such interest as aforesaid, then and in that case the [defendant] shall make good and pay to the [plaintiff] one moiety of the deficiency of the . . . two principal sums and interest; and if in either of the . . . last-mentioned cases, the sum or sums to be received by the [plaintiff] shall exceed the . . . sums of £5,000, and £2,000, and interest as aforesaid, then I award and direct that the defendant shall be entitled to one moiety of such excess, and the plaintiff to the other part thereof."

After the date of the award, the plaintiff, with the consent of the defendant, moved in the cause depending in the Exchequer, that a sale might be directed of the East Mark estate, but, the vendors in the Exchequer opposing the motion, it was refused on Feb. 12, 1811. Within fourteen days after the refusal of that application the plaintiff gave written notice to the defendant of his readiness to join in authorising a sale of all the estate, right, title, and interest of himself and the defendant in the East Mark estate, pursuant to the award, and tendered to the defendant for his signature, an authority to the auctioneers for making such sale which he refused.

The bill, filed by the plaintiff, stating these facts, prayed that the defendant might be directed specifically to perform the award so far as relates to the sale of all the estate, right, title, and interest of the plaintiff and the defendant to and in the East Mark estate, and forthwith to sign the authority to enable the auctioneers to make such sale, and that he might be directed to do all other necessary acts for perfecting such sale on his part, and that the moneys to arise from such sale might be applied according to the directions of the award.

The defendant, by his answer, insisted that he was not bound to execute an authority for the sale of the estate, it being uncertain whether the vendors could convey a good title; and the arbitrator having declared that in case of their inability so to do, it did not appear to him that he could make a specific award concerning the estate, and in the event of the rescinding that contract for want of a good title or otherwise, having given directions for the settlement of the business between the plaintiff and the defendant. The answer also stated, that the defendant had advanced large sums of money in the management and concerns of the estate, and that a compulsory sale with a defective title, as required by the plaintiff, would be attended with great detriment to him.

The decree made by SIR WILLIAM GRANT, M.R., on Mar. 22, 1814, declared that the defendant was bound to perform his part of the award, by joining with the plaintiff in the sale of all the estate, right, title, and interest of the plaintiff and defendant to and in the East Mark estate; and ordered, that the defendant should join the plaintiff in signing an authority to Messrs. Hoggart and Phillips, auctioneers,

to sell all such estate, right, title, and interest, pursuant to the award accordingly; and after such sale should have been made, that the plaintiff and the defendant should respectively execute all proper and necessary conveyances of their respective rights and interests in and to the East Mark estate to the purchaser or purchasers at such sale, and do all acts necessary to carry such sale into effect; and that the moneys for which the said estate, right, title, and interest should be sold, after payment of all incidental expenses, should be paid and applied in such manner as is in the award directed.

On May 23, 1815, an order was made by consent, for a reference to the Master to settle and approve a particular and conditions for the sale of all the estate, right, title, and interest of the plaintiff and defendant to and in the East Mark estate. On Sept. 15, 1815, the sale took place, and Mr. Farquhar became the purchaser at the price of £10,100; and by an order of Jan. 22, 1816, it was referred to the Master to approve a proper conveyance. Before the sale the defendant presented a petition of appeal from the decree at the Rolls; and having been attached for refusing to execute the deed of conveyance approved by the Master, he was on July 11, 1817, discharged, on executing the deed as an escrow, to be deposited in the Master's office, and abide the event of the appeal.

Sir Samuel Romilly, Leach and Cooke for the plaintiff.

Hart and Spranger for the defendant.

LORD ELDON, L.C.—This case presents four questions. First, what is the meaning of the award? It is contended on the part of the plaintiff, that the Court of Exchequer having refused his application made in obedience to the award for an order for the sale of the estate, inasmuch as that attempt to dispose of the estate became ineffectual, the interest of himself and the defendant under the contract must be put up to sale. On the other hand it is urged that until, by the report confirmed, it appears that a good title can be made, it was not the meaning of the award that the equitable interest, which might be more, or less, or nothing, should be sold. Secondly, supposing the meaning of the award ascertained, and considering an award being founded in an agreement to refer, as an agreement of the parties, of which the specific performance may be enforced, whether the award may not be in its nature so unreasonable, that a court of equity will lend no assistance to its execution? A doubt founded in this instance on the circumstance that, according to the plaintiff's construction, the arbitrator orders a sale before it is known that a good title can be made, and when the period during which the reference of inquiry into the title has been pending, must depreciate the property. Thirdly, whether the award can be carried into effect? It is insisted by the defendant, that, supposing the meaning of the award such as the plaintiff contends, it requires the parties to do acts which would amount to champerty or maintenance. Fourthly, whether the question on the construction of the award has been already determined, the Court of King's Bench having dismissed the application of the plaintiff for an attachment against the defendant, on the report of its officer that the defendant had not been guilty of a breach of the award? On the decision of these questions depends the general question whether, under the circumstances, the decree of **SIR WILLIAM GRANT, M.R.**, ought to be affirmed or reversed.

The decree declares that the defendant is bound to perform his part of the award, by joining with the plaintiff in the sale of all their estate, right, title, and interest, to and in the East Mark estate. On that principle the decree proceeds; and the subsequent ordering part is calculated only to carry it into effect. The circumstances of the case are these. In 1797 the vendors entered into a contract with the defendant and the plaintiff, for the sale of the estate, at the price of £23,000; in the same year possession was taken; and the history of this case may, I think, amount to a demonstration that the court acts with something like justice, when, as in later times, it insists that purchasers taking possession of the estate shall not retain the price. The purchase-money was not put into a neutral

state between the parties, as perhaps in all cases of possession by the purchaser it ought to be; but the plaintiff payed on account of the joint contract, in 1797 £5,000, and in 1799 £2,000 and in 1800 he executed a lease, by which he incurred an obligation to maintain the lessee in the enjoyment of the estate, for no less a term than twenty-one years. In 1806 the vendors filed a bill in the Exchequer to compel performance of the contract; and the plaintiff and the defendant, in that suit putting in question not the contract, but the title, the Court of Exchequer had only to refer it to the remembrancer to inquire whether a good title could be made. It must be admitted that the case is not without difficulty; for the reference was directed in 1807, and the remembrancer has not yet resolved that single question. It appears that previously to 1809, the defendant and the plaintiff had unfortunately engaged with each other in various suits at law and in equity, all which were referred to the decision of the arbitrator, and decided by his award. The question on the appeal is whether **SIR WILLIAM GRANT, M.R.**, has rightly construed that award.

It is extremely clear that every award must be certain and final; but it has, particularly in more modern times, been considered the duty of the court, in construing an award, to find that it is certain and final; and instead of leaning to a construction, which in effect would destroy nine-tenths of the awards made, if possible to put one consistent sense on all the terms. In considering the meaning of this award relative to the sale of the estate, it must be recollected that the business of the arbitrator was to settle the differences between the defendant and the plaintiff; and that the Court of Exchequer, or the vendors, plaintiffs in that court, might not consent to the sale of the interest, such as it was, or that property so circumstanced might not meet with a buyer; and that notwithstanding the direction to sell, the estate might thus remain unsold.

The direction for the sale of the right title, etc., is, according to its incontrovertible meaning, a direction that all the right, title, and interest in the estate (those words never having been before used in the award) should be forthwith sold. The arbitrator seems to have intended a sale not only of the right, title, and interest, but of the estate itself, if it could be brought to sale. The direction is express, that the plaintiff and the defendant shall consent to a sale, and shall, if either of them becomes the purchaser, accept such title as the plaintiffs in the Exchequer can make. Attending to the constant language and practice of this court, where it is repeatedly held that a party has by his acts rendered it impossible for him to object to a title, and coupling that with this express direction, it cannot be doubted that if the plaintiff or defendant bought the estate, they must take such title as could be made. The arbitrator though he could compel them to consent to the sale, yet could make no such effectual order on the vendors, who were not parties to the reference. He foresaw that they might choose to retain the estate, notwithstanding the objections to the title, rather than carry it to sale subject to the depreciation arising from those objections. Providing for the event of their withholding their consent, he says, that in case the Court of Exchequer should not think fit to direct a sale, the defendant and the plaintiff shall give authority to sell, not the estate, but all the right, title, and interest. Here is no qualification, no direction that the sale shall depend on the remembrancer's report that the title is good.

Then comes the clause on which so much difficulty has arisen :

"But if in either of the cases aforesaid it shall appear, that . . . [the vendors] cannot make a good title, etc., it does not appear to me that I can make any specific award concerning the said East Mark estate."

It occurred to the arbitrator that it might finally appear that a title could not be made to this estate, that the purchasers would not be obliged to take it, and that, therefore, in certain events which might happen he could not make a specific award respecting the estate itself. Does that render the award less final and certain with respect to the defendant and the plaintiff? Being as I say they were, the owners of the estate in equity, they had a right, subject to considerations of law to which I

shall presently advert, to sell such right, title, and interest as they had. It is impossible on a fair exposition to contend that the arbitrator meant by this clause to defeat all the prior clauses. In the construction of an award the court is bound, so far as the terms will admit, to give to it such a meaning as shall render it conclusive; and not by the construction of one part to defeat another. That is my opinion on the first point. It is said that this opinion clashes with the judgment of the Court of King's Bench; I think not, but were it otherwise, if upon investigation I become convinced that their judgment is wrong, I should violate my duty by adopting it in preference to that which I think right.

One difficulty which I confess I felt, I shall now state, together with the grounds on which I have at length overcome it. That a bill will lie for the specific performance of an award is clear, because the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person; and then the bill calls only for a specific performance of an agreement in another shape: but the court has always exercised the discretion of withholding its assistance for the performance of unreasonable agreements. I was much struck with the consideration of this as an agreement to sell an estate under the circumstances in which the arbitrator has directed a sale; the very fact that the title is in dispute in the Court of Exchequer, must throw a damp on the proceedings and depreciate the property. No one will dispute this proposition, that if a man offers to sell an estate in fee simple, and it appears that he is unable to make a title to the fee simple, he cannot refuse to make a title to all that he has. The purchaser may insist on having his estate such as it is. The vendor cannot say that he will give nothing, because he is unable to give all that he has contracted to give. If a person possessed of a term for one hundred years, contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey, the term, and this court will arrange the equities between the parties. But the present agreement is to be regarded as an agreement embodied in an award; and the question is: What is the effect of an agreement coming into a court of equity in that shape? That question must be considered with reference to the cases in which courts have determined that they will conform to the opinion of judges chosen by the parties. If judges so chosen erroneously decide a question of law, the court will abide by that decision. Upon that principle I am of opinion that the objection of the unreasonableness of this award cannot be sustained [But see now s. 21 (1) and s. 23 (2) of the Arbitration Act, 1950; 29 HALSBURY'S STATUTES (2nd Edn.) 89; and 2 HALSBURY'S LAWS (3rd Edn.) 58 (h)].

It is then contended that the performance of the award will involve the parties in the guilt of champerty and maintenance. It must be admitted, that neither this court nor any other will enforce an agreement by which, if carried into execution, the parties would be compelled under the process of a court of justice, to do that which in the view of justice is criminal. In many of the proceedings relative to this award, on motions for rules for an attachment, and to discharge rules, etc., this objection might have been urged, but without adverting to that circumstance, let us now consider the foundation of the objection according to the settled practice of the court. I have referred to a class of cases in which this court has been in the habit of declaring that a party who contracts for the purchase of an estate in fee simple is entitled to what the vendor can give. It is extremely clear that an equitable interest under a contract of purchase may be the subject of sale. A person claiming under that contract becomes in equity a trustee for the persons with whom he afterwards contracts; without entering into any covenants for that purpose, they are obliged to indemnify him from the consequence of all acts which he must execute for their benefit; and a court of equity not only allows, but actually compels, him to permit them to use his name, in all proceedings for obtaining the benefit of their contract. Assuming that the award directs the sale of the estate, right, title, etc., before the determination of the suit in the Exchequer, what is that but what happens every day? If the defendant and the plaintiff during the pendency of the suit in the

Exchequer, sold the estate to A. B., he would have a right in a court of equity to insist, as purchaser of the estate, that they should convey to him the fee simple, or such title as they had. So insisting, he claims no more than they would be entitled to claim, if they had not sold their equitable interest; having sold, they become trustees of that equitable interest: their vendee acquires the same right which they had; that is, a right to call on the original vendors, indemnifying them against all costs and charges, for the use of their names to enable them to execute the sub-contract, by which they have undertaken to transfer their benefits under the primary contract. If I were to suffer this doctrine to be shaken by any reference to the law of champerty or maintenance, I should violate the established habits of this court, which has always given to parties entering into a sub-contract, the benefit which the vendors derived from the primary contract.

I think that the opinion of the Court of King's Bench was not against the contract; but if it were, it would be my duty as a judge, with all respect to their authority, to express my own judgment. The opinion of that court on an attachment, is in truth little more than the opinion of their officer. It is a consolation to me, that if I am wrong in this case, my error may be corrected elsewhere; but I have taken great pains to be right. The decree must be affirmed.

Appeal dismissed.

DOWNES v. GRAZEBROOK AND ANOTHER

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), August 16, 1817]

[Reported 3 Mer. 200; 36 E.R. 77]

Trustee—Purchase of trust property—Property put up to auction by trustee and knocked down to his agent.

By a conveyance dated Sept. 15, 1815, made to secure repayment of a loan consisting of the proceeds of sale of £7,200 government stock and the performance of stipulations regarding the re-investment of the money and recoupment of dividends the plaintiff conveyed some property to the defendant in fee simple on trust for the plaintiff until default in any of the terms of the loan and thereafter on trust to sell the land and apply the proceeds in satisfaction of the loan and performance of the stipulations. After various defaults by the plaintiff the land was put up for auction by the defendant and was knocked down to one Clarke, his attorney. The plaintiff sought to impeach the sale on the ground of fraud, collusion and oppressiveness and also because the defendant was a trustee of the property.

Held: apart from any question of improper conduct by the defendant (of which there was no indication) he, being a trustee under the terms of the conveyance, could not purchase the trust property without the express authority of the cestui que trust, and the same applied to a purchase by his attorney on his behalf.

Semble: If Clarke had bid for himself, being present as solicitor for the vendor, the sale would not have been enforced, as such a bid would tend to damp the sale.

Notes. Considered: *Orme v. Wright* (1839), 3 Jur. 972; *Re Bloye's Trust*. [1843-60] All E.R. Rep. 1092. Explained: *Robertson v. Norris* (1858), 1 Giff. 421. Distinguished: *Warner v. Jacob* (1882), 20 Ch.D. 220; *Farrar v. Farrars, Ltd.* (1888), 40 Ch.D. 395; *Nutt v. Easton* (1899), 47 W.R. 430. Referred to: *Hodson v. Deans*, [1903] 2 Ch. 647.

As to purchase of trust property by trustee, see 38 HALSBURY'S LAWS (3rd Edn.) 961; and as to mode of exercise of power of sale by mortgagee, see *ibid.*, vol. 27, p. 302; and for cases see 35 DIGEST (Repl.) 569.

Cases referred to :

- (1) *Whelpdale v. Cookson* (1747), 1 Ves. Sen. 9; 27 E.R. 856, L.C.; 47 Digest (Repl.) 258, 2268.
- (2) *Webb v. Rorke* (1806), 2 Sch. & Lef. 661; 35 Digest (Repl.) 410, *410.
- (3) *Ex parte Lacey* (1802), 6 Ves. 625; 31 E.R. 1228, L.C.; 47 Digest (Repl.) 259, 2278.
- (4) *Twining v. Morrice* (1788), 2 Bro. C.C. 326; 29 E.R. 182; 3 Digest (Repl.) 23, 168.
- (5) *Nelthorpe v. Pennyman* (1808), 14 Ves. 517; 33 E.R. 619, L.C.; 40 Digest (Repl.) 69, 512.

Motion for an injunction in an action for a declaration that a deed had been obtained by fraud and collusion, an account, and other relief.

In August, 1815, the defendant Grazebrook agreed to lend the plaintiff the proceeds of £7,200 government 3 per cent. stock on her undertaking to replace that amount of stock in his name on Mar. 15, 1816, and to secure the re-investment and the interim dividends by a mortgage of certain property with a power of sale. Grazebrook sold the stock and paid the proceeds (£4,068) to the plaintiff or her attorney, and by an indenture of bargain and sale dated Sept. 15, 1815, prepared by the plaintiff's attorney on her instructions, and containing recitals of the loan and sale of the stock and the agreement to secure the said stock to the defendant, together with the dividends, as thereafter mentioned, the plaintiff conveyed the property to Grazebrook in fee-simple on trust for the plaintiff until default in re-investment at the agreed date or in payment to Grazebrook of the interim dividends, together with interest thereon, and after any such default on trust to sell the property by public auction or private treaty and out of the proceeds to pay his expenses, re-purchase the same amount of stock in his own name and retain the amount of interim dividends with interest, and the plaintiff also covenanted to re-invest and pay dividends as aforesaid.

In April, 1816, two dividends had become due and Grazebrook had lent the plaintiff a further £18, making a total of £234, for which he took her promissory note. He also extended the time for re-investment until Aug. 1, 1816, on the security of a bond for £200 dated June 15, 1816, prepared by his solicitor.

The plaintiff again defaulted and thereupon agreed to convey the property to Grazebrook absolutely and a draft deed was prepared, but she refused to execute it. Grazebrook thereupon sued in ejectment and took steps to have her committed for debt. The plaintiff, to prevent this, executed a letter and warrant of attorney to Grazebrook to sell the property on condition that no execution should be issued under a judgment for £6,000 to be entered against her in the action unless the plaintiff made default in replacing the said stock by June 1, 1817, and in payment of £324 for accrued dividends and of all future dividends, together with interest on the dividends, and Grazebrook's costs; but if default was made then Grazebrook was entitled to levy execution under the said judgment so far as might be necessary to discharge the plaintiff's obligations; with other provisions not material.

Default being again made, Grazebrook offered the property for sale by auction, after consulting the plaintiff's attorney, on whose recommendation a friend of the plaintiff was chosen as auctioneer. At the sale, the defendant, and one Clarke, as his attorney and agent, were present, and Clarke bid 4,000 guineas for the estate, at which sum it was knocked down to him.

The bill stated that by such bidding on behalf of the defendant, others were deterred who would else have offered to become purchasers at the sale; the answer denied this and alleged that previous to the sale the defendant was taken by the plaintiff's solicitor into a private room, where in the presence of the auctioneer,

the latter urged him "to bid a good price for keeping up the sale;" to which the defendant answered that it was not his intention to bid, but that if he did, it would be in the exercise of his own discretion, and that the estate must be sold. The answer stated circumstances from which it was inferred that the plaintiff had herself so acted as to prevent a sale to any other person, namely, that on the estate being put up, a person stood forward, and declared that the plaintiff, whom he had seen that morning, had declared to him that she would not consent to the sale; that though the plaintiff's own attorney was present when this declaration was made and was called on by the defendant to state that the sale was made with the plaintiff's concurrence, he preserved an obstinate silence; and the same person who made the declaration was afterwards seen in close conversation with the plaintiff's solicitor. The defendant stated his belief that the person in question was sent by the plaintiff or her solicitor to prevent a sale, and stated that at the time of Clarke's bidding, no other person had bid, although the estate had been then put up for a considerable time, and no other bidding was afterwards made although the auctioneer purposely kept it open more than the usual time. No notice was given by Clarke at the time of the sale or afterwards of his attending and bidding on behalf of the defendant.

The bill, charging gross fraud and collusion, prayed a declaration that the deed of September, 1815, was fraudulent inasmuch as it purported to secure the re-transfer to the defendant Grazebrook of the £7,200 stock, and the payment of such sums as he would have received for dividends thereon if standing in his name, and that the same might stand and be a security for such sums only as had been actually advanced and paid by the defendant to or for the use of the plaintiff, with interest; an account; the delivery up of the promissory note, bonds, and warrant of attorney to be cancelled; an injunction restraining the defendant from commencing any action on the note or bonds and from causing the sheriff to make a return to the writ of execution. The bill also prayed an account against Chamberlayne (who was stated to be a prior mortgagee); that the contract entered into by Clarke on behalf of Grazebrook might be declared void; an injunction restraining both defendants from selling or conveying any of the lands except under the direction of the court; and a sale under such direction.

The answer of the defendant Grazebrook denied all the charges of fraud and collusion made by the bill and all notice of prior encumbrances, insisting on the validity of the several instruments; submitting to the court the question whether either Clarke or the defendant could become the purchaser of the estate, and whether the contract so entered into by the former could in the circumstances be supported; and claiming the benefit of the statute 4 and 5 Will. and Mar., c. 16. "for preventing frauds by clandestine mortgages" [repealed by the Law of Property Act, 1925, s. 207 and Sched. 7], on the ground that this was a mortgage to Grazebrook without notice of a prior mortgage, if, as the bill alleged, the mortgage to Chamberlayne was in fact prior to Grazebrook's.

The plaintiff moved for an injunction restraining the defendant Grazebrook from commencing any actions on the promissory note and bonds and from receiving any moneys levied in execution of the writ and restraining the Sheriff of Northamptonshire from paying to the defendant the moneys so levied, until answer or further order; and for an injunction restraining the defendant from selling or disposing of the lands.

Bell and Haslewood for the plaintiff.

Sir Samuel Romilly and Beames for the defendant.

LORD ELDON, L.C.—If the question is to turn on whether Clarke was a purchaser for Grazebrook or for himself, and it appears that he has a good contract the case is of so much importance in point of principle that I shall read the answer before I determine it. With regard to the previous transactions, Grazebrook might bargain for the re-transfer of the stock, and the payment of dividends; but he could

A not bargain ab ante for interest on the dividends remaining unpaid. The warrant of attorney, however, goes that length, and so far it cannot be enforced in a court of equity.

B But the great question is on the sale itself, and as to that I am of opinion that Grazebrook cannot be considered otherwise than as a trustee under the conveyance to him of the estate by the deed of Sept. 16, 1815. A trustee cannot (generally speaking) become a purchaser, either by private contract or publicly; and there is a case in VSEY where it was laid down by LORD HARDWICKE, that such a purchase should not be allowed to stand, although not the trustee himself, but another on his behalf, had bought the estate at a public auction: *Whelpdale v. Cockson* (1).* I take it, however, that the doctrine is not accurately stated in saying that under no circumstances whatever a trustee can purchase.† A trustee for sale is bound to bring the estate to the hammer under every possible advantage to his cestui que trust. He may if he pleases retire from being a trustee, and divest himself of that character, in order to qualify himself to become a purchaser; and so he may purchase, not indeed from himself as trustee, but under a specific contract with his cestui que trust. But while he continues to be a trustee he cannot, without the express authority of his cestui que trust, have anything to do with the trust property as a purchaser. In order to make the sale in the present case a valid transaction, it is, therefore, incumbent on Mr. Grazebrook to show that he had such an authority to enable him to become a purchaser at that sale. His answer states the conversation between himself and the plaintiff's solicitor, as amounting to such an authority: but it is at all times a transaction to which the court will look with the utmost jealousy, and it would be too dangerous to allow the solicitor for the cestui que trust, without one word of authority, to bind his employer.

E The next question is one of great importance, viz., supposing Clarke to be the purchaser, whether, under these circumstances, the sale can be enforced. I recollect that LORD KENYON†† would not allow an agent for the vendor to bid at a public auction, upon the ground that such a bidding would have a direct tendency to damp the sale.

F THE LORD CHANCELLOR afterwards stated that he had read the answer, and although there was not the slightest ground for imputing to the defendant either fraud, oppression, or harshness of conduct towards the plaintiff, he thought that consistently with the general rule the sale to Clarke could not stand.

G The parties then consented to a sale before the master, and the following order was drawn up: "That the Sheriff of Northamptonshire do, out of the moneys levied by him in the action in the pleadings mentioned, now in his hands, pay the sum of £200 to the defendant Grazebrook on account of his costs, without prejudice to the taxation of his bill of costs, or to any other question in the cause, and do pay the residue into court. And, by consent, that the estates in question be sold with the approbation of the master—all parties to join in the sale—to produce deeds, &c.: and the moneys arising from such sale to be paid into court, subject to further order."

* See BELT'S SUPPLEMENT TO VESEY for the facts of that case, and for a reference to the later authorities. See also *Webb v. Rorke* (2).

† See *Ex parte Lacey* (3) (6 Ves. 625): "The rule is, not that a trustee shall not purchase from the cestui que trust, but that he shall not purchase from himself. If a trustee will so deal with his cestui que trust, that the amount of the transaction shakes off the obligation that attaches upon him as a trustee, then he may buy. A trustee is not precluded from bargaining that he will no longer act as trustee. The cestui que trust may by a new contract dismiss him from that character; but even then the transaction must be watched with infinite and the most guarded jealousy."

†† In *Twining v. Morrice* (4). And in *Nelthorpe v. Pennyman* (5) (14 Ves. 517), the Lord Chancellor said: "It would be a very wholesome rule to lay down, that the solicitor in the cause should have nothing to do with the sale; as the certain effect of a bidding by the solicitor is, that the sale is immediately chilled."

BUSHBY v. MUNDAY AND OTHERS

[VICE-CHANCELLOR'S COURT (Sir John Leach, V.-C.), February 20, 28, March 5, 8, 1821]

[Reported 5 Madd. 297; 56 E.R. 908]

Conflict of Laws—*Foreign court*—*Injunction to restrain proceedings by persons resident in England*—*Foreign judgment*—*Injunction to restrain enforcement*—*Foreign judgment obtained in disobedience to order of English court.*

Where defendants are resident in England and properly brought before an English court that court has full authority, if the ends of justice require, to order them to take or omit to take any proceedings in any other court, whether in this country or in a foreign country. In so doing the English court does not pretend to any interference with the other court. It acts upon the defendant by punishment for his contempt if he disobeys the order of the court, and if he continues to be contumacious and ultimately obtains a judgment in the other court, it will protect the plaintiff here by restraining by injunction the defendant from taking the fruit of his judgment.

Notes. Considered: *Carron Iron Co. v. MacLaren* (1855), 5 H.L. Cas. 416; *Venning v. Loyd* (1859), 1 De G. F. & J. 193; *Re Connolly*, *Wood v. Connolly*, [1911] 1 Ch. 731; *Cohen v. Rothfield*, [1918-19] All E.R. Rep. 260. Applied: *Ellerman Lines, Ltd. v. Read*, [1928] All E.R. Rep. 415. Referred to: *Bunberry v. Bunbury* (1839), 8 L.J.Ch. 297; *MacLaren v. Stainton*, *MacLaren v. Carron Co.* (1855), 26 L.J.Ch. 332; *Hyman v. Helm* (1883), 24 Ch.D. 531; *Guaranty Trust Co. of New York v. Hannay & Co.*, [1914-15] All E.R. Rep. 24; *Orr-Lewis v. Orr-Lewis*, [1949] 1 All E.R. 504.

As to restraint of foreign proceedings, see 7 HALSBURY'S LAWS (3rd Edn.) 172-175; and for cases see 11 DIGEST (Repl.) 546-549.

Case referred to:

- (1) *Wharton v. May* (1799), 5 Ves. 27; 31 E.R. 454, L.C.; 7 Digest (Repl.) 181, 135.

Also referred to in argument:

Newman v. Milner (1794), 2 Ves. 483.

Jervis v. White (1802), 7 Ves. 413; 32 E.R. 167; 20 Digest (Repl.) 305, 463.

Smith v. Buchanan (1800), 1 East, 6; 102 E.R. 3; 4 Digest (Repl.) 645, 5738.

Bill to set aside a bond for £5,000 and interest given by the plaintiff, William Bushby, to the defendant Munday as a trustee for the defendant C. W. Cracroft in part satisfaction of a sum won at play by Cracroft of the plaintiff, which bond the defendant Jeremiah Cloves had purchased of Munday for £4,000.

Injunctions nisi had been obtained against Cloves and Munday, and a motion was now made (without prejudice to exceptions taken and allowed to the answer of the defendant Munday) that the injunctions already granted might be extended to stay any proceedings by or on behalf of Cloves or Munday in the Court of Session, or otherwise, in Scotland against the plaintiff or his estate upon or by virtue of the bond in question in this cause.

Bell and Duckworth, supporting the motion: If an action be brought in a foreign court on an English security, this court will, if necessary, stay proceedings. Besides, the invalidity of this bond arises out of an English Act of Parliament which invalidates securities for money won at play. In different countries different policies prevail. What the law is as to gaming securities in Scotland must be found in that law; it may be very different from ours: English courts are the most proper forums for the construction of English Acts of Parliament. Suppose a note given in respect of goods smuggled from France, it would be invalid here, but the French courts might adjudge it good, and would not this court permit a bill to be filed here to have it delivered up and to restrain proceedings in France?

A In this country the assignee of a bond takes subject to all the equities as between the obligor and obligee; in Scotland, the rule is not so strict. Here, we may ask to have the bond delivered up; in Scotland, no such relief is given. Here, we may avail ourselves of the discovery afforded by Munday's and Cracroft's answers, but in the suit in Scotland we cannot; there, they are not evidence. They say that in Scotland, Munday and Cracroft may be examined as witnesses, but suppose they
B are not in Scotland. It is said that, if they are not within the jurisdiction, a commission may be issued for their examination, but suppose they refuse to give evidence under the commission, what means are there of compelling them to do so? None. This, therefore, is a case which requires to be tried in an English court of justice, and it would be acting as ancillary to an evasion of the Act of Parliament to suffer the suit in Scotland to proceed. In *Wharton v. May* (1) (5 Ves. at p. 71),
C the decree directed that the defendants should be restrained from entering up any judgment or carrying on any action in the Court of Great Session in Scotland on their securities.

Hart, Heald and James, against the motion: The assignee of the bond, Mr. Cloves, denies by his answer that he knew the bond was given in respect of a gaming debt. He sues in Scotland; he had a right to do so because the obligor
D is a Scotsman, a Scots proprietor, and being abroad is not amenable to the jurisdiction of the English courts. Bushby, as a Scotsman and a Scots proprietor, is amenable to the jurisdiction of the Scottish courts, although resident abroad: ERSK. INST. lib. 1, tit. 11, s. 19, and though Cloves might proceed against Bushby in this country (if he had a domicile here), it was more natural that he should
E proceed in Scotland, as Bushby's only means of payment, his heritable estate, was in Scotland. They say Munday and Cracroft may not be examinable as witnesses; that they may be abroad; and that their answers in the suits instituted here are not evidence in the suit in Scotland. It may be admitted that those answers are not evidence there, but MR. CRANSTOUN, in an opinion adverted to on the other side, says that the Court of Session has very ample, legal and equitable powers,
F and may examine the plaintiff and the defendants in the action in Scotland as to the transaction. They may be examined either in court or under a commission. Munday and Cracroft, therefore, may be so examined. The Court of Session, it is true, cannot compel witnesses resident beyond its territory to attend for examination, but it is presumed that English courts would enforce the Scottish warrant in the same way as the judge ordinary in Scotland would enforce an
G examination, under an English commission. They have the means, therefore, of eliciting the whole circumstances of the case. What should we say of the Court of Session, if it restrained a proceeding here, because a witness was absent from England? Suppose a great mercantile house in Scotland had acceptances remitted to it and it sues the acceptors in the Scottish courts, could this court restrain those suits? It would be a singular state of international law if that were permitted.
H Suppose a bond be void in England and yet good in Scotland, what is to prevent a proceeding in Scotland? No authority is cited to the contrary. The action in Scotland was before the bill was filed here, and there is no reason or authority for intercepting its progress by injunction. If in any case it appears to the Court of Session that two suits exist, one in Scotland and one in England, on the same
I subject, its inquiry is whether there was truly a *lis alibi pendens*, a suit previously instituted in a foreign court competent to try the question; if so, that court dismisses the Scottish suit. Complete justice may be done in the Court of Session in Scotland in the suit instituted there prior to that instituted here. That court being first in possession of the subject-matter of the suit and a lien being by such suit obtained on Bushby's Scottish estate, it would be a violation of the principles of international law to stay the suit there by the injunction of this court, and it may be doubted whether the Court of Session would consider itself bound by the injunction of this court.

SIR JOHN LEACH, V.-C.—The defendant Cloves having raised an action in the Court of Session in Scotland against the plaintiff Bushby to enforce the payment of this bond out of an estate in that country, the present suit is instituted by Mr. Bushby in this court against Mr. Cloves, Mr. Munday and Mr. Cracroft, to have this bond delivered up to be cancelled. The question before me, is whether this court shall permit the defendant Cloves, pending the proceedings here, to prosecute this suit in Scotland. Over the Court of Session in Scotland this court has not, nor can pretend to have, any authority whatsoever. The Court of Session is an independent court which happens to have a jurisdiction upon the matter of the suit from the circumstance that Mr. Bushby has an estate in Scotland, and the question in this court is the same, and must depend upon the same principles, as if the foreign court thus exercising its independent jurisdiction were sitting, not at Edinburgh, but at Paris or Vienna.

Where parties, defendants, are resident in England and brought by subpoena here this court has full authority to act upon them personally with respect to the subject of the suit as the ends of justice require, and, with that view, to order them to take, or to omit to take, any steps and proceedings in any other court of justice, whether in this country or in a foreign country. If a defendant who is ordered by this court to discontinue a proceeding which he has commenced against the plaintiff in some other court of justice, either in this country or abroad, thinks fit to disobey that order and to prosecute such proceeding, this court does not pretend to any interference with the other court. It acts upon the defendant by punishment for his contempt in his disobedience to the order of the court, and if he continue contumacious and ultimately obtain a judgment in the other court, it will protect the plaintiff here against the consequences of that judgment.

This authority is ordinarily found fully adequate to the purposes of justice. In this view of the case the only present consideration is whether the ends of justice do require that pending the proceedings here it should not be permitted to the defendant Cloves to prosecute the action in Scotland. The action in Scotland and the suit here both involve precisely the same question—whether by the law of England the defendant Cloves has a right to recover upon the bond in question? The ultimate consequence of the two proceedings is not, however, necessarily the same. The plaintiff may succeed in his defence in Scotland, and still be exposed to future proceedings upon the bond, but if he establish his case here, the bond itself will be delivered up to be cancelled, and he will be absolutely relieved from all future proceedings. It must be admitted, that this court is a more convenient jurisdiction for determining the question whether the defendant Cloves has by the law of England a right to recover upon the bond in question than the Court of Session in Scotland, and it is truly stated that the proceeding there is less likely to elicit the truth of the case than the proceeding here, because there the plaintiff cannot have the benefit of Mr. Munday's admissions upon his oath and because Mr. Munday and Mr. Cracroft, being both resident out of Scotland, the plaintiff cannot compel their testimony as witnesses.

If, therefore, the Court of Session should happen to come to the conclusion upon the case as made before it that the defendant Cloves has by the law of England a right to recover upon the bond it would be in vain to urge that this court ought to be concluded by that judgment. The substantial ends of justice would require that this court should pursue its own better means of determining both the law and the fact of the case, and it would necessarily follow that it must bind the interests of the parties by its own conclusions. If the opinion of this court did not concur with that of the Court of Session, the defendant Cloves must be restrained by the injunction of this court from taking the fruit of his judgment there, and if the opinion of this court did concur with that of the Court of Session the defendant would have the fruit of that judgment, not by the proper force of that judgment, but because he was entitled to it by the opinion of this court. Since, therefore, this is a case which must be fully investigated and finally decided here, I think

the ends of justice do require that it should not be permitted to the defendant Cloves to harass the plaintiff by the further prosecution of the suit in Scotland.

There is however one effect which the suit in Scotland may have which must be fully reserved to the defendant Cloves; I mean the preferable lien which he may acquire by it on the land in Scotland, if he should ultimately establish any demand on the bond. The plaintiff must submit to such steps in Scotland, either by judgment or otherwise, as will secure to the defendant Cloves the benefit of that priority, subject always to the future direction of this court. With respect to an argument that might be used against the power of the court to grant this injunction, derived from art. 19 of the Act of Union with Scotland [1707: 6 Anne, c. 11], I must state that my mind is in no degree affected by it. The articles meant to provide that after the union the courts of Scotland should continue as absolutely independent of the courts in England as they were before the union. If the Act of Union had never been made, this court would have granted this injunction which in no manner breaks in upon the absolute independence of the Court of Session, and touches only the party affected by it.

Injunction granted.

DOWAGER MARCHIONESS OF LANSDOWNE v. MARQUIS OF LANSDOWNE AND ANOTHER

[HOUSE OF LORDS (Lord Eldon, L.C., Lord Redesdale and Lord Lauderdale), May 3, 5, July 3, 1820]

[Reported 2 Bli. 60; 4 E.R. 250]

Conflict of Laws—Annuity—Charge on real property abroad—Currency in which payable.

In the absence of specific provision in the deed of charge an annuity charged upon real property is payable in the currency of the country in which the property is situated. To ascertain a special intention on the part of the parties to the deed the language of the whole of the deed must be considered.

Notes. Considered: *Noel v. Rochfort* (1836), 10 Bli. N.S. 483. Referred to: *Cope v. Cope* (1846), 15 Sim. 118; *Bourne v. Hartley*, *Bourne v. Mahon* (1854), 2 Eq. Rep. 910.

As to charges on immovable property abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 41, 42; and for cases see 11 DIGEST (Repl.) 381-384.

Cases referred to:

- (1) *Phipps v. Earl of Anglesea* (1721), 1 P. Wms. 696; 2 Eq. Cas. Abr. 220, pl. 1; 5 Vin. Abr. 209, pl. 8; 24 E.R. 576, L.C.; 11 Digest (Repl.) 382, 441.
- (2) *Saunders v. Drake* (1742), 2 Atk. 465; 26 E.R. 681, L.C.; 11 Digest (Repl.) 407, 613.
- (3) *Wallis v. Brightwell* (1722), 2 P. Wms. 88; 2 Eq. Cas. Abr. 62, pl. 4; 24 E.R. 652, L.C.; 11 Digest (Repl.) 383, 442.
- (4) *Pierson v. Garnet* (1786), 2 Bro. C.C. 38, 226; Prec. in Ch. 201, n.; 29 E.R. 20, 126; 11 Digest (Repl.) 408, 614.

Appeal from an order and decree of the Court of Chancery in Ireland in a suit instituted by the appellant, Maria Arabella Dowager Marchioness of Lansdowne,

for the recovery of the arrears of her jointure charged upon the lands of the respondents, Henry Marquis of Lansdowne and his son William Earl of Wycombe.

William Marquis of Lansdowne, the father of the respondent, Henry Marquis of Lansdowne, being seized for the term of his life of several estates situate partly in England and partly in Ireland, with a remainder in tail male to John Henry Petty, commonly called Earl of Wycombe, his eldest son, by deeds of lease and release, bearing date May 16 and 17, 1794, and made between the Marquis of Lansdowne, of the first part, the Earl of Wycombe, of the second part, John Cross, of Lansdowne House, in the county of Middlesex, gentleman, of the third part, John Willmott, of Bedford Row, in the said county, Esq., and Sir Francis Baring, of London, of the fourth part, and the Right Honourable Henry Richard Lord Holland, and Benjamin Vaughan, of London, Esq., of the fifth part, the greater part of the Lansdowne family estates, situate partly in England and partly in Ireland (except certain lands in the barony of Ballycowen and King's County, Ireland), were limited and assured, subject to certain encumbrances affecting different parts thereof, to the use of trustees, for a term of five hundred years, upon trusts thereby declared. This settlement contained powers to appoint by way of jointure in the following terms :

"Provided also that . . . it shall be lawful to and for the said Earl of Wycombe from time to time, and at any time or times either before or after his intermarriage with any woman or women he may happen to marry, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by him in the presence of, and to be attested by, two or more credible witnesses, or by his last will and testament, to be signed and published by him in the presence of, and to be attested by, three or more credible witnesses, to grant, limit, or appoint to or to the use of any woman or women with whom he the said Earl of Wycombe shall intermarry or take to wife, for the life or lives of such woman or women, and in full, or in part only, of or in the nature of her or their jointure or jointures, and in bar of her or their dower, to take effect immediately after the death of the said Earl of Wycombe, any annual sum or sums of money or yearly rentcharge or rentcharges to be tax-free and without any deduction and to be issuing out of and chargeable upon all or any part of the said manors messuages farms lands tenements hereditaments and premises, hereinbefore mentioned, and intended to be hereby granted and released which are situate in the said kingdom of Ireland . . . so that such rentcharge or rentcharges do not, during the lifetime of the said Marquis of Lansdowne, exceed in the whole the yearly sum of £2,000 of lawful money of Great Britain, and do not, after the decease of the said Marquis of Lansdowne, exceed in the whole the yearly sum of £3,000 of lawful money of Great Britain, and so that such rentcharges be subject, and without prejudice to, the aforesaid term of five hundred years, and the trusts thereof. . . ."

To this settlement were annexed three schedules, containing the names of the tenements conveyed, and of the occupiers, and the rents at which they were respectively held, valued in Irish and English currency. This settlement was executed in England.

William Marquis of Lansdowne died in May, 1805, and upon his death, John Henry, Earl of Wycombe, became Marquis of Lansdowne, and succeeded to the family estates under the limitations of the settlement. John Henry married the appellant in his father's lifetime. By a deed of appointment bearing date Feb. 20, 1809, after reciting the settlement of 1794 and the power of jointuring contained therein, it was recited that he had resolved to exercise the power and by virtue thereof to settle upon the appellant during her life, if she should happen to survive him, a clear annuity or yearly rentcharge of £3,000 English money for her jointure and in bar of dower and freebench, and to secure the payment thereof, by the

A means and in the manner therein mentioned. It was witnessed that John Henry, in consideration of his love and affection for the appellant, and to make a suitable provision for her maintenance and support if she should survive him, and by virtue and in exercise of the power or authority given to him by the settlement and of any other power or authority whatsoever vested in or enabling him in that behalf, did grant, limit and appoint that from and after the death of him, the said John B Henry, the appellant his wife (in case she should happen to survive him), or her assigns, should and might have, receive, and take, during the term of the natural life of the appellant and for her jointure, and in lieu, bar, and recompense of her dower and freebench, of and in all or any of the freehold, customary, or copyhold estates of John Henry one annuity or yearly rentcharge of £3,000 of lawful money C of Great Britain to be issuing out of and charged and chargeable upon all and every the manors, messuages, towns, lands, tenements, and hereditaments whatsoever which John Henry had power to charge with a jointure, under, or by virtue, or in pursuance of the settlement of 1794 . . . to be payable to the appellant or her assigns at the common dining-hall of Lincoln's Inn by four equal quarterly payments, in every year, tax-free, and without any deduction. This deed was D executed in England, and at the time of the execution thereof all the parties interested therein were domiciled and resided in England.

John Henry Marquis of Lansdowne died without issue on Nov. 14, 1809, leaving the appellant his widow, and upon his death the respondent, Henry, his half-brother, succeeded to all the estates in Ireland under the settlement of 1794, the net rents of which estates produced about £30,000 a year.

E On Oct. 26, 1813, the appellant filed her bill of complaint in the Court of Chancery in Ireland against the respondents, Henry Marquis of Lansdowne and William Earl of Wycombe, his eldest son, and also the Right Honourable Richard Lord Holland, Benjamin Vaughan, Esq., Sir Thomas Tyrwhitt Jones, and John Dent, Esq., setting forth the deed of settlement, the appointment, and facts before-mentioned, and stating that since the decease of John Henry Marquis of Lansdowne F four years of the jointure of £3,000 had become due to the appellant under the deed of appointment of Feb. 20, 1809; and that all payments which the appellant had been able to obtain on account of it amounted only to £4,350. She further stated that she had frequently requested Henry Marquis of Lansdowne to pay the arrears of her jointure, which he had declined doing.

G The respondent, Henry Marquis of Lansdowne, by his answer, admitted the marriage of the appellant with the late marquis and the due execution of the settlement of 1794, and stated that he believed that a deed appointing a rentcharge to the appellant by John Henry late Marquis of Lansdowne in 1809 had been executed in pursuance of the power given him by the settlement of 1794 and that those deeds were to the purport stated in the appellant's bill. He further admitted H that on the death of the late marquis in 1809 he became possessed of the settled estates, the net profits of which amounted to a considerable sum, more than sufficient to answer the demand of the appellant; that applications had been made to him to pay in British money the charge claimed by the appellant; and that the Earl of Wycombe resided in England when the deed of 1794 was executed, but he denied that he had always resided there. The respondent, the Earl of Wycombe (the first tenant in tail of the estates under the settlement of 1794 expectant on I the decease of his father, Henry), being an infant, by his answer submitted his rights to the protection of the court.

The cause came on to be heard before the Lord Chancellor of Ireland, on May 27, 1814, when his Lordship directed that the cause should stand over, with liberty for the parties to proceed to obtain the opinion of the Court of Common Pleas in Ireland on the question whether the annuity or jointure so payable to the appellant was payable in English or Irish currency and where the same was to be paid. A Case was prepared, and argued before the Court of Common Pleas in Michaelmas Term, 1814. The judges of that court certified their opinion as follows :

"That the jointure of the said Marchioness of Lansdowne, being a rent charged on lands in Ireland, is payable in Irish currency, and that the same is payable in Ireland."

The cause came on to be heard before the Lord Chancellor on the certificate of the judges of the Court of Common Pleas, upon Dec. 8, 1814, when his Lordship made the following decree :

"That, according to the true intent and meaning and the legal operation of the deed of May 17, 1794, the appellant is entitled to be paid the rentcharge of £3,000 per annum therein mentioned according to the currency of money in Ireland and not according to the currency of money in Great Britain, and is entitled to be paid the said rentcharge in Ireland, and not elsewhere. The defendant having, by his answer, offered to pay the same, it was referred to the Master to take an account of what was due upon the foot of the said rentcharge, after all just allowances, and it was further ordered, that all parties should abide their own costs."

The Dowager Marchioness appealed to the House of Lords against this decree, praying that the House would so far reverse the decree, as to direct "That, according to the true construction of the deed of May 17, 1794, the appellant shall be paid her said jointure of £3,000 yearly, according to the currency of money in England, and not according to the currency of money in Ireland, and that she shall be paid the same in England."

Sir Samuel Shepherd and Heald for the appellant.

Horne and Abercrombie for the respondents.

LORD ELDON, L.C.—If this were the case of a simple charge of £3,000 on lands in Ireland, the place of contract, the domicile of the parties, the place appointed for payment, and other circumstances, might require consideration, and would furnish the ground for the decision of the case, but the instrument itself must, in this case, give the rule of decision. It was impossible that the Court of Common Pleas should have given a satisfactory opinion upon the question if the case was sent nakedly to them without a statement of the deed. It will be proper that we should carefully inspect every part of the deed before we decide whether the judgment ought to be affirmed or reversed.

May 5, 1820. **LORD ELDON, L.C.**—This is a question whether, under an instrument purporting to be an appointment according to a power of an annuity of lawful money of Great Britain, the sum is to be paid in lawful money of England at the rate of English or of Irish currency.

The Lord Chancellor of Ireland, it is said, was of opinion that the annuity was payable in English currency, but thought fit, nevertheless, to direct a Case for the opinion of the Court of Common Pleas, in which the question raised was whether the annuity or jointure was payable to the appellant in English or Irish currency, and where payable. The court, whose opinion was desired, certified that the jointure being a rentcharge upon lands in Ireland, was payable in Ireland and in Irish currency. The reason for this opinion is to be collected only from the certificate, namely, that it is a charge upon lands in Ireland. We are not informed of any other reason. If that were the simple case, the matter is clear according to settled principles of law. But in this case the question is to be decided by the intention expressed in the deed of settlement. The meaning is to be collected from the words immediately applicable to the point, from the context, and from all parts of the settlement.

This is a power to charge the lands with a jointure of "lawful money of Great Britain." The appointment is made according to the authority, and in the words of the power. The question is whether these words can be said to mean Irish currency. In the naked case of a charge upon lands the law is clear and settled, but upon wills and instruments of marriage contract all the cases cited authorise

A a distinction. In such cases the intention of the person making the will and of the parties to the contract is to be collected from the different parts of the instrument.

B *Phipps v. Earl of Anglesea* (1) is to be found in three books, but is most fully reported in VINER'S ABRIDGMENT. According to that report, by a settlement made upon the marriage of the Earl of Anglesea with the daughter of the Countess of Dorchester a term of five hundred years was created in trust to raise £12,000 for the portions of daughters. The parties to the settlement resided in England, and upon a bill filed in Chancery by a daughter, the sole issue of the marriage, and her husband to have the portion, with the rest of her fortune, settled, the first point raised in court was whether the £12,000 portion charged by means of the term of years upon lands in Ireland should be paid in England without any abatement or deduction for the exchange from Ireland to England. After hearing arguments which, in many respects, were similar to those urged in the present case, the Chancellor of that day was of opinion that the portion ought to be paid where the contract was made and the parties resided, and not in Ireland where the lands lay charged with the payment, for that it was a sum in gross and not a rent issuing out of the land and it was certainly the intention of the parties that the portion should be paid in England and not to send the young lady into Ireland to get her portion. In that case, as the facts are stated in the report, it was a question simply upon a charge of a sum of money for a portion upon estates in Ireland. There were no such words as "sterling," or, as in this case, "lawful money of Great Britain."

E It is true that in *Phipps v. Earl of Anglesea* (1), the distinction is taken in the judgment which was urged in this case at the Bar—that there it was a sum in gross and not a rent issuing out of land, but that seems to be in answer to that part of the argument in that case which is founded on the different expressions of the settlement as to the jointure of the wife and the portions of the daughters. As to the former, which is by name a rentcharge, it is provided that it shall be paid in London without deduction for the exchange, whereas in the declaration of the trust of the term created for raising the portion these words are omitted and it is only said in trust to raise £12,000. Upon this point of the argument the court seems to have been of opinion that in the case of a rentcharge, the addition of such words might be necessary, but that the question as to a sum in gross (which the portion in that case was considered to be) was to be decided on circumstances, and accordingly the decision rests, in substance, upon the domicile and the presumed intention of parties resident in England that a portion secured for a daughter should be paid to her in England. That case decides nothing which can rule the present case, and, although it may be inferred from that case that the court thought that, in the simple case of a rent charged upon lands in Ireland, it would be payable in Ireland and in Irish currency, yet nothing is to be concluded from the case as to what the judgment would have been in the case of a rentcharge of lawful money of Great Britain.

H *Saunders v. Drake* (2) shows that, whatever the rule may be in the simple case of a rentcharge, in a devise the construction must be according to the intention. In that case the testator, being domiciled and making his will in Jamaica, gave, in the first place, certain legacies to be paid in sterling money, and immediately after two legacies are given by the will without any direction that they should be paid in sterling money. The person who claimed one of these legacies filed a bill claiming payment of his legacy in English currency. LORD HARDWICKE in that case was of opinion that the residence of the person devising must decide the question as to the legacies given generally, but where directed to be paid in sterling money they ought to be paid in the currency of England, although the testator resided in Jamaica. So, if the question now before us had occurred upon an Irish will, the rule established in *Saunders v. Drake* (2) would authorise our deciding that a

legacy, given in the words contained in this power, must be paid in the lawful money of Great Britain, that is, in the currency of England.

In *Wallis v. Brightwell* (3), again, it appears that intention is to furnish the rule of decision. There the testator, living with his wife in England, by his will made in England devised his lands in Ireland to a trustee for five hundred years in trust out of the rents and profits to pay £80 per annum to his wife for life. It was argued in that case that, no place being appointed for payment and the fund being in Ireland, the annuity ought to be paid in Irish currency or subject to the charge of remittance, but LORD MACCLESFIELD, L.C., decided that, the will being made in England where all the parties to the contract resided and this being a provision for a wife, it should be intended that the provision was estimated in the money of the country where the will was made. He added that, if one, by will made in England, gives a legacy of £80 it must be intended of English money and it will be the same thing though charged on lands in Ireland. In that case, although the words are simply to pay out of rents, etc., £80 the intent presumed from domicil and other circumstances prevailed. Must we not a fortiori where the words are to grant a rentcharge of £3,000 lawful "money of Great Britain," presume a similar intent under similar circumstances? So again, in *Pierson v. Garnet* (4), LORD KENYON said that he was tied down by the authorities, and held that unascertained or general legacies must be paid in the currency of the country where the will is made.

If this be the rule of law in the case of a legacy where the party must claim under the voluntary benefaction of the testator, will it not, a fortiori apply to a case where the party is a purchaser? In this case, it must be remembered, the appointment under a power given by contract is of a sum of £3,000 a year, lawful money of Great Britain, and such sum must be paid in such lawful money unless the instrument of contract, in all its other parts, manifests a clear intention to the contrary. Without going through the provisions of the settlement, it is enough to say, there is not a page of it in which it does not appear that the annuity to be charged is payable in lawful money of Great Britain.

True, it is a rentcharge, but upon that the only question will be what is the quantum of the rentcharge? How it is reserved is immaterial, whether in guineas, sovereigns, or dollars. It need not be in money at all. If it had been in loaves or oatcakes, the principle of decision would have been the same. There are throughout the settlement charges on English as well as Irish estates. Can it be said as to any of these charges that a different sum is to be paid to the person entitled, according to the site of the estates out of which the money is drawn? In those instances where Irish estates only are charged the situation and conduct of the parties, and the language of the instrument of contract, show that they meant English currency. In the schedule annexed to the settlement the Irish estates are valued according to Irish currency, and then it is reduced to English. If the parties have, in the schedule, recognised the distinction, and shown an intention to compute in English currency, how can I understand that they make no distinction or have a different meaning in the body of the deed? Even in the body of the deed the distinction is taken and acted upon with respect to the compensation given to the Marquis of Lansdowne.

The question, looking at the whole deed, is whether the power is duly exercised by granting a rentcharge of £3,000 of lawful money of Great Britain. If the power gave him authority to do so it is sufficient. It is said to be the practice in Ireland (but I never heard of a decision to the effect) that a bond given for £3,000 lawful money of Great Britain could be discharged by paying £3,000 of Irish currency. In this case the decision must be grounded upon the construction of the instrument before us.

There is a point remaining to be noticed which did not form part of the argument at the Bar of the House although it is included in the certificate and adopted by the Court of Chancery, namely, the question whether the annuity is to be

A paid in England or in Ireland. Upon this it is to be observed that the power is to charge Irish lands with so much lawful money of Great Britain. It is not, however, such a power that it is necessarily to be inferred that the money must be paid in England. The appointment directs it to be paid in Lincoln's Inn Hall, but we can only decide that the power is well executed so far as it charges on the lands a sum of £3,000 lawful money of Great Britain. As to the cost of exchange, the
B appointee may be liable to that deduction. I found my opinion upon the short reason that, by the appointment, £3,000 of lawful money of Great Britain is given according to the power, and that such a provision, from the expressions and the whole frame of the contract, seems to have been contemplated by the parties.

LORD REDESDALE.—There is no doubt that, according to the intention of
C the parties and the legal operation of the appointment made under the power, this rentcharge is to be paid in lawful money of Great Britain, and at the rate of English currency.

No part of the deed of settlement furnishes a ground to infer that the money to be charged should be paid in Irish currency. As to exchange the case is different. The currency is always the same; the rate of exchange depends on circumstances
D which may cause a gain or loss upon payment in either country. If the proceedings had been by distress, a tender of 3,000 sovereigns would have put an end to the distress, and the tender must have been where the proceedings took place. The right of demand and payment was certainly in Ireland. In that part of the appointment which directs payment in Lincoln's Inn Hall, the donee has exceeded his power. The proceeding in equity and not by distress was necessary in this
E case because the term of five hundred years might have been interposed and defeated the distress, but a court of equity could only decree payment of the sum charged into court, or to the individual suing by his agent, in lawful money of Great Britain. The court could not decree that 3,000 sovereigns should be sent to the claimant in England. There is, therefore, no doubt that the money is payable in Ireland.

F The question then is whether the money is payable in Irish currency which is not expressed, or in lawful money of Great Britain which is expressed in the deed. In all cases of a similar description upon legacies where the word "sterling" or some word equivalent has been used the money has been held payable in English currency, even although the testator was resident out of England. In some cases
G [*Phipps v. Earl of Anglesea* (1); *Wallis v. Brightwell* (2)] it has been inferred from circumstances that the money was payable not only in English currency but also in England, but there is no ground for such inference here. The decree itself drops the words "lawful money of Great Britain," which was a necessary omission to make it consistent. To have said that £3,000 of lawful money of Great Britain should be paid in the same sum of lawful currency of Ireland would have been
H contradictory, for the one would exceed the other by eight and a half per cent.

LORD LAUDERDALE.—If lawful money of England is paid in Dublin the only deduction to be incurred would be the price of the purchase of a bill or the cost of conveyance. There is a great difference between paying a sum in English money in Dublin and paying the same sum in Dublin, according to the difference of exchange in which the value of the Irish currency is computed.

I May 8, 1820. **LORD ELDON, L.C.**—Upon looking at the cases, it appears that the appeal extends to the question of costs, and, as the term given, according to the power to secure the annuity, provides for the payment of all "costs and charges relating thereto," we think the reversal ought to be with costs. As to the other points it will be sufficient to reverse the decree on further directions. The reference to the Court of Common Pleas was according to the course of a court of equity, and ought not to be impeached.

MOGG v. MOGG

[ROLLS COURT (Sir William Grant, M.R.), May 31, 1811, Trinity Term, 1815]

[Reported 1 Mer. 654; 35 E.R. 811]

Will—Children—Child of daughter “begotten or to be begotten”—Child en ventre sa mère at testator’s death.

The testator devised freehold estates in possession to the children begotten or to be begotten on the body of his daughter, S.M., for life and after the decease of such child and children to the lawful issue of such child and children to hold to such issue, his, her, and their heirs, as tenants in common, in default of such issue, over to other persons. S.M. had nine children, four born in the testator’s life and five after his decease. The testator devised other freehold estates to trustees during the life of his son, J.H., upon certain trusts, remainder to his son’s children and their issue, in the same words as in the above devise to his daughter’s children, in default of such issue to all and every child and children of his daughter, S.M. (in the same words as before).

Held: six of the nine children of S.M. took under this devise, namely, five who were born before, and one who was en ventre sa mère at, the death of J.H.

Notes. Considered: *Gooch v. Gooch* (1851), 14 Beav. 565; *Eddowes v. Eddowes* (1862), 30 Beav. 603. Referred to: *Boughton v. James* (1844), 1 Coll. 26; *Cattlin v. Brown* (1853), 11 Hare, 372; *Re Wenmoth’s Estate*, *Wenmoth v. Wenmoth*, [1886-90] All E.R. Rep. 591.

As to the rights of a beneficiary en ventre sa mère, see 39 HALSBURY’S LAWS (3rd Edn.) 1075, 1076; and for cases see 44 DIGEST 834-836.

Questions arising on the construction of a will.

George Hodges, the testator, was, at the date of his will—Aug. 19, 1759—and at his death—1762—seized in fee simple of a manor and other hereditaments in the parish of Littleton (distinguished by the name of the Littleton freehold estates), and of freehold lands and hereditaments in several other parishes (called the Mark estate). He was also seized of copyholds in the parish of Timsbury and several other parishes, in some of which he had an estate in fee, in others for lives only. He had also estates for life or lives in certain leasehold premises in Timsbury and other parishes, in some of which the leases were renewable by custom. Lastly, he was possessed at the time of his death, of leaseholds for years in Timsbury and other parishes. Under some of the freehold lands, there were coal mines, and veins of coal, both opened and unopened, at the time of his death, and the testator was also entitled, at the date of his will and his death, to shares in several other coal mines situate under lands of which he was not owner, some of them being held in fee and others for years.

By his will the testator devised the Littleton freehold estates to Baker and Hooper, trustees, to and upon the uses and trusts after mentioned “that is to say, all coal mines, veins of coal, and coal works in, upon, and under the same excepted” to the intent that his wife, Martha Hodges, might hold the dwelling-house and certain other tenements thereon for her life, and, as to the residue, to the use of the trustees and their heirs, during the life of his son and heir-at-law, John Hodges, in trust to let the estates and apply the rents in manner following, that is to say, £150 per annum to be paid thereout to the said John Hodges during his life, and the overplus (charged with an annuity of £100 to his wife and with the sum of £1,500 afterwards directed to be raised) to be invested and the produce paid to and among the children of his [the testator’s] daughter, Sarah Mogg, begotten and to be begotten, until a child or children should be born to his son, John Hodges, then to such child or children during his said son’s life, and, after his death, the principal and accrued interest to go among his children, but, in case he should have no children, then to pay and divide the principal and accrued interest

A "unto and equally among the child and children begotten, and to be begotten, on the body of his said daughter, who should be living at his said son's decease, if no such child then living, to go to his daughter, Ann Harding, or her children, and, if she should be then dead without issue, to other persons therein named. The will continued :

B "And from and after the decease of my said son I give and devise such residue of my said messuages, etc., in High Littleton (subject and chargeable also in the first place by the issues and profits thereof, with or towards the payment of the yearly sum of £100, and the sum of £1,500 hereinbefore and hereinafter mentioned), unto and equally among the child and children lawfully to be begotten by my said son during his. her, and their life and lives. And from and
C after the decease of such child and children, I give and devise the same unto the lawful issue of such child and children, to hold unto such issue, his, her, and their heirs as tenants in common without survivorship. In default of such issue, I give and devise such residue of my said messuages, etc., unto and equally among the child and children begotten and to be begotten on the body of my daughter, Sarah Mogg, during his, her, and their life and lives, and
D from and after the decease of such child and children I give and devise the same unto the lawful issue of such child and children of my said daughter, Sarah Mogg to hold unto such issue, his, her, and their heirs as tenants in common without survivorship; and in default of such issue "

to his daughter, Ann Harding, for life, and, after her decease, to her children and their issue (using the same words as with reference to Mrs. Mogg's children)
E and in default of such issue, to certain other persons in fee.

"And as touching and concerning the several messuages, etc., above given to my said wife, I hereby will and direct that the same shall, from and after the death of my said wife, stand and be limited to and for the same use and uses that are above declared concerning the residue of my said messuages, etc."

F The testator then devised the Mark estate (coal mines, etc., excepted), charged as before with the £100 annuity, and £1,500 to the same trustees in trust that they should

"equally pay and apply the issues and profits thereof towards the support and maintenance of the child and children, begotten and to be begotten, of my daughter, Sarah Mogg, during his, her, and their life and lives."

G After the decease of such children he gave and devised the said estate to the lawful issue of such child and children of his said daughter, Sarah Mogg, to hold unto such issue, his, her, and their heirs as tenants in common without survivorship, and, in default of such issue, to the children of his son and their issue successively in like manner, and, in default of such last mentioned issue, to his daughter, Ann Harding, her children, and their issue successively in like manner.

H The testator gave to the same trustees all his copyhold and leasehold estates (except the leasehold and copyhold estate at Timsbury, which he directed to be enjoyed with the Littleton estate during the whole of his interest therein) chargeable as aforesaid, upon the same trusts for the children of Sarah Mogg, with a devise to their issue in the same words as those of the Mark estate, and, in default of such
I issue, to his son and his daughter, Ann Harding, as tenant in common, without survivorship. The testator gave to the same trustees all coal mines and veins of coal in or under his freehold estates upon trust to lease for any term or terms of years, reserving the best free shares and so as such lessees be not made punishable for waste, and he directed that such free shares (chargeable as aforesaid) should be applied to the uses already declared as to his leasehold and copyhold estates, and he gave and bequeathed all his

"share and shares, interest and interests, of and in all coal mines, veins of coal, and coal works then at work in the said county of Somerset"

to the same trustees in fee upon the same trusts as above declared concerning his copyhold and leasehold estates, also chargeable (as to the produce thereof) as aforesaid. The testator bequeathed the annuity of £100 to his wife for her life in compliance with a covenant in his marriage settlement, and he gave the £1,500 (so as aforesaid charged on the premises) to his son-in-law, John Harding, upon a certain condition and, in case of non-compliance therewith, the trustees were to raise the said sum out of the premises.

Lastly, after giving certain pecuniary legacies, the testator bequeathed the residue of his personal estate to the same trustees upon trust to dispose of the same and to apply the produce (after payment of his debts, funeral expenses, and legacies) towards raising the £1,500, and, as to the overplus (if any) to the child and children of his daughter, Sarah Mogg, their executors and administrators, share and share alike. He appointed the trustees executors of his will.

The testator died in 1762, leaving as his son and heir-at-law John Hodges who died in 1765, without having had a child. The testator's widow survived him, and died in 1775. Sarah Mogg (one of his daughters) had nine children, of whom Martha and Richard were born before the date of the will, George and Thomas were born after the date of the will, but before the testator's death, Jacob was born after the testator's death, but before the death of John Hodges, Charles was en ventre sa mère at the death of John Hodges, and Robert, Henry and Dorothy, were born after the death of John Hodges. All the children were born in the lifetime of the testator's widow. All lived to attain twenty-one. Martha married one Barter, and died in 1805 without issue. Richard died in 1792, intestate, leaving two daughters, Martha and Sarah, his heirs-at-law, who were also the heirs-at-law of the testator. Thomas died in 1803, without issue. The other six children were still living, and three of them (viz., Charles, Henry, and Dorothy, wife of one Kingsmill) had issue. The four children born in the testator's lifetime had done no act to alter their estates under the will, but the five born after his death had suffered recoveries, each on attaining twenty-one, of one-ninth of the freehold estates: the uses whereof were limited to themselves in fee. The trustees and executors administered the personal estate, and granted leases of some of the coal mines, but had not otherwise acted.

In Easter Term, 1810, Jacob, Charles, and Robert, three of the children born after the testator's death, filed a bill against the other children and their issue, the representatives of such of them as were deceased, and others claiming an interest by settlement and otherwise in their respective shares, praying that the rights of the parties under the will might be declared, a partition of the devised estates, and an assignment of the leaseholds.

The cause coming on to be heard before SIR WILLIAM GRANT, M.R., His Honour directed a Case to be stated for the opinion of the Court of King's Bench. Some of the clauses in the will of the testator being so expressed as to afford ground for argument that the whole legal estate passed to the trustees (which construction would have prevented the court of law from giving any opinion as to the effect of the devises to the children of Sarah Mogg), certain alterations were made in the case in the statement of the will, and, in particular, with respect to the Mark estate, it being necessary (in order to ascertain the situation of the equitable interests) to find, not only what estate the trustees took therein, but also which of the children would have been entitled if the devises to them had been of the legal estate in possession, that devise was stated twice, a fictitious gift (omitting the gift to the trustees) being introduced as applicable to an estate called in the case the Upper Mark estate and the real devise retained as applicable to an estate called the Lower Mark estate. Accordingly, by the fictitious clause in question, this Upper Mark estate was stated to be devised (chargeable with the £100 per annum and £1,500) to the children, begotten and to be begotten, of Sarah Mogg, during their lives, then to their issue, as tenants in common, and, in default of such issue, to the children of his son, John Hodges, and their issue, and to Ann Harding and her issue, successively, following the words of the will with respect to the

A last mentioned limitations. Another alteration made in the statement of the Case was as follows. The devise of the leasehold and copyhold estates, instead of being to the trustees upon the trusts of the Mark estate, was represented as a devise "so that the issues and profits might belong to the children of Sarah Mogg," and so on as before, and in stating the devise of the coal mines, the gift to the trustees was omitted.

B The questions referred to the Court of King's Bench upon the Case Stated were as follows: (i) Whether Martha and Richard (the two children of Sarah Mogg born at the date of the will) took under the devises to them any and what estates in any and what shares of the several properties above enumerated? (ii) whether George and Thomas (the two children of Sarah Mogg born in the lifetime of the testator, but after the date of his will) took under the devises to them any and what estates

C in any and what shares of the several properties enumerated? (iii) whether the five children of Sarah Mogg born after the death of the testator took under the devises to them any and what estates in any and what shares of the several properties? (iv) whether the grandchildren of Sarah Mogg (being the issue of such of her children as were living at the date of the will or of such of her children as were born after the date of the will and prior to the testator's decease, or of such of her children as were born subsequently to the testator's decease) took any and what estates in the several properties? (v) whether the shares of Martha (who was born at the date of the will) and of Thomas (who was born in the lifetime of the testator, but after the date of his will, both which children were dead without issue) did, on their deaths without issue, vest in any and which of the grandchildren?

E The Case was argued at Westminster in June, 1812, and the court, having taken time to consider, returned the following certificate.

ANSWER TO QUERIES (i), (ii), and (iii): We have heard counsel upon this case and have considered it and are of opinion that all the nine children of Sarah Mogg took estates in tail general, as tenants in common, with cross-remainders (a) in that part of the High Littleton estate which was devised to the testator's widow for life; (b) in the Upper Mark estate; and, (c) in those copyholds and coal mines of which the testator was seized in fee, and that those same persons took the absolute interest in the copyholds and leaseholds the testator had for lives or years, and in the coal mines he had for years, with the exception only of that copyhold or leasehold which was to be annexed to the residue of the High Littleton estate. As to such residue of the High Littleton estate and the copyhold or leasehold to be annexed thereto, we are of opinion, that the four children of Sarah Mogg, born in the testator's lifetime, Jacob Mogg, who was born before John Hodges died, and Charles Mogg who was then en ventre sa mère, take estates in tail general, with cross-remainders in such residue of the High Littleton estate, and also in such copyhold (if a fee-simple, and intailable), and that, if such copyhold or leasehold were for lives or years, those six persons took the absolute interest therein.

H ANSWER TO QUERY (iv): We are of opinion that the issue of such of Mrs. Mogg's children as were born prior to the testator's decease take an interest in the Lower Mark estate as tenants in common in fee-simple expectant upon the determination of the estate limited therein to Slade Baker, and John Hooper, as trustees, but that none of the issue of such of Mrs. Mogg's children as were born after the testator's death take any interest in the Lower Mark estate, and that none of the grandchildren take any interest, except as issue in tail, in any of the other property.

I ANSWER TO QUERY (v): We are of opinion that the shares of Martha Mogg and Thomas Mogg in all the fee-simple property, except the Lower Mark estate, vested upon their deaths in tail-general with cross-remainders in such of the children of Sarah Mogg respectively as, according to our answer to the first three queries, took estates tail in that property, and in the two daughters of Richard Mogg who died before Martha or Thomas, and that the shares of the said Martha Mogg and Thomas Mogg in the copyholds, leaseholds, and coal mines the testator had for lives or

years passed to the personal representatives of the said Martha Mogg and Thomas Mogg. A

In consequence of this certificate, the original bill was amended by striking out Robert Mogg as a co-plaintiff, and making him a defendant, and (several births and deaths having intervened), a bill of revivor and supplement was filed which stated the certificate and urged that, by the effect of the certificate, the Court of King's Bench was of opinion that, as to such parts of the testator's estates at High Littleton as were devised to the testator's wife for her life (consisting of the mansion house, and certain lands, hereditaments, and premises), the nine children of Sarah Mogg were equally entitled to the same in tail, and that, with respect to the residue of the estates in High Littleton, devised during the life of the testator's son to trustees upon certain trusts, the same belonged to the five children only of Sarah Mogg (including the plaintiff, Jacob Mogg) who were born in the lifetime of the testator's son, John Hodges, and the plaintiff, Charles Mogg, who was then en ventre sa mère (but excluding the defendant, Robert Mogg), in tail-general with cross-remainders; and that with respect to the freehold estate of the testator not within the parish of High Littleton, all the nine children of Sarah Mogg took equitable estates for life, to each of them one undivided ninth part, with remainder to the issue collectively of the four eldest of such children, which four eldest only were born in the lifetime of the testator; that the freehold collieries wheresoever situate belonged to the nine children of Sarah Mogg equally in tail; that the copyholds of inheritance in Timsbury belonged to the six children only of Sarah Mogg who were living, or en ventre sa mère at the time of the death of John Hodges, the testator's son, in tail; that the copyholds for life in that parish and the leaseholds in the same parish, whether for lives or years, belonged to the same six children absolutely, exclusive of the collieries, whatever tenure they might be of; that all copyholds of inheritance in any other places belonged to the nine children of Sarah Mogg equally in tail, and copyholds not of inheritance in the nine children absolutely, and the collieries wheresoever situate and of what tenure soever (not being freehold) belonged to the nine children of Sarah Mogg equally and absolutely; that the shares of Martha Barter, and Thomas Mogg deceased, became the property of such parties and for such estates as follows (that is to say) with regard to the estates in High Littleton devised to the testator's widow for life, that the same belonged to the six surviving children of Sarah Mogg deceased, and to Sarah Mogg and Martha Mogg, the children of Richard Mogg, in seven parts or shares (the said Sarah Mogg and Martha Mogg taking one of such seven shares); and, with respect to the estates in High Littleton devised to the trustees during the life of John Hodges, to George Mogg, Jacob Mogg, and Charles Mogg respectively and to the said Sarah and Martha, the children of Richard Mogg deceased, in four equal parts or shares (the said Sarah and Martha taking one of such four shares between them); and, as to the freehold estate not in the parish of High Littleton, that the same belonged to the children of Richard and George Mogg, respectively, according to their numbers, as purchasers in fee-simple. As to the freehold collieries and copyhold estates of inheritance not in Timsbury, to the six surviving children of Sarah Mogg, and to Sarah and Martha, the children of Richard Mogg (such last mentioned children taking one-seventh part between them); as to the copyhold estates of inheritance in Timsbury to George Mogg, and the children of Richard Mogg (such children taking one-fourth part); and as to the copyhold estates for lives, to the customary heirs of Martha Barter and Thomas Mogg; and the chatel leases to their personal representatives absolutely. The bill prayed that the certificate of the Court of King's Bench might be confirmed, and the rights and interests of the parties declared accordingly. B C D E F G H I

The cause came on upon the equity reserved at the sittings after Trinity Term. 1815.

A *Leach and Palmer* for the defendants, *Henry Hodges Mogg*, and *Dorothy Kingsmill*, and their families.

Hodgson for the defendant, *Robert Mogg*.

Sir Samuel Romilly, *Roupell* and *Preston* for the plaintiffs.

Nothing fell from the court, but the following is an abstract of the decree.

B The nine children of *Sarah Mogg* took estates in tail-general as tenants in common with cross-remainders in such parts of the estates at *High Littleton* as were devised to the testator's widow for life, and in the collieries, etc., of which the testator was seised in fee. They also became entitled in equal shares as tenants in common to estates in the nature of estates tail, with limitations thereupon in the nature of cross-remainders, in all such parts of the copyhold and leasehold estates (except collieries, etc.) as were holden for one or more life or lives, and not situated in *Timsbury*. They also became entitled to the like estates and with the like limitations in such of the leasehold collieries, etc., wherever situate as were holden for one or more life or lives. They also became entitled absolutely, as tenants in common, in equal shares, to such of the copyhold estates as were held for years determinable upon lives, and to the leasehold collieries, etc., and other leasehold estates held for years or for years determinable upon lives (except such copyholds and leaseholds for years not being collieries, etc., as were situate in *Timsbury*, which were by the will directed to be annexed to the residue of the estates at *High Littleton*). *Martha Barter* deceased, *Richard Mogg* deceased, the defendant *George Mogg*, and *Thomas Mogg* deceased (the four children of *Sarah Mogg* born in the lifetime of the testator), together with the plaintiff, *Jacob Mogg* (who was born before the death of *John Hodges* the testator's son), and the plaintiff, *Charles Mogg* (who was en ventre sa mère at the time of the death of *John Hodges*), took estates in tail-general, with cross-remainders in such parts as were freehold of inheritance in the residue of the estates in *High Littleton* not devised to the testator's wife for life and in such of the copyhold estates of inheritance as were situate in *Timsbury*. The same parties took, as tenants in common, estates in the nature of estates tail, and subject to limitations in the nature of cross-remainders, in such of the copyhold estates and leasehold estates holden for one or more life or lives as formed any part of such residue of the *High Littleton* property or were situate in *Timsbury* (except collieries, etc.), and were also entitled to, and took absolutely and equally as tenants in common, such parts of the residue of the *High Littleton* property as were held for years or for years determinable on lives, and all the copyhold and leasehold estates in *Timsbury* held for years or for years determinable on lives other than and except the collieries, etc. The nine children of *Sarah Mogg* took, as joint tenants, an equitable estate for their lives and the life of the survivor of and in all the freehold estates not situate within *High Littleton* (except collieries, etc.), with remainder in fee-simple to the issue collectively of the four eldest of such children, viz., *Martha Barter*, *Richard Mogg*, *George Mogg*, and *Thomas Mogg* (being the children born in the lifetime of the testator), such issue to take as tenants in common, and not as joint tenants, and the same parties took the same, or the like interests, and with the same or the like remainders, in the copyhold estates of or to which the testator was seised or entitled for an estate of inheritance, not situate in *Timsbury*.

I The shares late of *Richard Mogg*, *Thomas Mogg*, and *Martha Barter* (the three deceased children of *Sarah Mogg*), in all the testator's estates and properties respectively (exclusive of their shares of the freeholds and copyholds of which they were only tenants for life) did, on their deaths, descend, go to, or become the property of, such parties as follows: (A). As to the share of *Richard*, (i) with respect to his share of the estates held as freehold of inheritance to *Sarah* and *Martha*, the daughters and heirs of the body of *Richard Mogg*, equally as coparceners in tail; (ii) with respect to the estates holden by copy of court roll or leases for life or lives wherever situate, it was declared that a certain settlement executed

by Richard Mogg barred the estate tail or interest in nature of an estate tail then vested in him, and all estates and interests, or limitations in the nature of cross-remainders expectant or dependent thereon, and that the said share passed by certain other conveyances in the pleadings mentioned; (iii) with respect to the estates holden by copy of court roll, or by leases for years absolute, or for years determinable upon life or lives, it was declared that his said share, having vested in him for an absolute estate, also passed by the settlement and subsequent instruments. (B). As to the share of Thomas, (i) with respect to the estates in High Littleton devised to the testator's wife for life, the same went or remained to the seven children of Sarah Mogg surviving at the death of Thomas, and to Sarah and Martha, the children of Richard Mogg deceased (they the surviving children taking each an equal eighth share, and the said Sarah and Martha taking the remaining eighth, as representing their said late father); (ii), with respect to freeholds of inheritance being parts of the residue of the estate in High Littleton, the same went or remained to Martha Barter deceased, and George Mogg, and the plaintiffs Jacob and Charles Mogg, and to Sarah and Martha, the children of Richard Mogg, deceased, in equal parts or shares (that is to say), Martha Barter, George, Jacob and Charles, took one-fifth each, and Sarah and Martha the remaining fifth between them; (iii), with respect to the freehold collieries, etc., wheresoever situate, to the surviving seven children of Sarah Mogg, and Sarah and Martha, the children of Richard Mogg deceased, in equal parts or shares (that is to say, to each of the said surviving children an equal eighth, and to Sarah and Martha the remaining eighth part between them equally); (iv), with respect to the copyhold estate of inheritance in Timsbury, to Martha Barter, George Mogg, the plaintiffs, Jacob and Charles Mogg, and Sarah and Martha, the children of Richard Mogg in equal fifth parts, Sarah and Martha taking an equal fifth between them equally; (v), with respect to the estates held by copies of court roll or leases for lives, the share of Thomas Mogg (except such part of the original share of Richard Mogg as Thomas acquired under the deeds or instruments in the pleadings mentioned) did on the death of him, the said Thomas Mogg (he having done no act to bar his estate or interest in the nature of an estate tail, and the limitations thereon expectant or depending as aforesaid), go over in the nature of a remainder to such of his surviving brothers and sisters as at the time of his death were (according to the several declarations of the original rights of the parties before made) tenants in common with him, Thomas Mogg, of the said premises respectively, and to Sarah and Martha, the daughters and heirs of Richard Mogg deceased, each surviving brother or sister (so entitled by way of cross-remainder), and the said Sarah and Martha (as representing the said Richard Mogg, their father) taking one equal part or share, and the said Sarah and Martha, taking their share equally between them, and the part which Thomas Mogg so acquired as aforesaid of the share originally of Richard Mogg did, on the death of Thomas, pass by his will in the pleadings stated; (vi), with respect to the estates held by copy of court roll or leases for years absolute or years determinable with lives, the share of Thomas Mogg, having vested in him for an absolute estate and interest, did, on his death, pass by his will.

The court made a similar distributive declaration as to the share of Martha Barter, deceased (*mutatis mutandis*), and referred it to the Master to inquire and certify what estates freehold, copyhold, and leasehold, and what collieries, mines, and veins of coal, the testator died seised and possessed of, and to state the tenures respectively, and to distinguish all the different parts of the estates with reference to the preceding declarations, and also in like manner to inquire and certify in whom the several estates and shares of the said estates were then vested, with reference to the aforesaid declarations, and how, and by what means, and for whose use, the same were then so vested.

TREGONWELL v. SYDENHAM AND ANOTHER

[HOUSE OF LORDS (Lord Eldon, L.C., and Lord Redesdale), May 2, July 27, 1814, July 7, 11, 1815]

[Reported 3 Dow, 194; 3 E.R. 1035]

Intestacy—Realty—Failure of devise in will—Rights of heir-at-law as against subsequent devisees—Beneficial interest—Heir-at-law not to be disinherited unless express words or necessary implication in will.

It is a general rule that where land, or interest in land such as would descend to the heir-at-law, is not disposed of by a will, the heir-at-law, and not subsequent devisees, shall have the benefit of all that is not disposed of. If the testator has disposed of the legal interest, but not the beneficial, the heir-at-law shall take by a resulting trust all the beneficial interest which is undisposed of. The court will not disinherit an heir-at-law unless it is clearly the intention of the testator that the property should go in another direction. Accordingly, when a devise fails the interest goes to the heir-at-law unless there appears in the will express words or necessary implication to the contrary.

Equity—Conversion—Land directed by testator to be turned into money—Money directed to be laid out in land—Consideration as that species of property into which conversion directed.

Per LORD REDESDALE: Where land is directed by a testator to be turned into money, or money is directed to be laid out in land, both shall be considered as that species of property into which they are directed to be converted.

Notes. Some modification and alteration of the rule against perpetuities is to be found in the Perpetuities and Accumulations Act, 1964 (44 HALSBURY'S STATUTES (2nd Edn.) 870). In the case of a death after 1925 the same rules of succession normally apply to undisposed of realty as to undisposed of personalty: see Administration of Estates Act, 1925 (9 HALSBURY'S STATUTES (2nd Edn.) 718), and the Intestates Estates Act, 1952 (*ibid.*, vol. 32, p. 115).

Considered: *Cogan v. Stephens* (1835), 5 L.J.Ch. 17. Referred to: *Sidney v. Shelley* (1815), 19 Ves. 352; *Re Cooper's Trusts* (1853), 23 L.J.Ch. 27, n.; *Oddie v. Brown* (1859), 4 De G. & J. 179; *Smith v. Lomas* (1864), 33 L.J.Ch. 578; *Simmons v. Pitt* (1873), 21 W.R. 860; *Re Conyngham, Conyngham v. Conyngham*, [1920] 2 Ch. 495.

As to intestate succession, see 16 HALSBURY'S LAWS (3rd Edn.) 392 et seq., and as to the equitable doctrine of conversion, see *ibid.*, vol. 14, pp. 576 et seq. For cases see 24 DIGEST (Repl.) 923 et seq.; 20 DIGEST (Repl.) 354 et seq.

Cases referred to:

- (1) *Fletcher v. Ashburner* (1779), 1 Bro. C.C. 497; 28 E.R. 1259; 20 Digest (Repl.) 356, 815.
- (2) *Jackson v. Hurlock* (1764), 2 Eden, 263; Amb. 487; 28 E.R. 899, L.C.; 44 Digest 426, 2555.
- (3) *Gravenor v. Hallum* (1767), Amb. 643; 27 E.R. 417; sub nom. *Grosvenor v. Hallam*, 1 Bro. C.C. 61, n., L.C.; 20 Digest (Repl.) 402, 1224.
- (4) *Arnold v. Chapman* (1748), 1 Ves. Sen. 108; 27 E.R. 922, L.C.; 8 Digest (Repl.) 361, 390.
- (5) *Radcliffe v. Roper* (1712), 10 Mod. 89; 88 E.R. 639; sub nom. *Roper v. Radcliffe*, 9 Mod. 181; on appeal sub nom. *Roper v. Radcliffe* (1714), 5 Bro. Parl. Cas. 360; sub nom. *Roper v. Radcliffe*, 9 Mod. Rep. 167; 10 Mod. Rep. 230, H.L.; 44 Digest 335, 1653.
- (6) *Carrick v. Errington* (1726), 2 P. Wms. 361, L.C.; affirmed sub nom. *Errington v. Carrick* (1728), 5 Bro. Parl. Cas. 391; 2 E.R. 751, H.L.; 44 Digest 430, 2588.

- (7) *Hopkins v. Hopkins* (1738), 1 Atk. 581; West temp. Hard. 606; Cas. temp. A Talb. 44; 26 E.R. 365; 37 Digest (Repl.) 62, 62.
- (8) *Stonehouse v. Evelyn* (1734), 3 P. Wms. 252; 2 Eq. Cas. Abr. 567; 24 E.R. 1050; 20 Digest (Repl.) 400, 1211.
- (9) *Barrington v. Hereford* (1778), cited in 1 Bro. C.C. 61, n.; 28 E.R. 984, L.C.; 8 Digest (Repl.) 447, 1409.

Bill by two devisees under a will against the heir-at-law and the executor of the survivor of the trustees named in the will to have it declared that the trusts of a term of sixty years created by the will were void as being too remote, and that the plaintiffs, as next in interest, were entitled to the lands comprised in the term discharged of the trusts.

The bill stated in substance that Humphrey Sydenham by his will, dated Feb. 25, 1737, devised and bequeathed his estates in the parish of Astington, in the county of Somerset, to trustees upon certain trusts and to certain uses, among others, upon the determination of certain terms therein mentioned, to the use of his son, St. Barbe Sydenham, for life; and, after the usual remainder to preserve the contingent remainders, remainder to the first and other sons of St. Barbe Sydenham in tail male, remainder to the eldest daughter of St. Barbe Sydenham and the heirs of her body, with like remainders to the second and other daughters of St. Barbe Sydenham, remainders over, with the ultimate remainder in fee to the testator's right heirs.

The testator devised his estates in the parishes of Dulverton and Brushford, in Somerset, to the same trustees to the use of several termors and persons who had estates for life given them by the will, and among others to St. Barbe Sydenham for life, with remainder to his first and other sons successively in tail male, remainder to the second and other sons of the testator in tail male; and in case there should be no such issue male of the testator's body, or the same should become extinct, then as to that part of these estates called Coombe, the Clawes, Andrews Bill, etc., to the use of the testator's brother, Floyer Sydenham, for life, remainder to his first and other sons in tail male, and, after several other remainders for life and in tail, remainder to the plaintiff, John Sydenham the elder, for life, remainder to his first and other sons in tail male, with the ultimate remainder in fee to the right heirs of the testator. The will continued:

"And as to all the rest of his manors of Dulverton and Brushford Sydenham, and all other his estates in the parishes of Dulverton and Brushford, to retain the same in their [the trustees'] hands and custody, for and during the term of sixty years; and during the said term to receive the rents and profits thereof; and to grant leases for one, two, or three lives, until they should have received thereby the sum of £17,500, which his will was they should apply to the uses following, viz.: when they should have received £2,500, to lay out the same, together with such interest as they should have made therefrom, or from any part thereof, in some real estate in some or other of the parishes and counties therein mentioned; provided the same be not in tithes appropriations, or tithe-free lands (from the purchasing or keeping of which he thereby earnestly exhorted all his posterity and kindred that should receive any estate by virtue of his will); and at the same time to settle the same estate, so purchased, on such person for life, as by virtue of his said will, should then be in possession of his estate at Astington; or in case, by suffering a common recovery or otherwise, his said Astington estate should be in other hands, then on such person as would, in case no such common recovery or other thing had been suffered or done for the disinheriting such person, have been in possession of the same by virtue and according to the intent of his will; and so, from time to time, as soon and as often as the further sum of £2,500 should be raised, as thereinbefore directed, until the whole sum of £17,500 should be so raised, should lay out the same, together with its several

A interests as therein mentioned, in some or one of the parishes thereinbefore directed, to be settled on the several persons for life as should be, or should have been, in case no such common recovery or other thing had been suffered or done, on each of the said times, in possession of his Astington estate in pursuance of that his will; with such remainder that on each of the said several settlements the said estates to be settled be so settled in pursuance of that his will as might continue the said estates, so long as it should please God, in the blood and name of the said St. Barbes. And after the said £17,500 should be so raised, then to raise the further sum of £2,500, to be laid out in some real estates in some or one of the parishes of Dulverton, Brushford, East Ansley, Baddleton, or Baddington; and at the same time to settle the said estate, so purchased, on such person for life as, by virtue of that his will, should then be in possession of the estate of Dulverton; or in case of suffering a common recovery, or otherwise, his said Dulverton estate should be in other hands, then, on such person as should, in case no such common recovery or other thing had been suffered or done for the disinheriting such person, have been in possession of the same by virtue and according to the intent of his will, with such remainder as might continue the same, as long as it should please God, in the name and blood of the Sydenhams. And after the said two sums, amounting to £20,000 and expenses, should be raised for the said uses, or determination of the said term of sixty years, then to the use of his said brother Floyer Sydenham for life, with the remainder to his eldest and other sons in tail male: and, after such other remainders as he had limited with respect to the first part of the Dulverton estate, remainder to the elder plaintiff for life, remainder to his first and other sons in tail male, etc., with the ultimate remainder in fee to the testator's right heirs."

E Humphrey Sydenham, the testator, died in 1757 without having altered his will, leaving only one son, the said St. Barbe Sydenham, and two daughters. St. Barbe Sydenham entered on the estates limited to him for life, and had two daughters, Ellery and Katharine, but no male issue. Ellery died unmarried in her father's lifetime, and Katharine, who married Lewis Dymock Grosvenor Tregonwell, also died, leaving one son, St. Barbe Tregonwell (the defendant). St. Barbe Sydenham died in 1799, leaving St. Barbe Tregonwell his grandson and heir-at-law, and as such heir-at-law of the testator. St. Barbe Sydenham, Floyer Sydenham, and the several intermediate devisees, having died in the testator's lifetime or without issue male, the plaintiff, John Sydenham the elder, became entitled to an estate for life in possession in the premises of Coombe, the Clawes, Andrews Bill, etc., and the plaintiff, John Sydenham the younger, to an estate tail in remainder therein. St. Barbe Tregonwell was tenant in tail of the Astington estate. As to the second part of the Dulverton estate, one of the trustees of the term had died, and the property had become vested in the other trustee, Lucas, alone, but the trusts H had not been executed.

The plaintiffs contended that:

I "the limitations of the estates and premises so directed to be purchased by the money to be raised by means of the said term of sixty years were too remote, and were beyond the limits allowed by law for the limitations of estates by devise, and that the trusts declared by the said will of and concerning the said term of sixty years were contrary to the law and policy of this realm, and, therefore, wholly void and of no effect, as tending to create a perpetuity."

The bill prayed

"that the trusts declared and expressed in and by the said will, concerning the said term of sixty years, might be declared void, and that the defendant, Robert Tristram Lucas, executor of the surviving trustee named in the will, might be declared to be a trustee thereof, or of the remainder thereof, for the benefit of the plaintiffs, according to their respective rights and interests as

aforesaid, and might be decreed to transfer or assign the same for the remainder of the said term of sixty years to the complainants, or as they should appoint for their use and benefit, according to their estates and interest in the premises."

To this bill the defendant, St. Barbe Tregonwell, the heir-at-law, then an infant, answered by his father and guardian, submitting his interests to the protection of the court. After issue joined and proof by witnesses for the plaintiffs of the material allegations in the bill, the cause came on to be heard, and on May 15, 1807, the Court of Exchequer declared

"that the trusts of the sixty years' term were void, and that the defendant Lucas was a trustee thereof for the benefit of the plaintiffs according to their respective interests."

The court decreed

"that the said Lucas should convey and assign the estate and premises comprised in the sixty years' term to the plaintiffs, or as they should appoint, for the remainder of the said term, to attend the inheritance of the said estate and premises, etc."

From this decree the defendant, St. Barbe Tregonwell, appealed.

Romilly and *Leach* for the appellants.

Hart and *Roupell* for the respondents.

Their Lordships took time for consideration.

July 7, 1815. The following opinion was delivered.

LORD REDESDALE, after stating the facts: The effect of this decree is to put the term of sixty years entirely out of the will, as if it had never been there, and to give up the lands to the next tenant for life, as if he had been the immediate devisee. I confess my mind does not in that respect accord with the decree of the Court of Exchequer. It appears to me impossible to hold with the barons, that the trusts are void as to the term of sixty years. I do not apprehend that the trusts are altogether void, but only that the conveyances of the lands to be purchased are in certain events what the law will not permit to take effect, and so far only the trusts are void, but I do not see the reason why the trusts as to the raising of the £17,500 and the £2,500 should be void. The raising of these sums and the application of them in the purchase of lands were perfectly legal, and the only thing to be quarrelled with is the testator's having directed the lands when purchased to be conveyed to such uses. These are uses which, in certain events, the law would not perfect. The defect is in the disposition of the lands when purchased and not in raising the money and applying it in the purchase of lands when raised, or in the limitations made of the purchased lands in all events. But supposing the trusts to be void, the decree admits, and it cannot be denied, that the term was well created, and the only question is: For whom is Lucas trustee? In the will the trust is said to be for raising certain sums, amounting together to £20,000, and after that should be raised, or the term determined, to the use of those to whom he had devised the other part of the Dulverton estate, so that he has expressly excluded them from taking any benefit from this devise till the money should be raised, or the term determined.

I take it to be perfectly clear that where that is devised by will which would otherwise descend to the heir, whatever is not given to some devisee goes to the heir-at-law, and that what it is impossible for the devisee to take belongs to the heir. The question, where a purpose pointed out by the testator fails, always is whether the interest is expressly or by necessary implication given to some devisee. If not, the heir must take. In this case there are no words by which the next devisees can take till the £20,000 have been raised. It strikes me that, in that view of the case, we cannot affirm this decree consistently with the law as decided in other cases, that where the testator has not pointed out another to whom the benefit is to go, the heir-at-law must have it.

A I do not see any ground upon which it can be maintained that the trusts of the term were originally void. They are legal as far as the raising of this sum of £20,000. The laying out the money, when raised in the purchase of lands, is a perfectly legal trust. The directions for the conveyance of the lands so purchased are legal as applicable to certain persons. The point at which the illegality commences is where the testator limits for life to persons not in existence at the time
B of his death, as these could not be made tenants for life, at least not with remainders to their first and other sons, but must take a larger estate, so that I am strongly impressed with the idea that the trusts were not originally void, and that the directions to purchase were good.

C The present case is to be considered in two ways. First, the right of the heir to the land devised, so far as he is not disinherited. But he is not disinherited in favour of those who, according to the decision of the Court of Exchequer would be entitled, for they cannot take because the interest is not given them until the £20,000 be raised. The consequence necessarily is that, if there is a failure as to the whole of the devisees, the heir must take till the £20,000 is raised, or, if that cannot be raised within sixty years, then he must take the beneficial interest for the whole of the sixty years' term.

D The next consideration is what is the effect of the disposition of the lands when purchased with the money raised, the manner of settlement not being what the law will permit to take effect. It has been established in many cases that where land is directed to be turned into money, or money is directed to be laid out in land, both shall be considered as that species of property into which they are directed to be converted. This was distinctly stated by SIR THOMAS SEWELL, M.R., in
E *Fletcher v. Ashburner* (1), and, accordingly, we find in several cases that to be the clear and uniform decision. Considering the £20,000 as land, the disposition not being capable of being carried into effect, who is to take? The heir-at-law must take. If the testator had directed £20,000 to be paid out of the personal estate and lands to be purchased, these lands, on failure of the intended purpose, would
F go to the heir-at-law. The personal representative could not take, as the money was converted into land. Here the purpose intended by the testator was not capable of being carried into effect beyond the direction that the money should be laid out in land, and in the events which had happened, none but the heir-at-law could take. In a case where the ultimate remainder is to the testator's own right heirs, it is somewhat curious to say that he intended to disinherit his heir as to so much
G of his property as he left undisposed of, for when his devise should fail of effect, he himself has declared that his heir should take.

H The only case that appears materially to affect the question is *Jackson v. Hurlock* (2), decided by LORD NORTHINGTON. In that case the testator had given his real estate to a lady whom he intended to marry and afterwards did marry, reserving to himself a power to charge the land with a sum not exceeding £10,000. This power he afterwards executed to the amount of £6,000 for the benefit of charities. This was void, and LORD NORTHINGTON decided that the money sunk for the benefit of the devisee, but there the whole interest had been previously given to the devisee. In *Gravenor v. Hallum* (3), LORD CAMDEN held that a rentcharge given to a charity, being void by the statute, went to the heir-at-law, and the reason was that, though the gift to the charity was void, yet the rentcharge was severed from the devise, and must, therefore, go to the heir. So here the interest in the term was severed
I from the devise, the devisee not being to take till after the £20,000 were raised, and, therefore, it must go to the heir till then. That is conformable to the decisions in the other cases, where the courts have constantly held that when a disposition cannot take effect and there are neither express words nor necessary implication to show the testator's intention that the interest should go to a devisee, there the heir must take. In *Arnold v. Chapman* (4), a copyhold estate was devised to Chapman, he causing £1,000 to be paid to the executors, and then the testator gave all the residue of his estate, real and personal, after payment of debts and

legacies, to the Foundling Hospital. LORD HARDWICKE there said (1 Ves. Sen. at p. 110):

"In *Roper v. Radcliffe* (5), it was resolved that whatever is taken out of the real estate shall be considered as real, and this would be taking so much out of the real estate for the charity, which, therefore, shall not go to it."

The legacy was well laid on the real estate, but not well disposed of by reason of the Act, and it was decreed to the heir, and not to the devisee. So here the charge is well laid on the real estate, but in the events which happened not well disposed of, and, therefore, resulted to the heir-at-law, as not effectually disposed of by the will. I submit that the benefit of the trusts of this term does not belong to the subsequent devisees, but must go to the heir-at-law, and that the decree of the Court of Exchequer ought, therefore, to be reversed.

July 11, 1815. **LORD ELDON, L.C.**—The way in which I consider the case, is this. Where land, or interest in land such as would descend to the heir-at-law, is undisposed of by the will, the heir-at-law shall have the benefit of all that is not disposed of, and, if the testator has disposed of the legal interest, but not the beneficial, then the heir-at-law shall take by a resulting trust all the beneficial interest which is so undisposed of. I do not say that this is universally true, because particular circumstances in certain cases may make a distinction. But that is the general rule, and it amounts to this, that pro tanto the heir is not disinherited. It follows that when a devise fails the interest goes to the heir-at-law, unless there appear in the will express words or necessary implication to the contrary. In case a devise fails, then the interest must generally go to the heir-at-law, as not being disposed of by the will, because, generally speaking, such an interest cannot pass from the heir, except by express words, or necessary implication.

The general principle is that an heir can only be disinherited by express words, or necessary implication, and if there is a doubt whether it is intended for the devisee or heir, or in case what is given by the will to another should not have effect, then it goes to the heir. But if a gift over is clearly expressed, or necessarily implied, then it goes as the testator intended it should go. As for instance, land is devised to A., charged with a legacy to B., provided B. attain the age of twenty-one. There the devise is absolute as to A., unless B. attains the age of twenty-one. If he does, then he is to have the legacy, but his attaining twenty-one is a condition upon which alone he is to have it, and, if he does not attain that age, then the will is to be read as if no such legacy had been given, and the heir-at-law does not come in, because the whole is absolutely given to the devisee, but a gift which fails must be clearly intended, upon the failure of the condition, to be for the benefit of the devisee, otherwise he cannot take advantage of that failure, as he, being devisee, can only take what is given him by the will.

Arnold v. Chapman (4) proceeded on that principle. There one Emerson devised a copyhold to Chapman, he causing £1,000 to be paid to his executors, and then the residue of all his estates (after payment of debts and legacies), freehold, copyhold, leasehold, plate, rings, stock, etc., he gave to the Foundling Hospital. The land was prohibited to be given to such a charity, and the question was what was to become of the £1,000. It was not made applicable to the payment of the debts and legacies, and then the next of kin claimed it, but the court said No, it was not given to them. Then the devisee insisted that it should not be raised at all, and that it was the same as if the condition had been to pay it to the charity which was an unlawful act and, therefore, void, and the estate absolute. But to this it was answered that the testator had no intention to give it to him; that the estate was given to him, he causing £1,000 to be paid out of it; that the £1,000 could not go to the devisee, for his paying it was a condition upon which the estate was given him. LORD HARDWICKE said that, inasmuch as the heir might enter for breach of the condition and inasmuch as the hospital could not by law take it, and the devisee could not take it because it was not given him, the £1,000 must go to the heir.

A whether it was intended for him or not signified nothing as he did not take by force of the intent, but by the rule of law.

B So in *Gravenor v. Hallum*, where one Goldsbury by his will gave a message in Ipswich to his executors subject to a charge of £10 out of the same for ever to certain charities, the estate to be sold, and after payment of debts residue to some persons named, the question was what was to become of the £10. LORD CAMDEN said that the land was given to the devisees, subject to the payment of £10 a year, that the £10 was severed from the devise, and, being void as given to a charity, it went to the heir-at-law, as not effectually disposed of. There was no declaration of intention, express or implied, as to its going in a way permitted by law, and not being effectually disposed of ex consequentia it went to the heir-at-law.

C *Carrick v. Errington* (6) was decided on the same principle. Edward Errington, by lease and release, settled lands to himself for life, remainder to his first and other sons successively in tail male, remainder to Thomas Errington, a Papist, for life; remainder to trustees during the Papist's life, to preserve contingent remainders; remainder to the Papist's first and other sons in tail male; remainder to William Errington, a Protestant. The remainders were void as to the Papist, but the effect was held to be, not that the subsequent remainders were accelerated, but that the rents and profits belonged to the heir during the life of the Papist. Upon the same ground in *Hopkins v. Hopkins* (7), where estates were limited by will to certain persons on their attaining the age of twenty-one, with an allowance for maintenance in the meantime out of the rents and profits, the surplus rents and profits, remaining undisposed of till they attained the age of twenty-one, were decreed to the heir-at-law. So likewise in *Stonehouse v. Evelyn* (8), the decision was upon the same ground in favour of the heir, and this shows how careful the courts are not to disinherit an heir-at-law unless it is clearly the intention of the testator that the property should go in another direction. There one devised a rentcharge to a trustee to be sold to pay legacies amounting to £800, and, if the rentcharge should sell for £1,000, then to pay a further legacy of £200. The rentcharge sold for more than £800, though not for £200 more. The question was who should take the surplus above the £800. It was contended that the legatees should take in proportion to their legacies. But "no," said the court, "for in that way we should be making the will instead of the testator," and it was held that the surplus resulted to the heir-at-law.

G As to the charity cases where the gifts rendered void by the statute did not go to the heir, they all seem to have been decided on one or other of the grounds that the heir-at-law was completely disinherited or that his claim was barred under an intention of the testator, express or clearly implied.

H *Jackson v. Hurlock* (2) appears to have been decided on the first of these principles. This was a devise of the whole estate subject to the payment of such sums not exceeding £10,000 as the testator should appoint, not doubting the devisee's honour and integrity in the performance of the will. Several sums, amounting to £6,000, were appointed to charitable and superstitious uses. It was argued there that the heir-at-law ought to have this sum as the estate was given to the devisee subject to the payment, but the court said, and rightly said, "No. The testator gave the devisee the whole interest in the land, reserving only a power of appointment, and, if he abstained from appointing, or made an appointment which was void, he did not diminish the whole interest which was given to the devisee, and the heir was altogether disinherited." That points to the very distinction noticed by LORD CAMDEN in *Gravenor v. Hallum* (3), where the estate was given to the devisee subject to certain rentcharges which he created by his will, severing the rentcharge from the devise, and thereby manifesting an intention that it should not go to the devisee, and, the uses being void, the rentcharges went to the heir-at-law. That was LORD NORTHINGTON's decision, and the decision in *Barrington v. Hereford* (9) proceeded upon the same principle.

I See what this case is, and here I must distinguish between this and a case

lately decided in the Court of Chancery where a term was created for raising portions, and no portions were subsequently mentioned. It was there contended that the heir-at-law was entitled to the beneficial interest as undisposed of. But the court, looking at the intention as collected from the whole of the will, was of opinion that, as the testator had not mentioned any portions, he had merely stated what he proposed in case he had chosen to express it, but, as he had not mentioned any portions, the will was so framed that that part could have no application. It was decided that the principle was clear that the devisee should take subject to these portions if they were to be raised, if not, then absolutely, and so the term was assigned to him to attend on the inheritance. But that was a different case from the present. If the term there, for instance, had been for ninety years, in order to raise £20,000 for charities, and after the sum had been raised, then the lands to go to certain devisees, the question would have been whether the devisees could take anything till the money had been so raised. According to the cases which I have mentioned, of intention manifested that the devisees should take short of that, they had no right to say that the interest was included in the devise to them as they could only take according to the intention.

There could be no doubt but that in this case the term was well created. It was admitted to be so in the decree which directed that it should be assigned to attend the inheritance, and here I must intimate that, though these trusts have been considered as too remote, it is difficult to say that they were so in all events, but as the case had not happened in which they could be carried into effect, and as the money was to be raised out of land and the devisee could not take it because it was not given to him, it must go to the real representative. It appears to me then that the question is narrowed to this. Suppose the trusts were too remote, was it the intention of the testator that in such circumstances the devisee should take the beneficial interest in the term?—a question which must be considered with reference to the fact that there is an express direction to the trustees to get together the rents, profits, and fines for the purpose of raising £20,000, and that the lands were given over so and so expressly from and after the raising of the said sum of £20,000 for the said uses. Some stress was laid in argument on these last words, “for the said uses,” the uses being void as too remote. But, suppose it had been a devise to the use of a charity which the law would not permit to take effect, the cases authorise me to say that the beneficial interest in the term would not go to the devisee unless it clearly appeared that such was the intention of the testator. Here the interest is given minus in value £20,000, and only with a deduction of that sum. The testator then has said that the devisees shall not take it. The policy of the law will not permit the uses for which the testator intended it to take effect, and in such a case, in the absence of any expression of intention on the part of the testator with respect to a purpose which the law will allow, the doctrine of law is that he shall take the interest who takes independent of all intention and on whom the law casts it. On these grounds I agree with my noble friend that the money must be raised and applied for the benefit of the heir-at-law, and not of the devisees.

Decree reversed.

A
CLARKE AND OTHERS v. EARL OF ORMONDE

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), March 21, 24, May 5, 30, 1821]

[Reported Jac. 108, 37 E.R. 791]

B
Trust—Cestui que trust—Right to information regarding trust estates—Value of estates—Moneys raised by sales and from rents—Debts and encumbrances.

A cestui que trust has a right to be informed by the trustees regarding the value of the trust estates, the amount of the moneys raised by sales and from the rents, and of the debts and encumbrances paid and those remaining unpaid. He is entitled to inspect the vouchers held by the trustees in respect of payments made by them.

C
Trustee—Duty of trustee—Heirloom—Specific bequest—Preservation—Non-application in payment of debts.

When a testator specifically bequeaths certain articles or gives them to trustees with a direction that they are to be treated as heirlooms it is the duty of the trustees to execute that intention so far as they can, and, unless legally compelled, not to apply them in the payment of debts.

D
Conflict of Laws—Trust—Trust relating to realty abroad—Appointment of receiver.

A trust relating to real property in Ireland enforced and receivers of the estates appointed.

E
Notes. Considered: *Springett v. Dashwood* (1860), 2 Giff. 521. Referred to: *Seale v. Hayne* (1863), 9 L.T. 570.

As to right of cestui que trust to information, see 38 HALSBURY'S LAWS (3rd Edn.) 974-977; as to the duty of executors and trustees to preserve specific legacies, see *ibid.*, vol. 16, p. 320; and as to trusts relating to foreign realty, see *ibid.*, vol. 7, pp. 35-38. For cases see 47 DIGEST (Repl.) 360-363; 23 DIGEST (Repl.) 387 et seq.; 11 DIGEST (Repl.) 374-378.

F
Case referred to:

(1) *Jackson v. Leaf* (1820), 1 Jac. & W. 229; 37 E.R. 362, L.C.; 24 Digest (Repl.) 921, 9277.

Bill for the execution of the trusts of a will, an injunction and an account.

G
By private Acts of Parliament passed in 1795, 1805, 1808, and 1818, and by indentures of Feb. 22, 1808, several estates in Ireland were vested in trustees upon trust to raise money for the discharge of the encumbrances affecting them and of the debts of the Marquis of Ormonde who, subject to the trusts, was entitled to the estates in fee. The surviving trustees were Sir J. Graham, Douglas Kinnaird, and Charles Butler. The marquis made two wills, both dated Feb. 28, 1820, the first relating to his property in Ireland, the second to that in England.H
By the first will he directed that if the trusts of the Acts of Parliament and indentures of February, 1808, should not be performed at the time of his death, the trustees should proceed in the execution of them, and should also, by sale or mortgage, discharge all his debts which were not provided for by those trusts and his legacies, subject to which he directed the estates to be settled to the use of his first and other sons in tail male, with remainder to his brother, James Butler, for life, with remainders to his sons and their issue, with remainder to his brother, C. H. Butler Clarke (one of the plaintiffs) for life with other remainders over. He gave the service of plate, fixtures, furniture, and books at his castle of Kilkenny to the same trustees in trust to permit the same to be used, held, and enjoyed as heirlooms, so far as the rules of law and equity would admit, by the person or persons who, for the time being, should be entitled to the title and dignity of Marquis of Ormonde or of Earl of Ormonde and Earl of Ossory, but his will was that the same should not, for the purpose of transmission, vest absolutely in the child of any person entitled to have and enjoy the said title or dignity and who

should be living at the time of his decease, unless such child should attain the age of twenty-one years. Inventories were to be made by the trustees, who were from time to time to cause such reparations and replacings to be made as they might think proper. After giving several legacies, he directed that all his debts, which were not charged upon his real estates in England or Ireland and his legacies should be paid out of his personal estate in Ireland not specifically bequeathed. He declared that his personal estate was to be the primary and his real estate the auxiliary fund for the payment of his debts and legacies, but he excepted his personal estate from the payment of the annuities given by his will or any other testamentary papers and charged them upon his real estates in Ireland. He appointed the same trustees to be his executors. A B

By the other will he devised his estates in England to the Marquis of Huntley, Sir J. Graham, and Charles Butler, their heirs and assigns upon trust to settle his mansion house at Ulcombe and some other premises, in default of issue of his own body, to the use of his brother C. H. Butler Clarke for life, with remainders to his sons and their issue and other remainders over. The other part of his English estates was to be settled to the use of his brother James Butler for life, with remainders to his sons and their issue and other remainders over. He gave a service of plate to the trustees to be used and enjoyed as heirlooms by the person or persons for the time being entitled to his mansion house at Ulcombe in terms similar to those applied in the other will to the plate, etc., at his castle of Kilkenny. He gave his leasehold house in Bryanstone Square, with the plate, furniture, and other effects in it, to his brother James Butler, to whom he also gave the residue of his personal estate. He charged the debts which he might owe in England, and which were not specifically charged on his Irish estates by any deed or security or were not provided for by his other will upon the English estates devised to his brother James Butler for life. He appointed the Marquis of Huntley, Sir J. Graham, and C. Butler executors of this will. C D E

The testator died on Aug. 10, 1820, without issue, and was succeeded in the title of Earl of Ormonde by his brother James Butler. He was indebted to a large amount, and there were also considerable sums of money the payment of which had been provided for by the Acts of Parliament and the indentures of February, 1808, which still remained unpaid. The estates which by the wills were charged with the payment of these debts and the legacies were more than sufficient for the purpose without resorting to the specific legacies. The bill, which was filed in December, 1820, by C. H. Butler Clarke and his two sons for the execution of the trusts of the will, insisted that, after exhausting the testator's personal estate in Ireland not specifically bequeathed, the trustees ought by sale of the Irish estates to raise money for the payment of the debts and encumbrances, and prayed an injunction to restrain them from selling or disposing of the services of plate and the other effects specifically bequeathed by the wills. Another suit, *Beauchamp v. Marquis of Huntley*, was commenced about the same time by a creditor of the Marquis of Ormonde, praying the usual accounts and the application of the assets to the payment of his debts. The answers had not been put in to either of the bills. A motion was now made on the part of the plaintiff for an injunction as prayed by the bill, and also that he might be let into possession of the estates devised to him on entering into a recognisance to account for the rents and profits. On the opening of the motion, F G H I

LORD ELDON, L.C., observed that when a testator gave articles, intending them to descend as heirlooms, it was the duty of the executors to see, as far as they could, that the will was duly executed and that that intention took effect, unless compulsory measures were resorted to against them. The creditors might, by adopting such measures, drive them off that ground, but they were not voluntarily to take themselves off it.

The motion stood over for some time.

A *Heald and Koe* for the plaintiff.

April 5, 1821. *Hart and Roupell* for Lord Ormonde, in support of the motion : Though the testator's personal estate, even including the specific bequests and heirlooms, will not be sufficient for the payment of his debts, yet the estates devised for that purpose will, when sold or mortgaged, supply an ample fund. In the meantime, we desire that the executors should be restrained from applying
B these articles in payment of the debts. To do this spontaneously would be a great disregard of the wishes of the testator, and it does not appear that there is at present any creditor pressing for payment who is in a condition to take out execution and seize the property. When that happens the court will be able to provide for it. The question is not now with the creditors; their rights cannot be affected
C by this motion. No difficulty would arise if the defendants would put in their answers. A decree might then be obtained which would protect the estate from any proceedings at law on the part of the creditors, that being equally the consequence of a decree for the administration of the estate, whether the suit is by a legatee or a creditor : *Jackson v. Leaf* (1). Another suit has been commenced by a creditor, to which the executors are more friendly than to this, and they are
D anxious to have a decree made in that first, the effect of which would be to stop this. They refuse to put in their answer in this suit, till we have answered in the other, though this bill, praying more extensive relief, is, as we conceive, better calculated for the administration of the estate.

Horne and Lynch for the executors : There is no authority for such a motion as the present. The executors are placed in a very difficult situation, being much
E pressed by the creditors, and several actions having been commenced against them. They have not any adequate funds in hand, and cannot prevent the creditors from seizing. The executors are only desirous of indemnity, but they consider the other suit to be best adapted to the case.

LORD ELDON, L.C.—It is the duty of the executors to put in their answers in
F both suits. They have nothing to do with throwing the management of the business into any particular hands. They should put in their answers, whether the other parties will or will not put in theirs; all the answers should be put in, and they should then leave to the court to deal with the two causes. If Lord Ormonde had consulted the gentlemen who are his trustees as to how he could preserve these articles as heirlooms, I have no doubt they would have told him that after his death
G a bill would be filed, that they would answer it, and then a decree would be made, after which the creditors could not proceed at law.

The motion is to restrain the executors from selling the plate and other articles. When a testator makes a will providing that certain parts of his property shall be applied in payment of his debts and other parts of his property are specifically bequeathed or are given to trustees with directions to be treated as heirlooms, his
H intention is that his trustees and executors, so far as they may be able, so far as by law they may be permitted, shall devote to the payment of his debts that part of his property which is given for that purpose and that the other part shall not be so applied if it is in their power to withhold it. I take it that it is their duty to execute that intention according to the dictates of the will, as far as they can. On the other hand, no testator can in any way exempt any part of the personal estate
I from applicability to the payment of his debts, nor can he put into the hands of his executors the means of defending themselves at law, and, therefore, those who insist on the property being withheld from sale according to the will are bound, so far as they are able, to put the executors into possession of the means of defending it. They ought not to be contending about which shall put in their answers first; they should give to anyone who may file a bill the power of having the protection of the court. But if they have commenced this suit, they have tendered to the executors all the indemnity that they can want by giving them an opportunity of answering and of having a decree made. I will not enter into the question which

bill is best framed for the execution of the trusts of the will; it will be time enough to do that when I see what the record is in both. The court will then take care, either by conjoining the two suits or by restraining the one and making a decree in the other, to provide for the execution of the trusts. When it comes on there will be no difficulty in knowing what to do. A

How far these articles may be protected against an immediate or final application to the debts, I cannot yet know, but I may venture to say, that heirlooms are a kind of property that are rather favourites of the court, and we may observe that the court in its ordinary decrees directs at first only an account of the testator's personal estate not specifically bequeathed. If the creditors of this family, claiming satisfaction of their debts out of the real estates under the provisions of the will, are disappointing the will by proceeding against property that was intended to be exempted, I will not go the length of saying that they can claim the benefit of the devise for their payment if they are not satisfied with that which the testator has given to them and which the law has not given to them, nor will I say that, if they will not take the provision made for them by the will, they will not be obliged to take that provision only which they are entitled to by law. The best way will be to get both the causes to a hearing. Therefore, let this matter stand over for a week, and then inform me what state they are likely to be in. The executors have a right to say that, if they do not sell and if the property should be deteriorated in value in consequence of their not selling, it may be contended that they should be chargeable with the deficiency, but I should be disposed to say that they cannot be answerable, that is, not finally, for the testator having directed the preservation of the articles, I should think that the court would be authorised to throw the loss upon the real estates charged by the testator with the payment of his debts. B C D E

As to the other part of the motion, there does not seem to be any reason why the plaintiff should not be let into possession, giving security for the rents and profits, the security to be approved by the Master, not upon his own recognisance. The court will lend a favourable ear to applications of that kind by a tenant for life whose interest is wearing out, if it can be done consistently with the other objects that it has to attend to. The plaintiff must give security for the furniture also. I shall take care that the priority or posteriority of putting in the answers shall not effect any object for either party. F

The order directed that the plaintiff, upon giving such security as the Master should think fit, should be let into possession of the estates devised in trust for him, and that the furniture, books, pictures, plate, etc., should be delivered to him. G

April 30, 1821. The bill seeking accounts relating to the estates vested in trustees for sale in the lifetime of the Marquis of Ormonde, the defendant put in a plea as to part and answered as to the rest. Part of the bill sought discovery of the value in the whole, without the particulars, of the estates, other than of such as remained unsold at the time of stating and settling the account aftermentioned, and of the amount in the whole, without the particulars, of the debts, charges, and encumbrances, the payment of which was provided for by the Acts of Parliament and indentures in the bill mentioned, other than of such as remained unpaid at the time before mentioned, and of the amount in the whole, without the particulars, of all sums of money received by the trustees for and on account of the sales and of the rents and profits of the estates and hereditaments from the time of their being appointed trustees in 1808 up to and including Mar. 27, 1817, in Ireland, and up to and including Dec. 31, 1817, in England, and of the amount in the whole, without the particulars, of the sums so received which were, during the periods aforesaid, applied in payment of the debts, charges, and encumbrances, and interest thereon, and whether the defendant had, or when last had, in his possession or power divers or any and what accounts and vouchers relating to the receipts and payments of the trustees, from the time of their being appointed trustees H I

A in 1808 up to and including Mar. 27, 1817, as to Ireland, and up to and including
Dec. 31, 1817, in England. The bill prayed that the defendant might set forth a
list or schedule of these matters and produce and leave them in the hands of his
clerk in court, and also accounts of the sums of money received by the trustees
during the same period, and of their application. To this prayer the defendant
pleaded that he and J. Hosier (one of the trustees), who had survived W. Morland
B and J. H. P. Clarke (the two other trustees), both of whom were then dead,
previously to July 24, 1819, rendered an account to the Marquis of Ormonde of all
their receipts and payments concerning the trust premises vested in them by the
Acts of Parliament and indentures, i.e., of and concerning all the receipts and
C payments in respect of every sum of money received and paid by any person or
persons resident in Ireland, either as principals or agents up to and including
Mar. 27, 1817, and of and concerning all receipts and payments in respect of every
sum received and paid to any person or persons resident in England up to and
including Dec. 31, 1817, and that the marquis examined the said accounts and
D vouchers of the said J. Hosier and the defendant and was satisfied with the same,
and settled and signed the same in approbation thereof. The defendant further
said that by a deed poll, bearing date on or about July 24, 1819, under his hand
and seal, he did testify and declare that he had examined the trust accounts
and was satisfied with the same, and for himself, his heirs, etc., did, from the
trust accounts and all sums of money received by J. Hosier and the defendant,
before and up to and including Mar. 27, 1817, in Ireland and before and up to
and including Dec. 31, 1817, in England, and from all actions, suits, claims, and
E demands, on account or in respect thereof, and on account or in respect of any
and every act, deed, matter, or thing, before, up to, and including Mar. 27, 1817,
as to Ireland, and Dec. 31, 1817, as to England, done or executed by reason or
on account of the trust premises, absolutely acquit, release, and for ever discharge
J. Hosier and the defendant and the heirs, etc., of W. Morland and J. H. P. Clarke
and their estates and effects as by the said deed poll in the defendant's possession
F and ready to be produced, would appear. The plea having been set down,

Heald and Koe for the plaintiffs: The plea covers too much as there is no reason,
though the trustees have accounted, why they should not set forth what estates
were conveyed to them, and the vouchers also ought to be discovered.

LORD ELDON, L.C., after reading the plea, said that it stated nothing more
G than that an account was settled up to such a time, without any averment that
from that account it would appear what estates were sold and what was their value.
With respect to the vouchers, it was a plea in bar against producing them, but the
persons entitled to the estates had the same right to them as the late marquis had,
for they had the same right to protect the estates against the payment of the
debts.

H Prima facie, the Marquis of Ormonde and all claiming under him have a right
to ask what was the value of the estates, the amount of the moneys raised by sales
and from the rents, and of the debts and encumbrances paid and those remaining
unpaid. If the fact be, as it probably was, that an account was rendered satisfying
all these inquiries by furnishing the particulars, forming each of the totals which
are the subjects of inquiry, and that the deed referred to those accounts, then the
I plea should have been that such accounts were rendered by which these things
appeared and that by the deed the marquis signified that he approved that account,
thus manifesting all these particulars, but this plea does not aver anything of that
kind. If that were so, still I think he would be entitled to the inspection of the
vouchers. I state that without prejudice to what may be said upon it. If there
was a settlement of all the matters relating to this trust, the trustees would be
entitled to the possession of the vouchers as their discharge to the marquis, but he
would have a right to the inspection of them as his documents, to be used by him
against all who might be making demands upon him, in relation to these debts.

The difficulty I have is that the matter of the plea does not go to the matter inquired after. It may, perhaps, be made good by averment. A

HIS LORDSHIP desired the plea to stand over, for the defendant's counsel to consider the objections to it, and to be heard in support of it, if they thought fit; which they afterwards declined.

May 17, 1821. This cause, and the cause of *Beauchamp v. Marquis of Huntley*, were set down to be heard this day, and a decree made according to minutes agreed upon by the parties, establishing the wills and directing a general account of the testator's property and debts. The plea was ordered to stand for an answer. If the Master should find any settled account or release respecting the rents of the estates and the moneys arising from the sales, it was not to be disturbed, and the accounts were to be taken only from the close of such settled account and release, and from the foot of the same, without prejudice to any suit any of the parties interested might be advised to institute respecting the same. The decree directed the appointment of receivers of the estates and that the defendant should be let into possession of Kilkenny Castle and the demesnes, but without prejudice to what the court might think fit to do in case any application should be made to rent the castle and demesnes. The trustees and their agents were to have access to the muniment room in the castle and to the muniments therein, and also to the rent office at seasonable times. B
C
D

R. v. WATSON

[TRIAL AT BAR, COURT OF KING'S BENCH (Lord Ellenborough, C.J., Bayley, Abbott and Holroyd, JJ.), Trinity Term, 1817] E
F

[Reported 2 Stark. 116; 32 State Tr. 1]

Criminal Law—Trial—Identification of person in court—Direction of witness's attention.

To identify a person in court with one whom the witness has described, the attention of the witness may be directed to a person in court, and he may be asked whether that is the person of whom he has spoken. [See p. 337 post]. G

Criminal Law—Treason—Witness—Notice—Description—"Lately abiding" at address.

On a trial for high treason a witness was described in the list of witnesses given to the prisoner under s. 11 of the Treason Act, 1708, as "lately abiding" at a certain address. On examination of the witness upon the voir dire it appeared that he had had several later places of residence. H

Held: it could not properly be said that the witness was "lately abiding" at the address given, and, therefore, his evidence could not be received. [See p. 337 post.]

Evidence—Document—Printed document—Duplicate original—Need to give notice to produce manuscript from which document printed. I

Five hundred placards announcing a public meeting having been printed, the prisoner was proved to have taken twenty-five of them from the printer. One of the remaining placards was produced at the trial.

Held: each of the printed placards was to be regarded as a duplicate original and not as a copy of the original manuscript, and, therefore, the placard produced could be put in evidence although no notice had been given to the prisoner to produce the manuscript. [See pp. 337, 338 post.]

A *Criminal Law—Treason—Seditious speech—Admissibility in evidence—General charge of levying war.*

Evidence was tendered of a seditious speech by the prisoner which was not set out in substance in the indictment as an overt act.

B **Held:** the evidence was admissible (i) under the general charge of levying war against the King; (ii) in any event on the ground that what a person said might be given in evidence against him to explain his conduct. [See pp. 338, 339 post.]

Criminal Law—Treason—Act of one conspirator evidence against all—Seditious writings found in possession of one conspirator.

C Per BAYLEY, J.: There is no doubt that the act of any one conspirator in furtherance of a common design is evidence against all. Seditious writings found in the possession of one conspirator might be evidence against the other conspirators provided there was proof that they were intended to be made use of in furtherance of the common purpose. [See p. 340 post.]

Criminal Law—Evidence—Witness—Character—Evidence of general bad character.

D A person against whom a witness is called may examine witnesses as to the general character of the proffered witness, but he is not allowed to prove particular facts in order to discredit him. The witnesses may state that he is not a man to be believed on his oath, but they cannot state that at such a time he committed a particular offence, for, although every man may be supposed to be capable of defending his general character, he cannot come prepared to defend himself against particular charges without notice, and such evidence would, on that account, supply but a very imperfect test of credibility. If the witness were apprised of the charges, he might come prepared with evidence to show that, although there was prima facie evidence against him, they were in reality unfounded. [See pp. 341, 342 post.]

E *Evidence—Rules in criminal and civil cases the same.*

Per ABBOTT, J.: There is no difference as to the rules of evidence between criminal and civil cases. [See p. 342 post.]

Notes. Considered: *R. v. Blake* (1844), 6 Q.B. 126. Applied: *A.-G. v. Briant* (1846), 15 M. & W. 169. Considered: *R. v. Gunewardene*, [1951] 2 All E.R. 290. Referred to: *R. v. Duff* (1849) 7 State Tr. N.S. 795; *Mulcahy v. R.* (1867), 15 W.R. 446; *R. v. McCafferty* (1867), 15 W.R. 1022; *Marks v. Beyfus* (1890), 63 L.T. 733; *Toohey v. Metropolitan Police Comr.*, [1965] 1 All E.R. 506.

G Cases referred to:

- (1) *Nodin v. Murray* (1812), 3 Camp. 228, N.P.; 22 Digest (Repl.) 213, 2008.
- (2) *R. v. Francia*, 6 State Tr. 73.
- (3) *R. v. Coleman*, 2 State Tr. 661.
- (4) *R. v. Lord Preston*, 4 State Tr. 411.
- (5) *R. v. Staley*, 2 State Tr. 655.
- (6) *R. v. Drake* (1706), 2 Salk. 660.
- (7) *R. v. Hardy* (1794), 24 State Tr. 199; 14 Digest (Repl.) 135, 987.
- (8) *Harris v. Tippet* (1811), 2 Camp. 637, N.P.; 22 Digest (Repl.) 485, 5352.
- (9) *Spenceley v. De Willott* (1806), 7 East, 108; 3 Smith, K.B. 289, 321; 103 E.R. 42; 22 Digest (Repl.) 485, 5351.

I **Trial at Bar** of an indictment against James Watson the elder for high treason under the Treason Act, 1351, and the Treason Act, 1795.

The trial concerned those who later (1820) were hanged for their participation in what has become known as the Cato Street conspiracy to kill a number of the Ministers of the Crown while at dinner with the Earl of Harrowby at his house in Grosvenor Square, London. At the conclusion of the present trial the prisoners were acquitted.

The indictment charged that

"Arthur Thistlewood, late of the parish of Saint Andrew, Holborn, in the county of Middlesex, gentleman; James Watson the elder, late of the parish of Saint George, Bloomsbury, in the same county, surgeon; James Watson the younger, late of the same place, surgeon; Thomas Preston, late of London, cordwainer; and John Hooper, late of the parish of Saint Ann within the liberty of Westminster, labourer, being subjects of our Lord the King not having the fear of God in their hearts nor weighing the duty of their allegiance but being moved and seduced by the instigation of the devil as false traitors against our said Lord the King and wholly withdrawing the love, obedience, fidelity, and allegiance which every true and faithful subject of our said Lord the King should and of right ought to bear towards our said Lord the King on [Nov. 1, 1817] and on divers other days and times as well before as after with force and arms at the parish of Saint James, Clerkenwell, in the county of Middlesex, maliciously and traitorously among themselves and together with divers other false traitors whose names are unknown did compass, imagine, and intend, to move and excite insurrection, rebellion, and war against our said Lord the King within this kingdom and to subvert and alter the legislature, rule, and government now duly and happily established within this kingdom and to bring and put our said Lord the King to death."

A number of overt acts were then alleged.

The Attorney-General (Sir Samuel Shepherd), Topping, Gurney, and H. Shepherd for the Crown.

Wetherell and Serjeant Copley for the prisoner.

John Crisp having been sworn as a witness for the Crown, it was objected on the part of the defendant that he could not be examined on the ground that he had not been sufficiently described in the list of witnesses delivered under s. 11 of the Treason Act, 1708. The witness was described in the list as "John Crisp, lately abiding at No. 3, Tylers Court, Wardour Street, in the county of Middlesex, grocer;" whereas the Act required that

"when any person is indicted for high treason . . . a list of the witnesses that shall be produced on the trial for proving the said indictment . . . mentioning the names, profession, and places of abode of the said witnesses . . . be also given at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for the offence aforesaid, with such lists, shall be delivered to the party indicted ten days before the trial."

It was urged that the description of the witness as "lately" abiding was not sufficiently definite in point of time. It might mean two months or a year according to the vague apprehension of the person who used an expression in itself so indefinite. The objection was not to a mere matter of form since the intention of the legislature in requiring an identical description of the witness and his residence was that it might operate as a notice to the party accused to enable him to make all the inquiries which he might conceive to be conducive to his defence. If the existing residence of the witness was not given, this intention would be frustrated. If such a description were to be sufficient for one witness, it would suffice for all, and all the witnesses in the list might be described in this uncertain and indefinite mode.

LORD ELLENBOROUGH, C.J., observed that, with reference to the time of delivering the list, the description must necessarily be as "lately" unless the person delivering the list was actually at the place at the time, and, therefore, the place described as the place of residence must be that which it had lately been, but it would be proper to inquire, as a matter of fact, when the witness was resident there.

(A) Upon examining the witness, on the voir dire, it appeared that he had left the residence described in the list about three months before the delivery of the list on May 5, that he then went to reside at Milwall, where he remained about a month, whence he went to Ratcliffe Highway where he stayed about a fortnight or three weeks, and then removed to Chelsea, where he still resided. He had never concealed himself, but had not stated, upon leaving Tylers Court, where he was
(B) to be found. It further appeared that inquiry had been made on the part of the Crown at Tylers Court for the witness previously to the delivery of the list, and that, not being found there, he had been described as "lately" residing there, but, no information having been procured there, no further inquiry had been prosecuted as to any later place of abode.

(C) **LORD ELLENBOROUGH, C.J.**—Then it appears that Tylers Court was not the latest place of residence, and as it does not appear that any endeavour has been made to find him out after he left that place, he cannot be examined.

Upon it becoming necessary on the part of the Crown to identify three other persons charged in the same indictment as the prisoner Watson, it was objected
(D) that the attention of the witness was too directly pointed to them. But the court held that counsel for the prosecution might ask in the most direct terms whether any of the prisoners was the person meant and described by the witness.

It appeared that on Nov. 26 a person of the name of Castle took a manuscript to Seale, a printer, in order that he might print 500 large copies for placards and 4,000 small ones advertising a meeting at Spa Fields on Dec. 2, and that the
(E) prisoner Watson afterwards called upon him, Seale, and took away twenty-five of the large placards. Seale upon the trial produced one of the large placards, and another witness was afterwards asked whether similar placards had not been posted upon the walls of the metropolis.

It was objected for the prisoner that no evidence of the contents could be received without notice to the prisoner to produce the original manuscript. The original
(F) ought either to be produced or proved to be destroyed, or in the possession of the prisoner. Notice must be proved to have been given to him to produce it before secondary evidence could be received. All the printed placards were to be considered as copies, and not as originals, and it by no means followed that all were alike because all were printed. The case was likened to *Nodin v. Murray* (1), which was tried before **LORD ELLENBOROUGH**, where his Lordship held that a copy of a letter
(G) which was proved to have been taken by a letter-copying machine, and was, therefore, necessarily a true copy, could not be received in evidence without notice to produce the original. It was also urged that notice ought to have been given to produce the twenty-five copies which had been taken away by the prisoner.

LORD ELLENBOROUGH, C.J.—An order having been given to print 500 copies,
(H) Watson fetched away twenty-five. By this he adopted the printing as done in the execution of an order which he had given, and when he took away twenty-five out of a common impression they must be supposed to agree in contents. To prove that a party has notice of the contents of a newspaper, you show by one witness that he had a copy of the paper, and by another what the contents were.

(I) **BAYLEY, J.**—The objection is that without notice to produce the original any other evidence of the contents is but secondary evidence. It appears to me that that is not the case, for every one of those worked off are originals in the nature of duplicate originals, and it is clear that one duplicate may be given in evidence, without notice to produce the other. If the placard were offered in evidence in order to show the contents of the original manuscript, there would be great weight in the objection, but when they are printed they all become originals, and the manuscript is discharged. Since it appears that they are from the same press, they must all be the same.

ABBOTT, J.—If this paper were offered in order to show what were the contents of the original manuscript, it might be contended that sufficient preparatory evidence had not been given, but in another point of view it appears to me that the evidence is admissible to prove that Mr. Watson knew the contents of a placard posted in the streets relating to a meeting in Spa Fields on Dec. 2 and giving notice of it. The fact is proved that the printer, having printed a number of papers similar to the one produced, delivered twenty-five of them into the hands of Watson four days previous to the meeting. This, then, proves that Watson knew the contents of the placard posted in the streets relating to that meeting, and, if he had notice of the contents of the placard, it is evidence against him. A
B

HOLROYD, J.—I am of the same opinion. This is not a question of copy and original. A number of placards were printed by the order of two persons, and the prisoner took twenty-five of them away. None of these printed papers was an original more than the rest. The question is whether the prisoner took away part of the impression and whether that may be proved in the manner proposed. The evidence proves his knowledge of the contents of these placards, and I am of opinion that the one produced may be read. C

It was proved, that on Dec. 2 a great concourse of people was assembled in Spa Fields, some of whom bore flags and banners; that in the centre of the crowd there was a wagon, into which several persons ascended; and that Watson, having ascended the wagon, addressed the people. The witness, at the instance of counsel for the Crown, was about to state the prisoner's speech which he had taken down in shorthand, when counsel for the prisoner objected that the evidence could not be given, since the speech had not been set out in substance or otherwise as an overt act of treason on the face of the indictment. In support of this objection, the doctrine laid down in *EAST'S PLEAS OF THE CROWN*, c. 2, s. 58, was referred to, and *R. v. Francia* (2), *R. v. Coleman* (3), *R. v. Lord Preston* (4), and *R. v. Staley* (5), were cited. It was urged that in *Francia's* case the object of the letter was stated in the indictment, viz., that it was to invite the King of France to send troops to this country, that in the cases of *Coleman* and *Lord Preston* the substance and purport of the letters found upon them was set forth; that in *Staley's* case, the words having been spoken in French, the purport of them was set out in Latin; and that in *Francia's* case the rule had been laid down that it was not necessary to set out the letters themselves of a treasonable correspondence, but it was sufficient to state the substance and effect of them, since they were evidence of the secret compassing and imagination of the heart. The doctrine laid down by *HOLT, C.J.*, in *R. v. Drake* (6), was also referred to where he said that a libel might be set out either by the words, where the smallest variation would be fatal, or by the substance and effect in which case it would be sufficient if the sense were to be rightly stated. Therefore, the substance of the words in this case ought to have been set out on the record, and not have been described in general terms, as seditious and inflammatory speeches. It was also contended that this was necessary, because treason was assigned in the indictment under the Treason Act, 1795, by which statute it was made treason to conspire to levy war to force and compel the King to change his measures, and that with reference to the count on that statute it was material to know what the speech was in order to know what the measures were which the conspirators proposed to compel the King to change. D
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LORD ELLENBOROUGH, C.J., said that he was clearly of opinion that the speech was evidence under the overt acts for levying war. It was evidence *quo animo* the thing was done. If no such overt act had been laid it was a universal rule of evidence that what a party said might be given in evidence against him to explain his conduct. I

BAYLEY, J., was of the same opinion, and referred to the rule laid down in *Francia's* case (2), where the indictment alleged as an overt act that

A "the defendant did compose and write . . . several traitorous letters, notifying the intention and resolution of him the said Francis Francia, . . . to move and levy war, and requiring aid in the said war of the said foreigners and other persons in France,"

B and, on the objection in that case that the letter ought to have been set out, the court held that it was not necessary since the overt act was sufficiently stated and the letters were but evidence to prove that overt act. In the present case it was sufficiently stated as an overt act that the prisoner made seditious and treasonable, and inflammatory, harrangues, and that the particular expressions which he used, were evidence to prove that overt act.

C **ABBOTT, J.**, also was of opinion that the overt act was stated with sufficient certainty to warrant the court in receiving the evidence since it was alleged with as much certainty as had been usual in similar cases; and he referred to *R. v. Hardy* (7). He also intimated his opinion that, if no such overt act had been stated in the indictment, the evidence would still have been admissible since what the prisoner himself said with respect to what was then passing was to be received in evidence as explanatory of those proceedings, and to show whether the insurrection and riot which afterwards occurred, amounted to a levying of war.

D **HOLROYD, J.**, was also of opinion that the overt act was sufficiently stated as well as the object of it, and that the evidence could not be rejected, since several other overt acts were laid of consultation and conspiring to levy war, and to seduce the soldiery, and since the speeches uttered by the prisoner went to show the nature and object of the conspiracy, they could not be rejected.

E It was proposed to put in evidence and read a paper containing, inter alia, the following questions and answers :

F "How long ought soldiers to obey their commanders? As long as the orders of their commanders are founded on justice.—Can any conduct of commanders tolerate disobedience of orders? When orders to support tyranny and oppression and increase distress are given contrary to the will and interests of a nation, the commanders are unjust, and injustice ought never to be obeyed.—Ought soldiers to be the judges of their country's wrongs? Soldiers are men; they have feelings in common with their brethren, and can judge when rulers oppress the people.—When rulers are oppressors and have ruined a country, is it right in soldiers to disobey commanders? Soldiers ought not to be mercenaries.

G They are a part of the people; they ought not to add to the miseries of their starving industrious brethren; they are paid to cherish and protect them, and not to destroy them . . ."

H *Wetherell* and *Serjeant Copley*, for the prisoner, contended that this could not be received in evidence. If it had been previously proved that it had been proposed to distribute among the soldiery papers or placards tending to withdraw them from their allegiance such a paper might be evidence, since then there would be a connection between the means used and the object to be attained, but that it was not competent to counsel for the prosecution to produce out of a man's possession a series of written questions and answers without any proof that it had ever been printed or proposed to be printed, or that any attempt had been made to circulate it. Although there was upon the record a charge of attempts to seduce soldiers and evidence had been given of what was called a tampering with soldiers, yet this evidence was not admissible without previous evidence either of an actual publication of the paper or of a proposal to publish it. There was no evidence that this paper was in the handwriting of Watson, or of any one of the conspirators, and so it did not appear that it was the result of his own conviction. For anything which appeared to be contrary, they might have been handed to him, and he might have taken them with a view to refuting them and showing their fallacy.

I

The Attorney-General contended that this paper, having been found in the possession of one of the persons charged, was connected with and confirmed their proceedings as stated in the evidence. Although there was no evidence of an intention to circulate papers among the soldiers, there was evidence to show that the prisoners had entered into conversation with soldiers for the purpose of persuading them not to act against the conspirators and to render them dissatisfied with their officers and the government and draw those soldiers from their allegiance and duty. Ultimately, finding that the court entertained doubts as to the admissibility of this evidence, *the Attorney-General* withdrew it from their consideration, A B

LORD ELLENBOROUGH, C.J., observed that where a doubt existed his inclination was to reject a paper offered against a defendant in such a case. If there had been proof of a design to corrupt the soldiers by written papers circulated among them, this would have been evidence of a paper to effectuate that purpose, but that at present the contents of the paper appeared to be of too abstract a nature, and too little connected with any object of the conspiracy then in evidence, and that, therefore, it would be more safe to reject the evidence. C

BAYLEY, J., said that he was by no means prepared to say that the paper was not admissible in evidence, but he thought it so doubtful that he was of opinion that *the Attorney-General* had done right in withdrawing it. His doubt was that it was in evidence that the conspirators went about to different public-houses in order to address the soldiers, and if it had clearly appeared that the contents of the paper were intended to have been made use of in furtherance of the common purpose, he would have thought it receivable in evidence, but it did not appear to have been so intended, and, therefore, it was possible that it might be a collection of questions and answers intended to be used by young Watson himself without reference to any common purpose or design. There was no doubt that the act of any one conspirator in furtherance of a common design was evidence against all, and it was doubtful whether a collection of treasonable questions and answers might not be materials in furtherance of the design, but the question was so far doubtful that the safer course was to permit the evidence to be withdrawn. D E F

ABBOTT, J., said that he entertained considerable doubt upon the present question, but his present opinion was that the paper was too abstract in its terms to be admissible.

HOLROYD, J., said that, assuming it to be admissible, it would have been evidence only as a thing done in furtherance of the general intention of the parties and as confirmatory of that intention. G

In the course of the evidence adduced on the part of the prisoner, it was proposed to prove the certificate of the marriage of a witness, John Castle, with Elizabeth Streeter. Castle had been examined as a witness for the Crown and had stated himself to be an accomplice in the treasons charged against the prisoner, and upon his cross-examination had admitted that he had been guilty of several crimes. He had not been asked whether he had been guilty of bigamy, but the establishment of the marriage to which this certificate related would, when coupled with his admission of a previous marriage with a woman still living have proved that he was guilty of bigamy. H

The Attorney-General objected to the reception of this evidence if it was offered with a view to incriminate Castle. I

Wetherell and *Serjeant Copley* argued that the evidence was offered with a view, not to contradict the witness, but to incriminate him. He was not prepared with a record of the witness's conviction, but, he said, he had a right to prove such an accumulated infamy of character against the witness as would render him incredible. No decision could be cited by the counsel for the Crown to the contrary, and it would militate against the plainest principles of justice to reject such

A evidence since a man might be able to prove that a witness was not to be believed upon his oath by showing that he had been guilty of a number of criminal acts although he could not produce a single record of conviction. Since it might be proved indirectly that the witness was not credible upon oath, it was too strong a proposition to say that the same conclusion might not be proved directly by actual proof of accumulated crimes, which demonstrated the infamy of the witness. The witness himself, were it not for the particular objection that he was not bound to incriminate himself, might be asked whether he had committed a particular crime. Why, then, might not the same fact be proved by other evidence to which the particular objection did not apply. The consequences would be enormous and alarming to the administration of justice, if such evidence were to be shut out. A witness who had committed a multitude of crimes but had not been convicted of one would stand as a fair and credible witness in a court of justice. If he were to be asked the question, he would not be bound to answer it, and, therefore, if other evidence could not be adduced to prove it, that testimony, which was essential to the ascertainment of truth inasmuch as it ascertained the degree of credit due to a witness, would be wholly excluded.

D **LORD ELLENBOROUGH, C.J.**—This is so clear a point, and so entirely without precedent, that it would be a waste of time to call for a reply. For the purpose of ascertaining the credit due to witnesses the court indulge free cross-examination, but when a crime is imputed to a witness, of which he may be convicted by due course of law, the court know but one medium of proof, the record of conviction. It is the constant practice at nisi prius not to receive such evidence without the record of conviction. You may ask the witness whether he has been guilty of such a crime. This, indeed, would be improperly asked, because he is not bound to incriminate himself, but if he does answer promptly, you must be bound by the answer which he gives, for the court does not sit for the purpose of examining into collateral crimes. It would be unjust to permit it, for it would be impossible that the party should be ready to exculpate himself by bringing forward evidence in answer to the charge, and there would be no possibility of a fair and competent trial upon the subject. Therefore, it is never done.

G **BAYLEY, J.**—I entertain no doubt upon this point, and this is not the first time I have had occasion to consider it. If this evidence were admissible, it would be impossible to proceed in the administration of justice, because on every trial the court would have to try 100 different issues, and juries, instead of having one issue to try, would have their attention withdrawn from one single point to look into an indefinite number of crimes. If a witness has been guilty of a crime which incapacitates him, you are to produce the record of his conviction and prove his identity, and then he cannot be heard in a court of justice.

H The rule is that a party against whom a witness is called may examine witnesses as to the general character [of the proffered witness], but he is not allowed to prove particular facts in order to discredit him. The witnesses may state that he is not a man to be believed upon his oath, but they cannot state that at such a time he committed a particular offence, for, although every man may be supposed to be capable of defending his general character, he cannot come prepared to defend himself against particular charges without notice, and such evidence would, on that account, supply but a very imperfect test of credibility. If the witness were apprised of the charges, he might come prepared with evidence to show that, although there was prima facie evidence against him, they were in reality unfounded. You may indeed ask the question of the witness himself, but, if he choose to answer the question, you must stand or fall by the answer which he gives. He may demur to the question, for he is not bound to criminate himself, and, if he refuse, this is not without its effect with the jury. If you ask a witness whether he has committed a particular crime, it would perhaps be going too far to say that you may discredit him if he refuse to answer. It is for the jury to draw what inferences

they may. With regard to this particular case, I am of opinion that counsel for the prisoner cannot go into evidence of particular facts to show that the witness is not to be believed upon his oath.

ABBOTT, J.—I am of the same opinion. I was surprised to hear that counsel for the prisoner did not expect that the admissibility of this evidence would be questioned. It has been much disputed of late years whether it is competent to ask a witness whether he has committed any crime, or to put to him any question which tends to disgrace and disparage him. The subject is discussed much at length in the last edition [4th Edn.] of MR. PEAKE's book on Evidence. Reference is there made to a dictum of TREBY, C.J., who upon a trial for high treason said that no question could be put to a witness the answer to which might bring him into disgrace and disparagement. Within a few years upon a trial before the late Lord Chief Baron, than whom a more learned or humane judge never sat upon the Bench, a question was put to the witness, I do not precisely recollect whether to incriminate him, or whether it merely tended to discredit him, I believe the latter, but the Lord Chief Baron would not allow it to be put. To bring the question to a conclusion a bill of exceptions was tendered in order that the point might be brought before the House of Lords, but it was not proceeded in. The usual question put for the purpose of discrediting the testimony of a witness is: Would you believe that witness upon his oath?, but the particular reasons have never been received.

To what would the reception of such evidence lead? To the trial by the jury impannelled here whether the witness had committed a crime. If so, since a similar inquiry might be made in the case of every other witness, the jury might be kept here from day to day to an indefinite period. This would be imposing a burden which ought not to be cast upon them. There is no difference as to the rules of evidence between criminal and civil cases. What may be received in the one case may be received in the other, and what is rejected in the one ought to be rejected in the other. But in civil causes how can the party or witness come prepared to rebut the presumptive evidence of guilt which may be adduced against him? On these grounds without going further into the subject, I am quite sure that this evidence ought not to be received.

He afterwards added, that he recollected a case, *Harris v. Tippet* (8), coram LAWRENCE, J., at Gloucester, where a similar question was put to the witness, and the learned judge, after hesitating for some time, at last said: "You may put the question if you please, but if you do, you must take the answer for good or bad: you cannot call witnesses to contradict him."

HOLROYD, J.—I am also very clearly of the same opinion. If such evidence be admissible it is to be expected that it would have been very frequently tendered and received, for it is obvious how very important such evidence must be in criminal cases particularly. The circumstance that such evidence never has been received is a strong argument to show that it cannot be received, but this is not the first time that the question has occurred and the evidence has been rejected. In addition to the great inconvenience it would be impossible truly to decide collateral issues of this nature. How would it be possible for a party or a witness to come prepared to explain and rebut *prima facie* and presumptive proofs applicable to every action of his life, which notice of the charge might have enabled him to do? The effect would be to withdraw the attention of the jury from the question which they were impannelled to try in order to try a number of collateral issues, and to render witnesses unwilling to appear in a court of justice where they would be liable to charges which for want of previous notice they could not repel.

In *Spenceley v. De Willott* (9), which was an action for usury alleged to have been committed in a contract made by the defendant with the Marquis de Chambonas, after the Marquis de Chambonas had proved the usury as stated

A in the declaration the defendant's counsel proposed to ask the marquis what contracts he had made with a Mr. Schullenberg and with several other third persons from whom he had taken up money on the same days with a view to show that the contracts in question were of the same nature and not usurious, if he answered one way, or to contradict him if he answered otherwise. But LORD ELLENBOROUGH refused to suffer the question to be put, conceiving it to be entirely irrelevant to the issue, and he held that it was not allowable to a counsel on cross-examination to put a question to a witness concerning any distinct collateral fact not relevant to the issue, for the purpose of disproving the truth of the expected answer by other witnesses. The plaintiff having obtained a verdict for £25,000 the Court of King's Bench rejected a motion for a new trial upon that ground, but granted a new trial upon another ground. Upon that occasion LORD ELLENBOROUGH observed that he had ruled the point again and again at the sittings till he was quite tired of the agitation of the question, and, therefore, wished that a bill of exceptions should be tendered by any party who was dissatisfied with his judgment so that the question might finally be put to rest. If the case came on for trial again there was an opportunity of tendering a bill of exceptions by means of which the very eminent counsel [ERSKINE], if he had thought the question tenable, might have carried it to the House of Lords. Some cases have occurred since. I have understood that the rule has been acted upon to the extent, at least, that, if you propose a question to a witness and he declines to answer it, his not answering can have no effect with the jury. If he does answer it, you must be satisfied with his answer, since it is given upon the penalty of being prosecuted for perjury. This was so held by LAWRENCE, J., in *Harris v. Tippet* (8), and I have always considered it as settled law and acted upon from the earliest times.

F

PALMER AND OTHERS v. BATE AND OTHERS

[COURT OF COMMON PLEAS (Dallas, C.J., Park, Burrough and Richardson, JJ.), May 31, 1821]

[Reported 2 Brod. & Bing. 673; 6 Moore, C.P. 28; 129 E.R. 1125]

G

Contract—Illegality—Public policy—Assignment of emoluments of clerk of the peace to third party.

The future emoluments and profits of a clerk of the peace are not assignable, and a purported assignment thereof to trustees on trust, after payment thereof of a salary to the deputy of the clerk of the peace, to pay the interest due on certain debts held to be invalid.

H

Notes. Applied: *Hill v. Paul* (1841), 8 Cl. & Fin. 295. Referred to: *Clarke v. Richards* (1835), 1 Y. & C. Ex. 351; *Re Mirams*, [1891-4] All E.R. Rep. 370.

As to salaries not assignable, see 4 HALSBURY'S LAWS (3rd Edn.) 517, and *ibid.*, vol. 8, pp. 132, 133; and for cases see 8 DIGEST (Repl.) 657.

Cases referred to:

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- (1) *R. v. Baines* (1706), 2 Ld. Raym. 1265; 6 Mod. Rep. 192; 92 E.R. 332; sub nom. *R. v. Banes*, Holt, K.B. 512, 514; sub nom. *R. v. Baynes*, 2 Salk. 680; sub nom. *R. v. Cumberland (Clerk of the Peace)*, 11 Mod. Rep. 80; 33 Digest (Repl.) 272, 999.
- (2) *R. v. Evans* (1691), Holt, K.B. 188; 4 Mod. Rep. 31; 12 Mod. Rep. 13; 1 Show. 282; 88 E.R. 1132; 33 Digest (Repl.) 272, 1001.
- (3) *Harcourt v. Fox* (1693), 4 Mod. Rep. 167; 12 Mod. Rep. 42; 1 Show. 506; Comb. 209; Holt, K.B. 189; 87 E.R. 328; affirmed sub nom. *Fox v. Harcourt*, Show. Parl. Cas. 158; 33 Digest (Repl.) 271, 977.

- (4) *Godolphin v. Tudor* (1703), 6 Mod. Rep. 234; 2 Salk. 468; affirmed, 3 Salk. 251; Willes, 575, n.; 87 E.R. 984; (1704), 1 Bro. Parl. Cas. 135, H.L.; 7 Digest (Repl.) 179, 118.
- (5) *Stuart v. Tucker* (1777), 2 Wm. Bl. 1137; 96 E.R. 671; 8 Digest (Repl.) 564, 162.
- (6) *Barwick v. Reade* (1791), 1 Hy. Bl. 627; 126 E.R. 357; 8 Digest (Repl.) 563, 158.
- (7) *Arbuckle v. Cowtan* (1803), 3 Bos. & P. 321; 127 E.R. 177; 5 Digest (Repl.) 993, 8009.
- (8) *Flarty v. Odum* (1790), 3 Term Rep. 681; 100 E.R. 801; 8 Digest (Repl.) 564, 163.
- (9) *Blachford v. Preston* (1799), 8 Term Rep. 89; 101 E.R. 1282; 12 Digest (Repl.) 275, 2115.
- (10) *Parsons v. Thompson* (1790), 1 Hy. Bl. 322; 126 E.R. 190; 12 Digest (Repl.) 276, 2125.
- (11) *Osborne v. Williams* (1811), 18 Ves. 379.

Case Stated for the opinion of the court.

The Case stated, inter alia, that the defendant, Vaughan, clerk of the peace for the city and liberty of Westminster since 1802, under the *custos rotulorum* of the city, had from the time of his appointment executed the office by his deputy Lorenzo Stable, an attorney residing within the liberty. By an indenture, dated Jan. 25, 1806, he assigned to George Palmer and William Loaden, their executors, administrators, and assigns :

"All and singular the income, emoluments, produce and profits whatsoever, which, during the life of him, the said Thomas Wright Vaughan, and his continuing to hold the said place, or office of clerk of the peace for Westminster, should arise or become due, or payable to him . . . as clerk of the peace for Westminster, or otherwise by reason, or in respect of his said place or office, and all arrears thereof, then due, after deducting the salary or allowance of the deputy for the time being of him . . . in the said office, and all other expenses attending the execution of the said office. To hold, receive and take the said income, emoluments, produce and profits, of all and singular other the premises thereby assigned, thenceforth unto the said George Palmer and William Loaden, their executors, administrators, and assigns, upon trust, that the said George Palmer and William Loaden, and the survivor of them, his executors, administrators, and assigns, should in the first place, by and out of the same, retain and deduct, and reimburse themselves, and himself, certain costs and expenses therein particularly mentioned, and all such costs, charges, and expenses, as they, or any of them should have incurred or become liable to pay, in or about the execution of the aforesaid trust. And should, and would in the next place, pay and apply the same in, or towards payment and discharge of the interest, which from time to time should become due, or owing to Thomas Baylis and Samuel Ridge, respectively"

on certain debts, due from the defendant (Vaughan) to Baylis and Ridge, according to the true intent and meaning of a covenant contained in the indenture.

The indenture further provided :

"And should from time to time render and pay all the surplus and residue of the said income, emoluments, produce and profits, which should from time to time remain, after answering and satisfying the trusts and purposes aforesaid, unto the said Thomas Wright Vaughan, his executors, administrators or assigns, for his or their proper use and benefit."

The defendant, by the same deed, constituted the trustees, his attorneys, to demand, recover and receive the said income, emoluments and profits, and to give receipts and discharges for the same; and covenanted, that neither he, nor his

A executors or administrators, would at any time thereafter, by himself or themselves, or by any agent or agents, receive or take into his or their possession, the said income, emoluments, produce and profits, or any part thereof, or revoke, or make void, the powers and authorities thereinbefore contained.

B The questions for the opinion of the court were : (i) whether the assignment of the income, emoluments, produce and profits of the office, or place of clerk of the peace for Westminster (after deducting the salary or allowance of the defendant's deputy) by the defendant to the plaintiffs, George Palmer and William Loaden, by the said indenture dated Jan. 25, 1806, was a good and effectual assignment, and valid in the law. (ii) Whether the plaintiffs could legally and of right receive and take the income, profits, emoluments, and produce of the said place or office under and according to the true intent, meaning and effect of the said deed of assignment upon and subject to the trusts of the same.

C *Serjeant Lawes* for the plaintiffs : There is no authority immediately applicable to this case : the decisions regard offices of a different nature. It is not contended that the office is saleable ; it is a public office relative to the administration of justice, and the sale of it would be illegal by the Sale of Offices Act, 1551. But this is merely an assignment of the profits of an office which is regulated by the Custos Rotulorum Act, 1545, s. 3 [repealed by the S.L.R. Act, 1887] and the Great Seal Act, 1688, s. 5 [repealed by the Local Government (Clerks) Act, 1931]. By the former, the nomination of clerks of the peace is given to the custos rotulorum ; by the latter, a residence in the county is required ; and, by both, it is enacted, that the office may be executed by deputy, to be approved of by the custos rotulorum. That the office is a freehold appears from *R. v. Cumberland (Clerk of the Peace)* (1) and *R. v. Evans* (2) ; so much so that the succeeding custos rotulorum cannot displace the actual clerk : *Harcourt v. Fox* (3). Where profits are annexed to a freehold office, it cannot be said that the officer has not the disposal of them. Nor will public justice suffer from the assignment of them ; the fulfilment of the duties of the office by deputy being provided for. *Godolphin v. Tudor* (4) recognises the right of the principal to dispose of the profits of a public office, and *Stuart v. Tucker* (5) shows that the use of the half pay of a military officer is assignable. A close analogy may be found in the assignment of the profits of ecclesiastical benefices ; the only requisite in such cases is, that the cure be provided for, as the execution of the office is in the present case. **DALLAS, C.J.**—Suppose the deputy dies, and the custos rotulorum refuses to approve the nomination of a new deputy, what becomes of the performance of the duties of the office ? Again, suppose that the deputy becomes ill, the principal must then perform the duties of the office, but how is he to perform those duties when there is nothing to sustain him ? **PARK, J.**—*Stuart v. Tucker* (5) was much shaken by subsequent decisions. In *Barwick v. Reade* (6) it was held, that the full pay of a military officer could not be assigned by way of annuity ; and in *Arbuckle v. Cowtan* (7), **LORD ALVANLEY, C.J.**, in delivering judgment, says (3 Bos. & P. at p. 328) : “It is now clearly established, that the half-pay of an officer is not assignable, and unquestionably any salary, paid for the performance of a public duty, ought not to be perverted to other uses than those for which it is intended. Notwithstanding *Stuart v. Tucker* (5), in which it was held that the half-pay of an officer was assignable in equity, it was expressly decided, in *Flarty v. Odum* (8), that it was not assignable at all, which decision met with general approbation.”]

I *Serjeant Lens* for the defendant : It is admitted, that the office in question is not saleable ; if, then, the officer cannot sell, can it be contended that he may pledge his office for any amount ? The argument drawn from the provision for the deputy is beside the question. The principal cannot withdraw himself, otherwise there might be a hindrance of public justice. In the present case, the office is substantially no longer in the officer, but in those to whom he assigns the produce of it. Supposing the deputy to fail, there would be no one to perform the duties of the office. A military officer cannot assign his half-pay. And the analogy drawn from cases of

sequestration does not assist the plaintiff. Those cases turn on the old law of lay-fee. On suggestion that the clergyman has no lay-fee, the bishop levies, providing for the cure by appointing a curate and paying him out of the proceeds of the execution. *Godolphin v. Tudor* (4) is not in point. The officer here is the mere nominal possessor, and, substantially, has sold his office. *Blachford v. Preston* (9), *Parsons v. Thompson* (10), and *Osborne v. Williams* (11), show in what light contracts of this nature are viewed both at law and in equity. In *Harrington v. Klopprogge* (*infra*) the office, the profits of which the court held might be well assigned, was only that of a private secretary to Lord Holderness.

Cur. adv. vult.

May 31, 1821. The following certificate signed by **DALLAS, C.J., PARK, BURROUGH** and **RICHARDSON, JJ.**, was sent to the vice-chancellor:

This case has been argued before us by counsel. We have considered it, and are of opinion, that the assignment of the income, emoluments, produce, and profits of the office or place of clerk of the peace for Westminster, after deducting the salary or allowance of the deputy for the time being, of the defendant, Thomas Wright Vaughan, in the said office by the said defendant, Thomas Wright Vaughan, to the plaintiffs, George Palmer and William Loaden, by the indenture in the pleadings mentioned, dated Jan. 25, 1806, is not a good or effectual assignment, nor valid in the law. And that the said George Palmer and William Loaden are not entitled legally and of right to receive and take the income, profits, and emoluments, and produce of the said place or office, under and according to the true intent, meaning, and effect of the said deed of assignment, upon and subject to the trusts, intents, and purposes therein expressed and declared of and concerning the same.

NOTE

HARRINGTON v. KLOPPROGGE

[COURT OF KING'S BENCH (Lord Mansfield, C.J.), November 12, 1784]

[Reported 2 Chit. 475; 2 Brod. & Bing. 678, n.; 6 Moore, C.P. 38, n.; 4 Doug. K.B. 5; 129 E.R. 1127]

Action on a bond for payment of £1,200.

The defendant cravedoyer of the bond and condition. The condition recited that the plaintiff had joined in a bond with the defendant to one Newman for £1,200, to secure the payment of an annuity of £100 to Newman, during the life of the defendant. The money given for the annuity had been paid to the present defendant, and in order to indemnify the plaintiff against the consequence of becoming security, it was agreed that the profits of the place of the defendant, as secretary to Lord Holderness, should be assigned, and that, whenever the defendant should become possessed of any office of trust, commission, place or pension whatever, he should assign such office, etc., to the plaintiff, who was to take the whole profits: and for the performance of this agreement, the present bond was given. The plea then averred that the defendant, since the bond, had been private secretary to Lord Holderness; and that all the money received by him in that place, was paid by the defendant to the plaintiff, and that the defendant never had any other place.

The replication denied the receipt of the money as stated in the plea; and alleged that plaintiff had been obliged to pay Newman a certain sum.

To this the defendant demurred, and the plaintiff joined in demurrer.

Morgan for the defendant, made two objections to the validity of the agreement: first, that it was illegal and void by the Sale of Offices Act, 1551, being for the purpose of assigning all offices, etc., and that to assign an office of trust was illegal; secondly, that by the common law offices of trust could not be assigned.

LORD MANSFIELD, C.J., without hearing the other side: There is nothing in the objection. The agreement is for the assignment of all offices, and is good as to all offices which may legally be assigned. The profits arising from this office of private secretary to Lord Holderness might be assigned; and as to all others, they are not within the present case.

Judgment for plaintiff.

A

WAUGH v. BUSSELL

[COURT OF COMMON PLEAS (Gibbs, C.J., Heath, Chambre and Dallas, JJ.), November 3, 1814]

[Reported 5 Taunt. 707; 1 Marsh. 214, 311; 128 E.R. 868]

B

Bond—Alteration—Alteration by stranger—Immaterial alteration.

The alteration of a bond by a stranger will not destroy the bond when the meaning of the bond is sufficiently clear before the alteration and the alteration in no way alters the sense of it, and is, therefore, immaterial.

Notes. Applied: *Coles v. Hulme* (1828), 8 B. & C. 568. Considered: *Loveland v. Knight* (1828), 3 C. & P. 106.

C

As to immaterial alterations in deeds, see 11 HALSBURY'S LAWS (3rd Edn.) 370, 371; and for cases see 17 DIGEST (Repl.) 238; and as to the correction of deeds where words have been left in by mistake or are immaterial, etc., see 11 HALSBURY'S LAWS (3rd Edn.) 413-415; and for cases see 17 DIGEST (Repl.) 360.

Case referred to:

D

(1) *Cull v. Semaine* (1682), 1 Freem. K.B. 541; 89 E.R. 405; sub nom. *Cull v. Sarmin*, 3 Lev. 66; 7 Digest (Repl.) 191, 255.

Also referred to in argument:

Holman v. Burrow (1702), 2 Ld. Raym. 791, 794; 2 Salk. 658; 92 E.R. 28, 30; 17 Digest (Repl.) 366, 1715.

Roberts v. Harnage (1704), 2 Salk. 659; 2 Ld. Raym. 1043; 6 Mod. Rep. 228; 92 E.R. 192; 7 Digest (Repl.) 171, 18.

E

Pigot's Case (1614), 11 Co. Rep. 26 b; 77 E.R. 1177; sub nom. *Winchcombe v. Pigot*, 2 Bulst. 246; sub nom. *Winscombe v. Piggott*, 1 Roll. Rep. 39; sub nom. *Anon.*, Moore, K.B. 835; 7 Digest (Repl.) 240, 774.

Markham v. Gonaston (1598), Cro. Eliz. 626; 78 E.R. 866; 7 Digest (Repl.) 240, 775.

F

Action on a bond.

The defendant craved oyer of the bond and of the condition which was, that if the defendant, his heirs, etc., should pay to Elizabeth Phillips the intestate, her executors, etc., the full sum of £100 by six equal payments, that is to say, the sum of £16 13s. 4d. each and every year, with interest on the same, the first payment to be made good and paid on Oct. 3, 1812, and the same sum annually on the third day of October in each year with interest, until the full sum of £100 should be paid, without fraud, according to the true intent and meaning of that condition, then the bond should be void. The defendant pleaded non est factum; and upon the trial before CHAMBRE, J., the proof was, that the bond, which had been prepared by a schoolmaster, was left in his custody, as a friend of the parties; he discovering that the word "hundred" had been omitted in the last place where the condition above set out states it to occur, so that when the bond was executed, the condition was for payment of the instalments "until the full sum of one pounds should be paid," he without the knowledge of either party, interlined the word "hundred" between "one" and "pounds." The defendant insisted that the action could not be maintained, either on the ground that the alteration had wholly avoided the bond, or else the declaration varied from the bond such as it originally was executed. CHAMBRE, J., nonsuited the plaintiff, reserving the point.

G

H

I

Serjeant Vaughan obtained a rule nisi to set aside the nonsuit and have a new trial, on the grounds that the interlineation was of an immaterial word, the sense of the condition being sufficiently apparent without it, and not altered by the insertion, and that an alteration in an immaterial part would not vitiate the bond, even if made by the obligor, a fortiori, by a stranger.

Serjeant Best for the defendant, showed cause against the rule.

Serjeant Vaughan for the plaintiff, supported the rule.

GIBBS, C.J.—This is not a question for lawyers on the construction of the bond; the cases cited are good law, but not applicable. In those cases the declaration may be right, and yet may not contain a single word that is contained in the bond: it is only necessary to state the legal claim which arises by reason of the bond. But after oyer and non est factum pleaded, the question is whether the tenor set out is the same as the tenor of the bond executed, and I do not apprehend it would suffice, that it should agree in substance. The case in *LEVINZ* (*Cull v. Sarmin* (1)), when examined, is only because the plaintiff added an e final to the name of the widow Sarmin, and the court says that misspelling will not vitiate an obligation. **COMYNS, C.B.** [5 *COMYNS' DIGEST*, tit. Obligation, B. 4] has certainly misunderstood that case. Consider the reason of the distinction. In a declaration it is only necessary to state the legal effect of the instrument: but on oyer the plaintiff professes to produce a copy of it, as of the deed by which he asserts that the defendant is bound; and if it is not the true copy, the defendant may say that is not the deed he executed. We should be glad to relieve the plaintiff, but it is not in our power. The defendant has a right to see the instrument exactly as it is, and to make the most of the errors therein contained.

Rule discharged.

The plaintiffs having brought another action upon the bond, and on oyer set out the condition such as it was originally executed "until the full sum of one pounds is paid," upon the trial before **DALLAS, J.**, the jury found a verdict for the plaintiff on the issue of non est factum, which *Serjeant Best* with the permission of the judge, now moved to set aside, on the ground that the interlineation of the word "hundred" had been made by a stranger in a material part, and had destroyed the bond.

GIBBS, C.J.—We think that on the defendant's own showing this was an immaterial alteration: for, according to his argument, if the alteration leaves the sense what it was before, it is immaterial. We think this alteration does leave the sense of the bond what it was before; for the condition of the bond is that the full sum of £100 shall be paid: it goes on to prescribe how it shall be paid, viz., by six equal payments of £16 13s. 4d. in each and every year: it adds, until the sum of "one pounds" shall be paid; but it is sufficiently manifest that the word "hundred" is there accidentally omitted, and what has preceded has sufficiently shown what was to be done. The sentence is made intelligible by the context. We, therefore, think that the addition of the word "hundred" supplies nothing but what could be understood before it was inserted, and is immaterial, and, therefore, does not avoid the bond.

HEATH, J.—Enough of the condition is sensible to show the meaning of the parties, and the insensible part may be rejected as surplusage and immaterial.

The rest of the court concurred.

Rule refused.

A

VYVYAN v. ARTHUR

[COURT OF KING'S BENCH (Bayley, Holroyd and Best, JJ.), Hilary Term, 1823]

[Reported 1 B. & C. 410; 2 Dow. & Ry. K.B. 670; 1 L.J.O.S.K.B. 138;
107 E.R. 152]

B

Landlord and Tenant—Covenant—Covenant running with the land—Covenant to grind corn at lessor's mill.

A., being seised in fee of a mill and certain lands, granted a lease of the lands for ninety-nine years, the lessee paying certain rents and doing suit to the mill of the lessor by grinding all such corn there as should grow on the demised premises. The lessor afterwards devised the mill and the reversion of the demised premises to the plaintiff. In an action on the covenant for failure to do suit at the plaintiff's mill,

C

Held: the reservation of the suit to the mill was in the nature of a rent, and the implied covenant to render it resulting from the *reddendum* was a covenant that ran with the land as long as the ownership of the mill and the demised premises belonged to the same person; consequently, the assignee of the lessor might take advantage of it.

D

Notes. Considered: *Keppell v. Bailey*, [1824–34] All E.R. Rep. 10. Referred to: *Doe d. Calvert v. Reid* (1830), 10 B. & C. 849; *Standen v. Christmas* (1847), 16 L.J.Q.B. 265; *Norval v. Pascoe* (1864), 4 New Rep. 390; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Dewar v. Goodman*, [1908–10] All E.R. Rep. 188; *Dyson v. Forster*, *Dyson v. Seed*, *Quinn*, *Morgan*, [1908–10] All E.R. Rep. 212; *Ricketts v. Enfield*, [1909] 1 Ch. 544; *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179; *Re King*, *Robinson v. Gray*, [1963] 1 All E.R. 871.

E

As to rent generally, see 23 HALSBURY'S LAWS (3rd Edn.) 536 et seq.; as to covenants running with the land, see *ibid.*, 644 et seq.; and for cases see 31 DIGEST (Repl.) 239 et seq.

F

Cases referred to:

- (1) *Spencer's Case* (1583), 5 Co. Rep. 16 a; 17 E.R. 72; 31 Digest (Repl.) 153, 2907.
- (2) *Bally v. Wells* (1769), Wilm. 341; 3 Wils. 25; 97 E.R. 130; 31 Digest (Repl.) 154, 2919.
- (3) *Vernon v. Smith* (1821), 5 B. & Ald. 1; 106 E.R. 1094; 31 Digest (Repl.) 400, 5295.
- (4) *Congleton Corpn. v. Pattison* (1808), 10 East, 130; 103 E.R. 725; 31 Digest (Repl.) 152, 2903.
- (5) *Anon.* (1587), Godb. 120; 78 E.R. 73; sub nom. *Purfrey's Case*, Moore, K.B. 243; 31 Digest (Repl.) 151, 2894.

G

H

Demurrer to the declaration in an action by the plaintiff, as devisee under the will of the lessor, Thomas Vyvyan deceased, against the defendant, as administratrix of the lessee, Nicholas Donithorne Arthur, also deceased, intestate, for breach of covenant of a lease in the non-performance of certain suit and service at the mill of the plaintiff.

I

The declaration stated that, at the time of making the lease, Thomas Vyvyan, the lessor, was seised in fee of the demised tenements and also of a certain mill; and being so seised, on June 24, 1779, by indenture demised to N. D. Arthur, his executors, administrators, and assigns, a close of land together with certain common of pasture in the indenture described, for a term of ninety-nine years, if three persons therein mentioned should so long live, yielding and paying to the lessor, his heirs and assigns, certain rents, sums of money, payments, and returns; and also doing certain suits and services in the indenture mentioned; and also doing suit to the mill of the said Vyvyan, his heirs and assigns, by grinding all such corn there as should grow in or on the close thereby demised during the term.

The declaration then stated that the lessee entered upon the close, and that the reversion thereof belonged to the lessor who by his will afterwards devised them and the mill to three persons in the will mentioned, their heirs and assigns, to the use of the plaintiff for his life, and died, whereby the plaintiff became seised of the reversion in the demised premises and of the mill for the term of his life. It then stated that the lessee died intestate during the continuance of the term, and that administration was duly granted to the defendant; and that one of the persons for whose life the lease was granted was still living.

The breach alleged was that after the plaintiff became seised of the reversion of the demised premises and of the mill, and during the lifetime of the lessee, corn grew on the demised premises which ought to have been ground at the mill; yet the lessee in his lifetime, and the defendant since his death, did not do suit to the mill of the plaintiff by grinding there the corn so grown on the demised premises, but wholly neglected so to do. To this declaration there was a general demurrer.

F. Pollock for the defendant, supported the demurrer. This is not a covenant which runs with the land, for it does not affect the nature, quality or value of the thing demised. In *Spencer's Case* (1) it is laid down, that if the lessee covenant for him and his assigns, to build a house on the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee because it is merely collateral, and in no manner touches or concerns the thing that was demised or assigned over. Therefore, the assignee cannot be charged with it no more than any other stranger. Here the act required to be done is to be done on land of the lessor, which is no parcel of the demise. *Bally v. Wells* (2), *Vernon v. Smith* (3), and *Congleton Corpn. v. Pattison* (4) were cited as examples of covenants which ran with the land. In *Purfrey's Case* (5) the covenant was, that the lessee of a tavern should account monthly to the lessor for the wine which he sold, and should pay unto him so much money for every ton sold; and it was the better opinion of the court that it was not a covenant running with the land or reversion, but was a collateral thing, and did not pass to the assignee of the lessor. This doing suit to the mill is not in the nature of rent, for rent is incident to the reversion. Now here, if the original lessor had parted with his property in the mill, the doing suit at the mill would be a service due to the owner of the mill, and not to the owner of the reversion of the demised premises.

Gaselee for the plaintiff: The doing suit at the mill is in the nature of rent and may have been reserved in lieu of an additional rent. It is more connected with the land than a money rent, for the produce of the land itself is to be taken to the lessor's mill and he is to derive a profit out of it. The case from the YEAR Book of 42 Edw. 3, fo. 3, pl. 14, is expressly in point. That case is thus stated in *Spencer's Case* (1) (5 Co. Rep. at pp. 17b, 18a): "Grandfather, father, and two sons; the grandfather was seised of the manor of D., whereof a chapel was parcel: a prior, with the assent of his convent, by deed covenanted for him and his successors with the grandfather and his heirs, that he and his convent would sing all the week in his chapel, parcel of the said manor, for the lords of the said manor and his servants, etc. The grandfather did enfeof one of the manor in fee, who gave it to the younger son and his wife in tail; and it was adjudged that the tenants in tail, as terre tenants (for the elder brother was heir) should have an action of covenant against the prior; for the covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor as it is there said. . . . But if such covenant were made to say divine service in the chapel of another, there the assignee shall not have an action of covenant; for the covenant in such case cannot be annexed to the chapel, because the chapel doth not belong to the covenantee, as it is adjudged in 2 Hen. 4, fo. 6 B., pl. 25. But there it is agreed that, if the covenant had been with the lord of the manor of D. and his heirs, lords of the manor of D. and inhabitants therein, the covenant shall be

A annexed to the manor, and there the terre tenant shall have action of covenant without privity of blood." (He was then stopped by the court.)

BAYLEY, J.—I am of opinion that this is a covenant which runs with the land so as to entitle the assignee of the reversion to maintain this action which is brought against the defendant, not as assignee, but as personal representative of the lessee.

B An action at the suit of the assignee of the reversion is maintainable in some cases at common law, in others, under the Grantees of Reversions Act, 1540. I rather think that this case belongs to the former class.

C The lease contains a *reddendum*, and, whatever services or suits are thereby reserved partake of the character of rent. One of the services to be rendered to the lessor in this case is that the lessee shall grind all the corn grown on the demised premises at the lessor's mill. It is true that rent goes with the reversion of the land in respect of which it is reserved. In this case, however, at the time of granting the lease, the lessor was seised in fee of the mill as well as of the reversion of the premises devised, and, therefore, so long as the property in the mill and the reversion of the demised premises continued to be in the same person, the suit to the mill would continue to be a suit due to the owner of the reversion of the demised premises, and would, therefore, in that respect, be in the nature of a rent.

D It is by no means unusual for the owner of a mansion and estate to stipulate with his tenants that they should carry coals to his mansion and perform other similar services, and as long as the ownership of the mansion and the estate continues in the same person, those services are in the nature of rent, to be rendered to the reversioner of the lands demised. Here, the plaintiff is the reversioner of the thing demised and also owner of the mill.

E In the case cited from the *YEAR BOOK*, 42 Edw. 3, the prior and his successors took no interest in the land, yet the covenant to sing in the chapel was held to run with the land. Here the covenantor is tenant of land to the covenantee, and the suit to be done to the mill is in respect of the land demised. It is not necessary for us to decide what the case would be if the ownership of the land demised and the mill had been severed. Here the lessor continued owner of the reversion of the demised premises and of the mill from the time of granting the lease till the time of his death, and the plaintiff, as his devisee, then became entitled to both, and now continues so. My judgment is founded entirely on the unity of title to the reversion of the land demised and to the mill.

G **HOLROYD, J.**—The case cited from the *YEAR BOOK* of 42 Edw. 3, seems to me to govern the present, and is much stronger. This is a covenant running with the land at common law. Here the close was leased to the lessee, his executors, administrators and assigns, yielding the rents and doing the suits and services therein mentioned. The suits and services are to be rendered by the lessee, his executors, administrators and assigns, to whom the lands are leased; and this suit is to be rendered to the mill of the lessor, his heirs and assigns. So that it appears to have been the intention that the assignees of the lessor and lessee should be bound, for they are expressly named, and that suit should be done to the mill as long as it continued to be the property of the lessor, his heirs or assigns.

H It has been said that the thing to be done does not affect the land. But it affects the profits of the land and, generally speaking, they are considered the same thing as the land itself; for if the lessee in this case had had a mill of his own, he would still have been bound to grind the corn grown on the demised premises at the lessor's mill, and the price paid for the grinding of such corn would be in the nature of a varying rent to the lessor, and a deduction from the profits of the lessee.

I It is contended that as the thing required to be done by the covenant is not to be done on the land demised, but on other land which might or might not continue to be the land of the lessor, it does not, therefore, respect the land demised and, consequently, that the assignee cannot take advantage of the covenant. I am of opinion, however, that inasmuch as the thing to be done is to be done at a mill

which belonged to the lessor at the time of making the lease, and which has always continued to belong to the owner of the reversion of the land demised, that the covenant to be implied from the reddendum is in the nature of a covenant to render a rent and, consequently, that it is a covenant that runs with the land. A

It is said that it is not in the nature of a rent because it will not follow the reversion, for if the property in the mill and the reversion of the demised premises became severed, the service must be rendered to the owner of the mill and not to the owner of the reversion of the demised premises. As long, however, as the mill and the reversion of the demised premises belong to the same person, the suit to the mill is a service to be rendered to the reversioner of the demised premises; and so long, therefore, it would follow the reversion and in that respect partake of the nature of rent. Here, at the time of granting the lease, the lessor was seised in fee of the land demised and of the mill, and continued so seised of the latter and of the reversion in the former until his death, when his interest in both vested in the plaintiff as devisee. From the time of granting the lease to the present time, the grinding of the corn at the mill was in the nature of a rent to the reversioner, issuing out of and rendered in respect of the demised premises. For these reasons, it appears to me that the assignee may, in the circumstances, take advantage of the covenant and, consequently, that the plaintiff is entitled to the judgment of the court. B C D

BEST, J.—I am of the same opinion. Here, the reversion of the land demised and the property in the mill, belonged to the lessor during his life and, at his death, passed to his devisee, and they now continue united in him. At all times, therefore, the grinding of the corn at the mill in question was in the nature of a rent-service to the owner of the reversion of the demised premises. E

The general principle is, that if the performance of the covenant be beneficial to the reversioner in respect of the lessor's demand, and to no other person, his assignee may sue on it; but if it be beneficial to the lessor, without regard to his continuing owner of the estate, it is a mere collateral covenant, on which the assignee cannot sue. The performance of the covenant in this case, in the events that have occurred, would always have been beneficial to the owner of the reversion of the demised premises, and to no other person, and, therefore, that it is a covenant which runs with the land. F

Judgment for plaintiff.

DOE d. PITT v. LAMING

[COURT OF KING'S BENCH (Lord Ellenborough, C.J.), December 7, 1814]

[Reported 4 Camp. 73]

Insurance—Condition—Policy to continue to executors of assured—Endorsement to be made within three months after decease—Failure to endorse within time.

A lease contained a covenant to insure and keep insured the demised premises for a specified sum. The lessee effected such an insurance, the policy containing a memorandum that in case of the death of the assured the policy might be continued to his personal representative provided an endorsement to that effect was made upon it within three months after his death. The lessee died and an endorsement continuing the policy to his personal representative was made after the expiration of three months from the time of his decease.

Held: assuming that the condition was legal, as to which dubitante, the omission to make the endorsement within three months did not avoid the policy, and, therefore, there was no breach of the covenant to insure.

Notes. Statutory restriction on and relief against forfeiture of leases and under-leases is provided by s. 146 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 745).

Doubted: *Greenslade v. Tapscott* (1834), 1 Cr. M. & R. 55. Distinguished: *Wilson v. Wilson* (1854), 14 C.B. 616. Considered: *Re Universal Non-Tariff Fire Insurance Co., Forbes' Claim* (1875), L.R. 19 Eq. 485. Referred to: *Phillips v. Henson* (1877), 3 C.P.D. 26.

As to conditions of the policy of insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 217 et seq.; and for cases see 29 DIGEST (Repl.) 459 et seq. As to breach of covenant to insure, see 23 HALSBURY'S LAWS (3rd Edn.) 619; and for cases see 31 DIGEST (Repl.) 402.

Cases referred to:

(1) *Doe d. Pitt v. Shewin* (1811), 3 Camp. 134, N.P.; 31 Digest (Repl.) 400, 5296.

(2) *Doe d. Holland v. Worsley* (1807), 1 Camp. 20, N.P.; 31 Digest (Repl.) 415, 5442.

Action of ejectment on the forfeiture of a lease, dated July 21, 1812, whereby the lessor of the plaintiff demised to William Laming, since deceased, premises known as Grigsby's Coffee House, in Threadneedle Street.

The first covenant alleged to have been broken was:

"that the lessee, his executors, administrators, and assigns, should and would from time to time, and at all times during the continuance of the term thereby granted, insure and keep insured, or cause and procure to be kept insured, the sum of £800 at the least, in some sufficient insurance office within the cities of London or Westminster, upon the said demised premises."

William Laming, the lessee, in his lifetime, effected an insurance on the premises for £1,200 from Sept. 29, 1813, to Sept. 29, 1814. The policy, after reciting the contract and payment of the premium and duty for the first year, declared:

"That from the date thereof, and so long as the said assured should pay or cause to be paid the said sum at the time therein mentioned, and the said company should accept the same, the capital, stock, funds, and effects of the said company should stand charged and liable to pay to the said assured, his heirs, executors, and administrators, the amount of any loss or damage by fire to the property therein above mentioned, not exceeding the sum of £1,200."

On the back of the policy there was a printed memorandum, stating that in case

of the death of the assured, the policy might be continued to his legal representative, provided an endorsement was made on the policy to that effect, within three months after his death. William Laming died in the end of 1813, leaving the defendant his executrix, and an endorsement was made on the policy, continuing it for her benefit, before the ejectment was served, but more than three months after the death of the testator.

It was contended that there was a forfeiture of the lease for a breach of the covenant to insure as the policy was invalid as a result of the endorsement after the expiration of three months after the death of William Laming. Further that the policy was void, as it enumerated several trades which were considered double hazardous and declared that no insurance should be valid on the premises where any such trades were carried on, unless a premium be paid in proportion. Among such trades was that of an inn keeper and that Grigsby's Coffee House must be considered an inn. Lastly it was contended that the lease had been forfeited by part of the premises being underlet contrary to the following covenant:

"That . . . William Laming, his executors or administrators, should not nor would at any time or times thereafter during the continuance of the term, grant any underlease or leases for any term or terms whatsoever, or let, assign, transfer, set over, or otherwise part with the said messuage or tenement and premises, or his or their term or interest by the said indenture granted, or intended so to be, or any part thereof, without the special licence, assent, and approbation of the . . . S. Pitt, his heirs or assigns, under his or their hands in writing first obtained."

Evidence was given that a clerk in the post office had lodged above a twelvemonth in a room in Grigsby's Coffee House, of which he had the exclusive possession.

Garrow for the lessor of the plaintiff.

Garrow and Littledale for the lessee of the plaintiff.

Park and Andrews for the defendant.

LORD ELLENBOROUGH, C.J.—I do not think the policy became void for want of the endorsement within three months. At most, it was voidable by the company. The proviso relied upon is extremely harsh, and I doubt its legality where the policy, as here, is declared to be for a definite time. If the assured dies within the time, it inures to the benefit of his personal representative. In case of death, there may often be confusion in the affairs of the assured to prevent any application to endorse the policy within three months. He may die intestate, leaving infant children; or having named as executor a person living in the East Indies. Under such circumstances, to deprive the family of the benefit of the policy would be monstrous injustice. I doubt whether this proviso can have any such operation, but I think it had much better be omitted, or placed in a conspicuous part of the policy, that everyone may see the nature of the security he will obtain by the insurance: see *Doe d. Pitt v. Shewin* (1).

Grigsby's Coffee House I happen to know is like any other coffee house in the metropolis; and I think a coffee house is not an inn within the meaning of the policy. Horses, wagons, and coaches come to an inn; there are stables and out-houses attached to it; people are going to these with lights at all hours; hence there is an increased danger of fire, and the trade of an innkeeper is considered double hazardous. But the trade of a coffee house keeper is of a very different description.

The covenant not to underlet without the special licence of the lessor can only extend to such underletting as a licence might be expected to be applied for; and whoever heard of a licence from a landlord to take in a lodger? See *Doe d. Holland v. Worsley* (2).

Nonsuit.

SICKLEMORE v. THISTLETON

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Bayley and Holroyd, JJ.), January 23, 1817]

[Reported 6 M. & S. 9; 105 E.R. 1146]

B *Guarantee—Surety—Liability—Notice of default of principal debtor—Covenant by surety to "pay on demand" if debtor defaulted.*

The plaintiff demised to J.T. for seven years a messuage and farm at a yearly rent payable quarterly, and J.T. covenanted to pay the rent at the days and in the manner therein mentioned and also to pay interest in case the rent should be behind three quarters. The defendant covenanted that J.T. would at all times during the term pay to the plaintiff the rent at the respective days and also interest and would duly observe all the covenants in the lease, and that if J.T. neglected to pay the rent for forty days he (the defendant) would pay the sum due on demand.

Held: the defendant having covenanted to pay on demand, he was not chargeable until after forty days and demand made.

D *Document—Construction—Agreement to be construed as a whole—Intention of the parties to be regarded.*

Per LORD ELLENBOROUGH, C.J.: Covenants ought to be construed with due regard to the intention of the parties as it is to be collected from the whole context of the instrument, so as to make one entire and consistent construction of the whole.

E **Notes.** Considered: *Re Brown's Estate*, *Brown v. Brown*, [1893] 2 Ch. 300; *Bradford Old Bank v. Sutcliffe*, [1918] 2 K.B. 833. Referred to: *Re Colnaghi, Ex parte Marks* (1838), 3 Deac. 133; *Mackintosh v. Midland Counties Rail. Co.* (1845), 14 M. & W. 548; *Jowett v. Spencer* (1846), 15 M. & W. 662.

F As to rules of construction, instrument to be construed as a whole, see 11 HALSBURY'S LAWS (3rd Edn.) 389; and for cases see 17 DIGEST (Repl.) 269 et seq. As to extent of liability of surety, see 18 HALSBURY'S LAWS (3rd Edn.) 449 et seq.; and for cases see 26 DIGEST (Repl.) 69. As to reservation of rent, see 23 HALSBURY'S LAWS (3rd Edn.) 540; and for cases see 31 DIGEST (Repl.) 254.

Cases referred to:

G (1) *Browning v. Wright* (1799), 2 Bos. & P. 13; 126 E.R. 1128; 17 Digest (Repl.) 262, 664.

(2) *Trenchard v. Hoskins* (1624), Win. 91; 124 E.R. 76; 17 Digest (Repl.) 269, 727.

H **Rule Nisi** obtained by the defendant to arrest judgment in an action by the plaintiff, lessor, against the defendant who covenanted as surety for the lessee, for breach of covenant by the lessee for non-payment of rent, non-repair, and carrying off manure, etc.

I By a lease made between the plaintiff of the first part, James Thistleton the younger of the second part, and the defendant of the third part, the plaintiff, for the considerations therein mentioned, demised to Thistleton the younger a messuage and farm in Walpole Saint Peter's for seven years, at the yearly rent of £190, payable quarterly, and also the further yearly rent of £40, and so in proportion, for every acre ploughed contrary to the course of husbandry prescribed in the indenture. Thistleton the younger, for himself, his heirs, executors, and administrators, covenanted to pay the rent on the days and in manner therein mentioned, and also to pay interest in case the rent should be behind three quarters; and to keep the premises in tenantable repair, and not to carry off any of the produce, and to manage the farm in a husbandlike manner, etc. The defendant, for himself, his heirs, executors, and administrators, covenanted with the plaintiff, his heirs and assigns, that Thistleton the younger, his executors and administrators, should

at all times during the term well and truly pay, or cause to be paid, to the plaintiff, his heirs and assigns, the said rents, on the respective days mentioned in the indenture, and also interest; and should duly observe and perform all the covenants on his and their part to be observed and performed. The plaintiff alleged that Thistleton the younger entered, and that £237 10s. of the rent of £190 for one year and a quarter was and still is in arrear. Secondly, that three quarters of the rent of £190 were and still are unpaid, whereby Thistleton the younger became liable to pay interest; and there were other breaches assigned, as for non-repair, and for carrying off manure. The plaintiff alleged that the defendant, although often requested, had not kept the covenants. The defendant cravedoyer and denied liability.

At the trial at the Norfolk Assizes a verdict was found for the plaintiff with general damages upon the whole declaration. The defendant now moved to arrest the judgment on the ground that the breach for non-payment of rent was not well assigned, being for non-payment of rent generally by Thistleton the younger, as if the defendant's covenant were absolute in this respect; whereas it appeared onoyer, that the lease contained this clause, viz. :

"that in case Thistleton the younger should neglect to pay the rent, etc., for forty days, the defendant shall pay on demand;"

the force of which was to make the defendant only liable conditionally, that is, after a time certain, and upon request; so that this assignment, instead of being general for rent in arrear, should have been, that Thistleton the younger neglected to pay it for forty days, and the defendant was requested to pay it; for without this, he was not chargeable according to the true intent and meaning of the lease. Another objection was also taken, that here the damages being general upon the whole declaration, could not be severed, so as to be applied to such breaches as were well assigned, and, therefore, if any one breach was ill, judgment must be arrested.

Serjeant Blosset and Platt for the plaintiff, showed cause against the rule.

Topping for the defendant, supported the rule.

LORD ELLENBOROUGH, C.J.—I own that I cannot help thinking this is a qualified covenant, and that the stipulation that "if the lessee shall neglect to pay for forty days, the surety shall pay on demand," which must have been introduced for the protection of the surety, does, in reasonable construction, pervade and restrain the former covenant. According to the authority of *Browning v. Wright* (1), covenants ought to be construed with due regard to the intention of the parties as it is to be collected from the whole context of the instrument, so as to make one entire and consistent construction of the whole; and it appears to me that that would not be a consistent or just construction of this instrument, which would have the effect of making the defendant, who is only a surety, liable in the first instance, without notice, immediately upon the rent becoming due. It would, therefore, be contrary to the rule laid down in *Browning v. Wright* (1) not to give effect to the qualifying and narrowing words. This breach, therefore, is, in my opinion, ill assigned; and being so, the damages which are entire cannot stand, because of the uncertainty as to what portion of them is to be separated and applied to the several breaches on which the verdict rests, so that the court has no means of apportioning them, and can only arrest the judgment.

BAYLEY, J.—It is not possible to doubt that the latter clause, as it regards the surety, is a qualification of the former. Covenants must necessarily be construed altogether in order to attain their true meaning. The meaning of these covenants is that the defendant does not become chargeable eo instanti the rent becomes due, but only after forty days' non-payment and after demand made. If this were not so, the consequence would be that he would be subject to two actions, one on the day after the rent became due, and another after forty days and demand made. Upon the other point, as to the distinction that has been taken between entire

A damages on separate breaches and separate counts, it seems as if there ought to be none in point of law; but I shall look to the cases between this and tomorrow to ascertain if there be any. As at present advised, it seems to me that there is no distinction.

B **HOLROYD, J.**—In this case different breaches are alleged: one for non-payment of rent, another for carrying off straw from the premises. Upon these, the jury were to decide whether they were true in fact, and if they were, what damages the plaintiff had thereby sustained. It was not their province to determine whether the breaches were according to the legal construction of the lease properly alleged. The question, then, is this: whether the jury, having found a verdict on all the facts and given damages thereon, can be considered as having determined upon the legality of the causes of action over which they have no authority, and which, as C it now appears, could only be settled after a nice discussion of the rules of law which govern such actions. If, then, the question be for the court, upon the true construction of this lease, I am bound to say that, considering the two covenants together, and their object, and the consequences that would follow from giving a literal construction to one of them, I must presume the intention of the parties D to have been that the one should qualify the other. In *Trenchard v. Hoskins* (2), HOBART, C.J., said (Win. at p. 93):

“Every deed ought to be construed according to the intention of the parties, and the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence, and intent ought to be picked out of every part, and not out of one word only.”

E And I will add, in the words of that report: “I grant these are several covenants in point of fact, but not in point of obligation;” and the intent, and not the form, is what we are to look to. Here, then, the intent was that the surety was not to be liable for forty days after non-payment of the rent, nor until it was demanded of him.

Rule absolute.

BERNEY v. SEWELL

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), August 11, 1820]

[Reported 1 Jac. & W. 647; 37 E.R. 515]

Mortgage—Receiver—First mortgagee in possession—Mismanagement of estate—Mortgagee not in possession—Appointment of receiver at suit of subsequent encumbrancer—Mortgagee having legal estate.

When a first mortgagee is in possession a receiver will not be appointed against him except on his confession that he has been paid off or his refusal to accept what is due to him. Mismanagement of the estate, misapplication of the rents, and collusion with the mortgagor, are not grounds for a motion before answer to take possession from him. When the first mortgagee is not in possession a receiver may be appointed at the suit of a subsequent encumbrancer without prejudice to the first mortgagee's taking possession. A mortgagee who has the legal estate cannot have a receiver appointed.

Notes. Under the Law of Property Act, 1925, s. 101 (1) (iii) (20 HALSBURY'S STATUTES (2nd Edn.) 655) the mortgagee has a power, when the mortgage money has become due, to appoint a receiver.

Referred to: *Hele v. Bexley*, *Whitfield v. Bowyer*, *Whitfield v. Knight* (1855), 20 Beav. 127.

As to appointment of receiver on behalf of subsequent encumbrancers where prior mortgagee in possession, see 27 HALSBURY'S LAWS (3rd Edn.) 368; and for cases see 35 DIGEST (Repl.) 592 et seq.

Cases referred to :

- (1) *Quarrell v. Beckford* (1807), 13 Ves. 377; 33 E.R. 335, L.C.; 35 Digest (Repl.) 594, 2673.
- (2) *Codrington v. Parker* (1810), 16 Ves. 469; 33 E.R. 1062, L.C.; 35 Digest (Repl.) 594, 2672.
- (3) *Bryan v. Cormick* (1788), 1 Cox, Eq. Cas. 422; 29 E.R. 1231, L.C.; 35 Digest (Repl.) 592, 2638.
- (4) *Dalmer v. Dashwood* (1793), 2 Cox, Eq. Cas. 378; 30 E.R. 174; 35 Digest (Repl.) 592, 2639.

Motion by the plaintiffs for the appointment of a receiver.

The plaintiffs were mortgagees of the life interest of Mrs. C. Atkyns in certain real estates, with a power of sale. Mrs. Atkyns had appointed the defendants, J. Sewell and Blake, to be her receivers, who had accordingly been in possession for several years. Some time before the bill was filed a treaty was set on foot with the defendants, C. Sewell and Read, for the sale of the estate to them. This treaty the bill stated to have been abandoned, but C. Sewell and Read had bought in a prior mortgage, and had taken possession of the estates. The bill alleged that this mortgage, which was of small amount, had been paid off by J. Sewell and Blake out of the rents received by them, and that it had been assigned collusively for the purpose of keeping the possession from the plaintiffs; that the estates had been greatly mismanaged by the defendants, and the rents misapplied by being paid over to Mrs. Atkyns while the interest on the plaintiffs' mortgage was not kept down. The bill prayed that the priorities of the encumbrances might be ascertained, a sale of the estates, and a receiver. A motion for a receiver was now made by the plaintiffs, before answer, upon affidavits.

Wetherell, Cullen and Ching for the plaintiffs.

Horne and Sidebottom for the defendants.

LORD ELDON, L.C.—If a man has a legal mortgage, he cannot have a receiver appointed; he has nothing to do but to take possession. If he has only an equitable mortgage, that is, if there is a prior mortgagee, then, if the prior mortgagee is not in

A possession, the other may have a receiver, without prejudice to his taking possession; but if he is in possession, you cannot come here for a receiver; you must redeem him, and then, in taking the accounts, he will not be allowed any sums that he may have paid over to the mortgagor, after notice of the subsequent encumbrance. If you recollect, in *Quarrell v. Beckford* (1)* I went to the very utmost. I said then, that if Mr. Beckford [the mortgagee in possession] would swear that there was six-
B pence due to him, I would not take away the possession from him. If there is anything due, I cannot substitute another security for that which the mortgagee has contracted for. See also *Codrington v. Parker* (2). I know no case where the court has appointed a receiver against a mortgagee in possession, unless the parties making the application will pay him off, and pay him off according to his demand, as he states it himself. I cannot appoint the receiver against
C these defendants, unless you can bring me their confession that they are paid off, or their refusal to accept what is due to them. The rule about receivers is very clear: a mortgagee who has the legal estate cannot have a receiver; an equitable mortgagee may, but he cannot if the first is in possession. I remember the case of *Bryan v. Cormick* (3) where it was much discussed whether the court would appoint a receiver when it appeared by the bill that there was a prior mortgagee who was
D not in possession. I have a note of that case: there LORD THURLOW, L.C., made the appointment without prejudice to the first mortgagee's taking possession; and that was afterwards followed by LORD KENYON. See also *Dalmer v. Dashwood* (4).

E It was then argued for the plaintiffs, that there might be a distinction when the mortgagee was mismanaging the estates, and misapplying the rents; and they offered, if a receiver could not be granted upon other terms, to redeem the defendants' mortgage.

F LORD ELDON, L.C.—Where a mortgagee is in possession without notice from the second mortgagee, he may pay the rents over to the mortgagor; and the second mortgagee, if he is so imprudent as not to give that notice, as he cannot have an account of the bygone rents from the mortgagor, so he cannot have it from the other mortgagee. After notice given, the first mortgagee is answerable to the second; but the court cannot try upon affidavits, whether the rents have been properly applied, and whether the estates have been properly managed. The course is to decree a redemption, charging him with all that he has received, or that without his wilful default might have been received. You might redeem the defendants, but then you must frame your bill accordingly.

Motion refused.

* Before LORD ERSKINE; it probably came before LORD ELDON afterwards.

ROWE v. WOOD

[LORD CHANCELLOR'S COURT (Earl of Eldon, L.C.), March 10, 12, 17, 20, 22, 1822]

[Reported 2 Jac. & W. 553; 37 E.R. 740]

*Partnership—Rights of partner—Equal management of partnership business—
Duty to account to other partners—Precise accounts to be kept.*

Mortgage—Mortgagee—Mortgagee in possession—Duty to account to mortgagor.

A mortgagee under certain agreements, dated in May, 1818, and March, 1819, purchased shares in the mortgagor's business, and, accordingly, became a partner in the business. On a motion by the mortgagor for the appointment of a receiver against the mortgagee who was in possession on the ground of mismanagement and exclusion of the mortgagor,

Held: (i) under the agreements the parties became partners, and one partner could not wholly exclude another partner from equal management of the partnership business; (ii) the mortgagee as such would be bound to account to the mortgagor, but as a partner he would not be so obliged, although it was the duty of each partner to keep precise accounts and to be faithful to each other; (iii) the motion for the appointment of a receiver would not be allowed.

*Mortgage—Mortgagee—Mortgagee in possession—Duty to act as prudent owner—
Mismanagement—Proof to be clear and specified.*

Per Curiam: A mortgagee in possession is not bound to expend more than a prudent owner, and, if he is to be deprived of possession on the ground of mismanagement, it has to be mismanagement of a clear and specified nature.

Notes. As to what circumstances justify the appointment of a receiver by the court in a partnership, see 28 HALSBURY'S LAWS (3rd Edn.) 555, 556; and for cases see 36 DIGEST (Repl.) 591 et seq. As to the appointment of a receiver by the court on behalf of persons other than the first mortgagee, see 27 HALSBURY'S LAWS (3rd Edn.) 368, 369; and for cases see 35 DIGEST (Repl.) 591 et seq. As to a mortgagee's liability to account for wilful default, see 27 HALSBURY'S LAWS (3rd Edn.) 287; and for cases see 35 DIGEST (Repl.) 722 et seq.

Cases referred to :

(1) *Quarrell v. Beckford* (1807), 13 Ves. 377; 33 E.R. 335, L.C.; 35 Digest (Repl.) 594, 2673.

(2) *Rose v. Nixon* (1737), cited 2 Jac. & W. at p. 555; 37 E.R. 740, L.C.; 33 Digest (Repl.) 727, 33.

Motion by the mortgagor for the appointment of a receiver of the business mentioned in the headnote, the ground of the motion being mismanagement by the mortgagee and exclusion of the mortgagor.

The plaintiff had filed a supplement bill praying that the agreements of May, 1818, and March, 1819, might be set aside, and that a receiver of the mines might be appointed.

On the motion for a receiver, the plaintiff stated that the accounts were improperly kept, and the mines injured by mismanagement; that they would be much improved, and the produce greatly increased, by judicious expenditure and working, and that he was altogether excluded from the superintendence of them. He also complained that no satisfactory account had been given in the answer of the bills issued in the name of the Crinnis Mine Co., to which he still continued liable; and insisted that the debt due to M. Wood had been discharged, which he attempted to show by affidavits contesting the correctness of several items in the accounts. On the part of the defendants, the Woods, the allegations of misconduct and mismanagement were denied. They contended that a considerable balance was due upon the mortgage account; and it was stated that the Crinnis bills had never been presented to Rowe for payment, or been brought into the mine accounts.

A Sir Robert Gifford, Horne, Shadwell and Knight for the plaintiff.
Heald, Sugden and Sidebottom for the defendants.

B EARL OF ELDON, L.C.—The great difficulty which I feel arises from not seeing upon what principle I am to interfere in the present stage of the proceedings to deprive the defendant of the possession of the mine, not only as mortgagee but as partner, and where I must assume that the agreements stated in the pleadings are binding until they have been set aside.

C Mr. Beckford [in *Quarrell v. Beckford* (1)] was mortgagee of a West Indian estate, which may be represented to be in some degree like a trade, and is, in that respect, similar to a mine. In *Rose v. Nixon* (2), before LORD HARDWICKE, in 1737 an ejectment had been brought against a person to recover certain coal mines, and a verdict was given against him. He afterwards filed a bill for an injunction and an account of the profits, and it was contended, that it was in the nature of an action for mesne profits, but LORD HARDWICKE held, that it was to be considered as a trade and that many things were to be taken into account which were not taken into account in the rent of a landed estate. Finding that the plaintiff at law had obtained the verdict unrighteously, he said, upon the principles which I have mentioned, he would decree an account of the mesne profits, and stated, among other reasons, that a mine was in the nature of a trade.

D But if the court will take jurisdiction in that way, it must take it with all the difficulties which belong to it. If a man is mortgagee of a mine, and the mortgagor comes, as he does here, to complain of mismanagement, the first thing that requires consideration is: What is a mortgagee of a mine required to do, or what omission on his part will you call mismanagement? To put a case by way of illustration, suppose a person is mortgagee of a mine which is likely to be much improved by a large expenditure. If he were owner, he might speculate for himself as much as he pleased; the advantages, whatever they might be, would be his, and, if it turned out unfortunate, he would bear the loss. But can a mortgagee be required to do that? Can he be required to risk his own fortune in speculation, and to incur hazard in an adventure which is ultimately to redound to the benefit of the mortgagor? I apprehend that he cannot, and that at the utmost he is not bound to advance more than a prudent owner. So, taking this as the case of a partnership; with respect to the head of mismanagement, I should like to hear to what expense a partner can be called on to go, if he happens to be a very large creditor of the partnership trade.

F I was the more struck with this, because I felt great difficulty in a case lately before the court, in which Miss Vane was tenant for life of certain collieries in the county of Durham. When it came to be considered by the Master what part of the property was to be expended in coal adventures, considerable difficulty occurred. She was tenant for life of the mines, and was, therefore, bound to work them with due care and attention to the interests of those who were to come after, but what was due care and attention on her part and on that of the court and what was risk and speculation was very difficult to settle. There must be clear mismanagement, therefore, of a particular and specified nature, if the case is to be put upon that.

H With respect to the circumstance of the defendant being both mortgagee and partner, it is one which, if the facts were clear, deserves a good deal of consideration. As a mortgagee he would have certain rights, and if he filled that character only, would be bound to account with the mortgagor in a particular and special manner, and it is no inconsiderable hardship on him that he must account not only for what he has made, but for what without his wilful default he might have made. As a partner, he would not be obliged so to account, and a question may arise hereafter whether the account should be directed upon the principle of partnership only, or whether a decree can be framed, partly upon the principle of partnership, and partly, if I may so express myself, upon that of mortgageeship. If a mortgagee chooses to become a partner, the management must be considered with reference to the benefit of the other partner, as well as to the rights of mortgagor and mortgagee;

and it will be difficult to make out, that the mortgagee can wholly exclude his partner from interference in the partnership. It strikes me, however, particularly with reference to the agreements of 1818 and 1819, that this is not precisely the kind of motion which ought, at least in the first instance, to have been made. I cannot put these instruments entirely out of consideration, because a party says that he will not be bound by them. A

March 20, 1822. Considering the question as between mortgagor and mortgagee, I do not know of any instance where a mortgagee in possession has said by answer that anything was due to him, that the court has tried upon affidavits against the answer, whether that was true or not. In *Quarrell v. Beckford* (1)* I said that if he would swear sixpence was due, I would not appoint a receiver. It is impossible for the court to go on, if it is thus to try the question of the account between mortgagor and mortgagee. B

March 22, 1822. The original connection between these parties was that of mortgagor and mortgagee; and if a receiver or manager is to be appointed, in other words, if the possession is to be taken from the mortgagee, it must be on such grounds as the court acts upon in such cases, and if it is not, therefore, clearly shown, that the mortgagee is fully paid, and that almost by his own admission, this court will not deprive him of the possession. *Quarrell v. Beckford* (1) is the utmost length to which the court has ever gone; and in that case the mortgagee would not state that sixpence was due to him. It was, however, contended with reference to this, that, attending to the observations made on four particular items mentioned in the original bill and the answer sworn in 1817, the mortgage must be understood to be paid. C

It struck me that it was quite impossible to look at this case in that point of view, because the instruments of 1818 and 1819 must be taken to be binding, until the court has got to that stage of the cause in which it can pronounce, if it should be authorised so to do, that they ought not to stand; and in the former deed it was contemplated that a balance was due to Wood. If those agreements stand, although it may be very questionable, whether some of the items in the account will be allowed when the cause comes to a hearing, I cannot say that nothing is due, and the court must get to that extent before it can appoint a receiver. D

But I do not look at this case as one simply of mortgagor and mortgagee: under the agreements for the purchase of certain shares in the mine, which, although Wood was desirous of getting rid of, must stand until set aside by decree, the parties became partners; subject to Wood's demand on Rowe's share for the balance of his account. If they had been merely partners, and no rights had been created by the relation of debtor and creditor, the case would have been very simple; one partner cannot exclude another from an equal management of the concern; and it is the duty of each to keep precise accounts, and to have them always ready and, in short, to keep good faith towards each other; but whatever might have been their rights under the previous instruments, I am bound to look at the agreements of 1818 and 1819, and to consider them as valid, notwithstanding the allegations in the supplementary bill, until they are got rid of by decree. If so the rules as to partners cannot regulate all their rights, because under the last instrument they have stipulated that, whatever might be their original obligations, they will deal on the terms contained in those agreements. E

It is said that Rowe quarrels with these agreements, and is not entitled, therefore, to any benefit from them; but I think that the defendants are bound, without prejudice to the questions in the cause, to let him have the benefit of them, and, therefore, whatever may be the meaning of that part of the agreement which provides that he is to have the control of the working part of the mine, he has a right to have it until the equities are arranged. F

* Before LORD ERSKINE; it probably came before LORD ELDON afterwards. G

The circumstances respecting the blank acceptances, which were sent to Rowe, have been alluded to, and certainly the answer of Wood, that he can give no account of them, is very unsatisfactory. But I think it is now too late to complain of that transaction, though I have no hesitation in saying, that if it were now to take place, and this sort of answer only were given, it would be such conduct on the part of a partner as this court would not allow. At present I do not see my way to appoint a receiver; but I think that Rowe, subject to the equities which may be ultimately declared between the parties, has a clear right to insist that regular accounts shall be kept of all receipts, payments, transactions, and so on, relative to the mine, and to have constant access for the purpose of inspecting the accounts; and also, that, subject to those equities, he has a clear right to control the working of the mines; and if he is impeded in the exercise of any of these rights, let him come to the court again: the application, after the other parties have been apprised of what the court expects them to do, will be differently treated.

LEAKE AND OTHERS v. ROBINSON AND OTHERS

[ROLLS COURT (Sir William Grant, M.R.), February 27, 1817]

[Reported 2 Mer. 363; 35 E.R. 979]

Will—Contingent gift—Gift contained in direction to pay—Payment on attainment of specified age—Vesting at that age—Provision for advancement of beneficiary—Gift to class—Avoidance as too remote.

A testator directed his trustees to accumulate surplus interest and on his grandson's death to pay it with the capital to the grandson's children when they should have attained the age of twenty-five years.

Held: (i) the gift, being wholly contained in the direction to pay, was contingent and vested only on attainment of the specified age; (ii) a provision in the will for the maintenance and advancement of the grandson was a distinct gift and did not constitute an antecedent gift of which it could have been the testator's intention merely to postpone the enjoyment; (iii) the gift being to a class, the testator's general gift to the class could not be split into portions some of which individuals who were capable could take, but the limitation to the class was void for remoteness as to every member of the class.

Will—Residue—Residuary clause—Construction to prevent intestacy.

Per SIR WILLIAM GRANT, M.R.: There is certainly a strong disposition in the court to construe a residuary clause in a will so as to prevent an intestacy with regard to any part of the testator's property.

Notes. Distinguished: *Jones v. Mackilwain* (1826), 1 Russ. 220. Followed: *Vawdry v. Geddes* (1830), 1 Russ. & M. 203. Considered: *Kevern v. Williams* (1832), 5 Sim. 171. Distinguished: *Doe d. Dolley v. Ward* (1839), 9 Ad. & El. 582. Applied: *Watson v. Hayes* (1839), 5 My. & Cr. 125. Followed: *Re Bartholomew* (1849), 1 Mac. & G. 354. Distinguished: *Barker v. Barker* (1852), 5 De G. & Sm. 753. Applied: *Walker v. Mower* (1852), 16 Beav. 365; *Stead v. Platt* (1853), 18 Beav. 50. Considered: *Hobbs v. Parsons* (1854), 32 L.T.O.S. 47. Applied: *Laxton v. Eedle* (1854), 19 Beav. 321; *Re Hart's Trusts* (1858), 32 L.T.O.S. 98; *Thomas v. Wilberforce* (1862), 31 Beav. 299. Considered: *Re Bulley* (1865), 13 L.T. 264. Applied: *Locke v. Lamb* (1867), L.R. 4 Eq. 372. Referred to: *Marshall v. Holloway*, post p. 395; *Bull v. Pritchard* (1826), 1 Russ. 213; *Bland v. Williams* (1834), 3 L.J.Ch. 218; *Porter v. Fox* (1834), 6 Sim. 485; *Tollemache v. Coventry* (1834), 8 Bli. 547; *Comport v. Austen* (1841), 12 Sim. 218; *Davies v. Fisher* (1842), 5 Beav. 201; *Vanderplank v. King* (1843), 3 Hare, 1; *Davies v. Harris* (1844), 1 Coll. 416; *Packham v. Gregory* (1845), 4 Hare, 396; *Evans v. Jones* (1845), 2 Coll. 516;

Browne v. Houghton (1846), 10 Jur. 747; *Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; *Stone v. Harrison* (1846), 2 Coll. 715; *Smith v. Barneby* (1847), 16 L.J.Ch. 466; *Williams v. Teale* (1846), 6 Hare, 239; *Boughton v. Boughton*, *Boughton v. James* (1848), 1 H.L. Cas. 406; *Blagrove v. Hancock* (1848), 16 Sim. 371; *Goring v. Howard* (1848), 16 Sim. 395; *Lassence v. Tierney*, [1843-60] All E.R. Rep. 47; *Greenwood v. Roberts* (1851), 15 Beav. 92; *James v. Wynford* (1852), 1 Sm. & G. 40; *Monypenny v. Dering*, [1843-60] All E.R. Rep. 1098; *Peard v. Kekewich* (1852), 15 Beav. 166; *Cattlin v. Brown* (1853), 11 Hare, 372; *East v. Twyford* (1853), 4 H.L. Cas. 517; *Gosling v. Townsend* (1853), 22 L.T.O.S. 125; *Storrs v. Benbow* (1853), 3 De G.M. & G. 390; *Cowley v. Smith* (1854), 2 W.R. 327; *Reynolds v. Kortright* (1854), 18 Beav. 417; *Courtier v. Oram* (1855), 21 Beav. 91; *Hodgson v. Smithson* (1856), 21 Beav. 354; *Read v. Gooding* (1856), 21 Beav. 478; *Seaman v. Wood* (1856), 22 Beav. 591; *Baker v. Pugh* (1857), 28 L.T.O.S. 317; *Re Sanderson's Trust* (1857), 3 K. & J. 497; *Bernard v. Minshull* (1859), John. 276; *Evers v. Challis* (1859), 7 H.L. Cas. 532; *Sonatum Bysack v. Sreemutty Juggutsoondree Dossee* (1859), 8 Moo. Ind. App. 66; *M'Lachlan v. Taitt* (1860), 28 Beav. 407; *Wilkinson v. Duncan* (1861), 30 Beav. 111; *Re Grove's Trusts* (1862), 3 Giff. 575; *Thomas v. Wilberforce* (1862), 31 Beav. 299; *West v. West* (1863), 4 Giff. 198; *Holmes v. Prescott* (1864), 3 New Rep. 559; *Knapping v. Tomlinson* (1864), 34 L.J.Ch. 3; *Christie v. Gosling* (1866), L.R. 1 H.L. 279; *Merry v. Hill* (1869), L.R. 8 Eq. 619; *Smith v. Smith* (1870), 18 W.R. 742; *Re Moseley's Trusts* (1871), L.R. 11 Eq. 499; *Spencer v. Wilson* (1873), L.R. 16 Eq. 501; *Hale v. Hale* (1876), 3 Ch.D. 643; *Bolding v. Strugnell*, *Re Holt* (1876), 24 W.R. 339; *Picken v. Matthews* (1878), 10 Ch.D. 264; *Re Grimshaw's Trusts* (1879), 11 Ch.D. 406; *Re Bunn*, *Isaacson v. Webster* (1880), 16 Ch.D. 47; *Re Finch*, *Abbyss v. Burney* (1880), 49 L.J.Ch. 665; *Pearks v. Moseley* (1880), 5 App. Cas. 714; *Watson v. Young* (1885), 28 Ch.D. 436; *Re Bevan's Trusts*, [1886-90] All E.R. Rep. 706; *Re Martin*, *Tuke v. Gilbert* (1887), 57 L.T. 471; *Re Harvey's Estate*, *Harvey v. Gillow*, [1893] 1 Ch. 567; *Re Wintle*, *Tucker v. Wintle*, [1896] 2 Ch. 711; *Hancock v. Watson*, [1900-3] All E.R. Rep. 87; *Re Bowlby*, *Bowlby v. Bowlby*, [1904] 2 Ch. 685; *Bhagabati Barmanya v. Kali Charan Singh* (1911), 27 T.L.R. 267.

As to vesting contingent gifts, see 39 HALSBURY'S LAWS (3rd Edn.) 1119 et seq.; and for cases see 44 DIGEST 1031 et seq.

Cases referred to :

- (1) *Baldwin v. Karver* (1775), 1 Cowp. 309; 2 Doug. K.B. 502, n.; 98 E.R. 1102; 44 Digest 779, 6367.
- (2) *Walker v. Shore* (1808), 15 Ves. 122; 33 E.R. 701, L.C.; 44 Digest 779, 6370.
- (3) *Longhead v. Phelps* (1770), 2 Wm. Bl. 704; 96 E.R. 414; 37 Digest (Repl.) 106, 389.
- (4) *Proctor v. Bishop of Bath and Wells* (1794), 2 Hy. Bl. 358; 126 E.R. 594; 37 Digest (Repl.) 109, 407.
- (5) *Cambridge v. Rous* (1802), 8 Ves. 12; 32 E.R. 254; 44 Digest 1161, 10054.
- (6) *Routledge v. Dorril* (1794), 2 Ves. 357; 30 E.R. 671; 37 Digest (Repl.) 133, 599.
- (7) *Jee v. Audley* (1787), 1 Cox, Eq. Cas. 324; 29 E.R. 1186; 37 Digest (Repl.) 57, 15.
- (8) *Crompe v. Barrow* (1799), 4 Ves. 681; 31 E.R. 351; 37 Digest (Repl.) 106, 393.
- (9) *Blandford v. Thackerell* (1793), 2 Ves. 238; 4 Bro. C.C. 394; 30 E.R. 612, L.C.; 37 Digest (Repl.) 66, 81.
- (10) *Thellusson v. Woodford* (1799), 4 Ves. 227; 31 E.R. 117, L.C.; affirmed (1805), 1 Bos. & P.N.R. 357; 11 Ves. 112, H.L.; 44 Digest 540, 3571.
- (11) *Wilkinson v. Adam* (1813), 1 Ves. & B. 422; 35 E.R. 163, L.C.; affirmed (1823), 12 Price, 470; 147 E.R. 780, H.L.; 44 Digest 807, 6607.

- A (12) *Mogg v. Mogg* (1815), ante p. 314; 1 Mer. 654; 35 E.R. 811; 44 Digest 777, 6350.
- (13) *Beachcroft v. Broome* (1791), 4 Term Rep. 441; 100 E.R. 1008; 44 Digest 1259, 10873.
- (14) *Hockley v. Mawbey* (1790), 3 Bro. C.C. 82; 1 Ves. 143; 29 E.R. 420, L.C.; 44 Digest 1137, 9638.
- B (15) *Beard v. Westcott* (1813), 5 Taunt. 393; 128 E.R. 741; 44 Digest 1271, 10992.
- (16) *Northey v. Burbage* (1716), Gilb. Ch. 136; Prec. Ch. 470; 25 E.R. 96; sub nom. *Northey v. Strange*, 1 P. Wms. 340; 44 Digest 496, 3163.
- (17) *Humberston v. Humberston* (1716), 1 P. Wms. 332; 2 Vern. 737; 24 E.R. 412; sub nom. *Humberston v. Humberston*, Prec. Ch. 455; Gilb. Ch. 128, L.C.; 44 Digest 553, 3708.
- C (18) *Chapman v. Brown* (1767), 3 Bro. Parl. Cas. 269; 1 E.R. 1312; sub nom. *Chapman d. Oliver v. Brown*, 3 Burr. 1626, H.L.; 44 Digest 931, 7874.
- (19) *Barnes v. Allen* (1782), 1 Bro. C.C. 181; 28 E.R. 1069, L.C.; 44 Digest 1065, 9180.
- D (20) *Hanson v. Graham* (1801), 6 Ves. 239; 31 E.R. 1030; 44 Digest 1087, 9382.
- (21) *Kirkpatrick v. Kilpatrick* (1807), 13 Ves. 476; 33 E.R. 373, L.C.; 44 Digest 1141, 9867.
- (22) *Ellison v. Airzy* (1748), 1 Ves. Sen. 111; 27 E.R. 924, L.C.; 44 Digest 1166, 10100.
- (23) *Branstrom v. Wilkinson* (1802), 7 Ves. 421; 32 E.R. 171; 44 Digest 1101, 9503.
- E (24) *Booth v. Booth* (1799), 4 Ves. 399; 31 E.R. 203; 44 Digest 1087, 9381.
- (25) *Montgomerie v. Woodley* (1800), 5 Ves. 522; 31 E.R. 714, L.C.; 44 Digest 567, 3850.
- (26) *Andrews v. Partington* (1791), 3 Bro. C.C. 401; 29 E.R. 610, L.C.; 44 Digest 768, 6266.
- F (27) *May v. Wood* (1792), 3 Bro. C.C. 471; 29 E.R. 649; 44 Digest 1061, 9138.
- (28) *Batsford v. Kebbll* (1797), 3 Ves. 363; 30 E.R. 1055, L.C.; 44 Digest 1087, 9380.
- (29) *Pulsford v. Hunter* (1792), 3 Bro. C.C. 416; 29 E.R. 618, L.C.; 44 Digest 1091, 9416.
- (30) *Roe d. James v. Avis* (1792), 4 Term Rep. 605; 100 E.R. 1200; 44 Digest 936, 7918.
- G (31) *Church v. Munday* (1806), 12 Ves. 426; reversed (1808), 15 Ves. 396; 33 E.R. 804, L.C.; 44 Digest 659, 4984.
- (32) *Welby v. Welby* (1813), 2 Ves. & B. 187; 35 E.R. 290; 44 Digest 683, 5242.
- (33) *Pickering v. Lord Stamford* (1797), 3 Ves. 492; 30 E.R. 1121, L.C.; previous proceedings (1793), 4 Bro. C.C. 214; 2 Ves. 272; (1795), 2 Ves. 581; 44 Digest 183, 114.
- H

Bill to determine questions arising in the administration of trusts under a will.

By his will, dated June 17, 1790, John Milward Rowe gave to the plaintiffs (whom he appointed executor) all his 3 per cent. and 4 per cent. stock, upon trust, in the first place, to pay to his wife, Sukey Rowe, during her life two several annuities of £245 8s., and £168 out of the dividends of the 4 per cents. (which with certain other provisions, were declared to be in bar of dower and thirds), and, in the next place, to pay and apply an annuity of £54 12s. (thereby given) towards the maintenance, education, or advancement of his grandson, William Rowe Robinson, until he should attain twenty-five, and from and after his attainment of that age to pay him the said annuity during his life. After his decease the testator bequeathed the principal sum of £1,820 (part of his 3 per cent. annuities) or so much thereof as should produce the annual sum of £54 12s. as after mentioned, and after the decease of his wife he directed that his executors should pay and

apply the annual sum of £145 (part of the annuity of £245 8s.) and the annual sum of £40 (part of the annuity of £168), towards the maintenance of William Rowe Robinson till twenty-five, and afterwards for his life. After his decease the testator bequeathed the principal sums of £4,846 16s. 8d. 3 per cents., and £1,000 4 per cents., as after mentioned.

The testator then directed the plaintiffs to apply the dividends of £3,333 6s. 8d., 3 per cents., for the maintenance and advancement of his grandson, Charles Mitford, until twenty-five, and upon his attaining that age, to transfer to him the said principal sum of £3,333 6s. 8d., 3 per cents. He then gave to the plaintiffs £1,000 India stock upon trust, to apply the dividends, etc., thereof, and also the annual sum of £100 (part of the dividends, etc., of his 3 per cent. stock) or so much as they should think fit, towards the maintenance, education, and advancement of his said grandson, William Rowe Robinson, until twenty-five, and upon his attaining that age he gave to him the dividends of the said stock during his life. After his decease, he bequeathed the said £1,000 East India stock, and the sum of £3,333 6s. 8d., 3 per cents. (the dividends whereof then produced £100 per annum) as after mentioned.

The testator devised and bequeathed to the plaintiffs, their heirs, etc., all his real estates at Westham and Pevensy of which he was seised in fee or as mortgagee in possession, or otherwise, the principal sums charged thereon, and the ground rents issuing out of his messuages in Hedge Lane upon trust to apply the ground rents, the rents and profits of his estates, and the interest of the mortgage moneys, or such parts as they should judge proper, towards the maintenance, education, or advancement of his said grandson, William Rowe Robinson, until twenty-five, and after his attaining that age to pay to, or permit him to have and receive the same during his life, and after his death (in case he should leave any lawful issue) to pay and apply the said several annual sums of £54 12s., £145 8s., £100 and £40, and the dividends of the £1,000 India stock, the rents and profits of the estates at Westham and Pevensy, the interest of the mortgage moneys, and the ground rents, or such part thereof as they (the plaintiffs) should think proper, unto, and for the maintenance, education, and advancement of all and every child and children of the said William Rowe Robinson, lawfully begotten, until (being sons) they should respectively attain twenty-five, or (being daughters) should attain such age, or marry with the consent of parents or guardians, and then to pay, transfer, and assign an equal proportion of the several principal sums of £1,820, £4,846 16s. 8d., and £3,333 6s. 8d., 3 per cents., £1,000 4 per cents., and £1,000 East India stock, the said ground rents and estates at Westham and Pevensy, the mortgage moneys, and all the interest, dividends, or rents due or payable in respect of the same

"to such child or children, being a son or sons, who shall attain such age or ages of twenty-five as aforesaid, and to such child or children, being a daughter or daughters who shall attain such age or ages, or be married as aforesaid, his, her, or their heirs, executors, or administrators; if only one such child, or, having been more, if all but one should die, before their shares should become payable as aforesaid, then the whole to such only, or surviving child."

The testator directed that

"in case the said William Rowe Robinson shall happen to die without leaving issue living at the time of his decease, or leaving such, they shall all die before any of them shall attain twenty-five, if sons, and if daughters, before they shall attain such age, or be married as aforesaid"

then the plaintiffs should pay, apply, and transfer the principal sums of stock, ground rents, estates and mortgage moneys

"unto and among all any every the brothers and sisters of the said William

A Rowe Robinson, share and share alike, upon his, her, or their attaining twenty-five, if a brother or brothers, and if a sister or sisters, at such age or marriage, with such consent as aforesaid."

B He directed the plaintiffs to invest the surplus or savings to arise out of the annuities, dividends, ground rents, and interest, until his grandson, William Rowe Robinson, or his issue (if any) or his brothers and sisters who should become entitled as aforesaid, should attain twenty-five or be married as aforesaid, and pay and apply the same for the benefit of the person or persons entitled, upon the attainment of such age or marriage respectively.

C The testator then (after making certain provisions out of the remainder of his stock before bequeathed to the plaintiffs for others of his grandchildren) gave to the plaintiffs all sums of money then due to him on mortgage (except those secured on the estates at Westham and Pevensey) upon trust to pay one moiety of the interest to his daughter Mrs. Robinson, for her life, and after her death to her husband, George Robinson, for his life, and after the death of the survivor in and towards the maintenance and advancement of William Rowe Robinson, till twenty-five, and after, etc., to William Rowe Robinson for life, and after his decease, towards the maintenance and advancement of all and every his child and children till twenty-five or marriage as aforesaid, and upon trust to pay or assign an equal proportion of such moiety of the mortgage moneys to such child or children respectively, and in case the said William Rowe Robinson should die without leaving issue, or all such issue should die before twenty-five or marriage as aforesaid, then upon trust to pay and divide the same, unto and among all and every the brothers and sisters of the said William Rowe Robinson, share and share alike, at their respective ages of twenty-five or marriage as aforesaid, with interest in the meantime for such brothers and sisters as before directed with respect to the issue (if any) of the said William Rowe Robinson. He directed the plaintiffs to pay the other moiety of the interest due to him on mortgage to his daughter Frances Dippery Mitford and her husband William Mitford for their lives and the life of the survivor, and after the decease of the survivor of them to pay and dispose of the interest and principal moneys to and among their children in the same manner as he had before directed, with respect to the issue (if any) of the said William Rowe Robinson.

G The testator then gave to the plaintiffs, their heirs, executors, etc., all the residue and remainder of his real and personal estate and effects not before disposed of, upon trust to sell (in case his daughters should think proper and so direct) and lay out the produce in the purchase of real estates or government securities, and out of such real and personal estate till disposed of, and the produce, etc., to pay one moiety of the rents, interest, and dividends to his daughter, Mrs. Robinson for her life, and after her death to her husband for his life, and after the death of the survivor to pay and apply the said moiety or so much thereof as they should think fit, unto or for the maintenance, education, and advancement of the said child and children of the said Elizabeth Grace Robinson by the said George Robinson (other than and except the said William Rowe Robinson) until they should attain twenty-five or marry as aforesaid, in equal shares and proportions, and after the attainment of such age or marriage to pay and transfer all such moiety of the residue or produce thereof to and among such child or children in equal shares and proportions, and with regard to the remaining moiety, he directed that his daughter Mrs. Mitford and her husband, and the child or children (if any) of them and their issue, should have and enjoy the same in the same manner as before expressed with regard to his daughter Mrs. Robinson and her family.

I The testator directed that in case of the death of any of his grandchildren before attaining twenty-five or marriage, the shares of them so dying should go to the survivors of their respective brothers and sisters, and in case of the death of either of his two daughters without leaving issue by her husband living at

her decease, or any child or children of such issue, then and in such case, the share or proportion of such part of his estate or effects given by him, or intended for such issue or the child or children of such issue, should go to and be divided among the issue of his surviving daughter by her then husband, or the child or children of such issue who might be dead, equally, share and share alike, and in case both his said daughters should die without issue living at their respective deaths by their then respective husbands or any child or children of such issue who might be deceased, then he directed that each of his daughters (subject to the life interest of their then husbands) might (notwithstanding their coverture) give and dispose of her share and proportion of his estate and effects to such person or persons as she might think proper, either by deed or will.

On June 17, 1790, when the testator made this will, his grandson William Rowe Robinson had one brother and three sisters living. Between the date of the will and the testator's death, he had another sister born. On Feb. 9, 1792, the testator died. Between the death of the testator and the death of William Rowe Robinson, Robinson had two other brothers born. On Oct. 10, 1800, Robinson died, having attained twenty-five without issue, unmarried and intestate. Another sister was born after his death. At the time of the testator's will, and of his death, Mr. and Mrs. Mitford had five children, one of whom was since dead, leaving issue, and after the testator's death, they had another child. Sukey Rowe, the testator's widow, survived him, and died in 1804, having first made her will, and appointed Mr. Mitford and another executors thereof. Mrs. Mitford was also dead, and her husband had taken out administration.

Under these circumstances the question for the decision of the court was whether, in the event which happened of the death of William Rowe Robinson without issue, the limitation to his brothers and sisters to take effect on their attainment of the age of twenty-five, or marriage as aforesaid, was a good and effectual limitation, or was void as being too remote. This principally depended on the determination of two other questions, viz., first, what classes of persons were those intended by the testator to take in the event of William Rowe Robinson dying without issue or without issue living to attain the age of twenty-five under the description of "all and every the brothers and sisters of the said William Rowe Robinson," because, if that limitation were held to extend to all the brothers and sisters who might be born, and (in the event which happened) actually were born, after the death of the testator, and the period of vesting was postponed by the will till their attainment of the age of twenty-five it was obvious that more than twenty-one years might pass after the death of the testator before the arrival of the limited time. This, consequently, gave rise to the second question—whether the attainment of twenty-five was in fact the period assigned for the vesting of the several shares or was to be taken only as the time fixed for the payment of the several shares which had already vested at some antecedent period.

Sir Arthur Piggott, Horne and Sugden for the defendant William Mitford (claiming on behalf of himself and his children all such benefits as were intended by the will, and also as administrator of his deceased wife one-third of the undisposed residue, and claiming also as executor of Sukey Rowe deceased): The testator has by this will made three distinct gifts of different parts of his property—(i) of his real estates and the bulk of his personal property; (ii) of the mortgages; (iii) of the residue previously undisposed of, as not falling within either of the former descriptions. With regard to the first, the disposition is upon trust to apply such parts of the rents and profits, etc., as the trustees might think proper for the maintenance of his grandson William Rowe Robinson till twenty-five, and "after his attaining that age," to pay the whole annual produce to, or permit him to receive the same, during his life, giving him thereby a vested interest upon his attaining that age, and no sooner. Then follow the provisions respecting the children of William Rowe Robinson expressed in such a manner as unquestionably to include all the

children that William Rowe Robinson might at any time have, and lastly the ultimate limitation, in the event of his having no child or children who should live to attain twenty-five, in favour of the brothers and sisters which is expressed in precisely the same general terms as the former

"unto and among all and every the brothers and sisters of the said William Rowe Robinson share and share alike, on attaining twenty-five . . ."

If the first limitation be held (as it must be admitted) to include all the children, there can be no reason why the second, which is expressed in the same terms, should not be taken to embrace all the brothers and sisters. As to this point, *Baldwin v. Karver* (1), which has been considered as a leading authority ever since its decision, is conclusive to show that all, whenever born, must come within the meaning of such a devise, and in *Walker v. Shore* (2), the Lord Chancellor, following the same rule, observes (15 Ves. at p. 125) that, although in that case

"the testator probably meant children living at his own death, yet upon the authorities the will must be construed to mean such as should come into existence before the period of distribution; a rule which is not to be shaken unless a time of distribution is expressly provided, excluding all who may afterwards come into existence."

It is not necessary in order to the operation of this rule, to show that it was the intention of the testator to comprehend all the children. It is enough that the law presumes such an intention, and, if so, then in the present case, the gift over is clearly void as being too remote. It is not the case of separate and distinct gifts to individuals, some of whom are capable of benefiting by it and others not. It is a single gift to a class of persons, some of whom are incapable of taking by the rule of law, and the consequence is that the gift must fail altogether. In *Longhead v. Phelps* (3), there was a legal term the trusts of which were to take effect on either of two contingencies, one of which was within the allowed limits, and it was held to be good in that event which had happened. But that is clearly distinguishable from the present case.

There is no authority enabling the court either to cut down the limitation of the period for vesting, or to confine the objects. In *Proctor v. Bishop of Bath and Wells* (4), the first devise being void as depending on a contingency too remote, the latter could not be let in to take effect, even though, in the event which happened, it would have vested immediately. In *Cambridge v. Rous* (5), which was a bequest to A. for life, and after her decease to her children at the age of twenty-seven respectively, and in the event of her not leaving any children, or of the death of all under twenty-seven, it was contended that the court had power to exclude those who were born beyond the limits which amount to a legal perpetuity; but it was held on the contrary that the limitation over was altogether too remote. In the present case, it cannot be said that it would be giving effect to the testator's intention to introduce a distinction which would exclude, perhaps, the majority of the intended objects of his bounty. The cases go far to show that the court has no authority, in such circumstances, to make a will for the testator: *Routledge v. Dorril* (6); *Jee v. Audley* (7).

The second gift, which attaches on the moneys due upon mortgage, falls entirely within the same doctrine as that already discussed. It is a gift to the parents during their lives, and afterwards to their children, in words which must be taken to include all the children; and there is no limitation over. This is consequently void, as well as the preceding.

With respect to the gift of the residue, it is clear that the property comprised in the two former bequests is not included in it, the testator having expressly excepted out of that gift all that was "before specifically disposed of;" and as he, at that time, supposed that he had exhausted the subjects of his two former bequests, it follows that it was not his intention to pass them by the residuary clause.

Sir Samuel Romilly and *Preston* (for one of the children of *Mrs. Robinson* born before the date of the will, and another who was born after the date of the will, but in the testator's lifetime: With regard to the two first bequests, the validity of which is the subject of dispute in this case, the limitations over to the brothers and sisters of *William Rowe Robinson* are good in the event which has happened of *William Rowe Robinson's* death without issue to the extent of such of the brothers and sisters as by law were capable of taking—i.e., all who were born in the testator's lifetime: *Baldwin v. Karver* (1). We admit that the gift to the children of *William Rowe Robinson* is void as being too remote, and that the limitation over would consequently be void, according to the doctrine of *Proctor v. Bishop of Bath and Wells* (4), if it were made to depend on the single contingency of those children not living to attain twenty-five. But where there are two contingencies, on either of which the limitation is to take effect and one of them is within the allowed limits, viz., the death of *William Rowe Robinson* without leaving issue living at his decease, that falls exactly within the principle of *Longhead v. Phelps* (3), and the limitation is good on the happening of the alternate event: *Crompe v. Barrow* (8). Suppose the persons intended to take upon that event were some of them capable and others incapable of taking according to the rule of law, the consequence would be, not that the limitation would fail altogether, because the intention that all should take cannot be carried strictly into effect, but that those should take who by law are capable: *Blandford v. Thackerell* (9); *Thellusson v. Woodford* (10), where the principle is much discussed, particularly in *LAWRENCE, J.'s* judgment; *Wilkinson v. Adam* (11); *Mogg v. Mogg* (12). The only case adduced against this view of the subject is *Routledge v. Dorril* (6), the case of a gift by virtue of a power of appointment in which the appointment was held to be void in deference to a settled rule that whoever will take under the execution of a power must be capable of taking under the deed creating the power, and that every appointment under a power must be construed with reference to the date of that instrument, whereas a will takes effect with reference, not to the time of its execution, but to the time of the testator's death. No case goes the length of deciding that persons who are capable of taking under a will shall not take, merely because they are joined in the bequest with others who are incapable. With regard to those of the brothers and sisters of *William Rowe Robinson* who were not in esse at the time of the death of the testator the rule of law is too strong for them, and, consequently, they, and they only, must be held to be excluded.

Hart, Bell and *Shadwell* (for children born before the date of the will): The gift over, in the event which has happened, is good: *Beachcroft v. Broome* (13); *Hockley v. Mawbey* (14); *Beard v. Westcott* (15) (*GILBERT ON USES*, p. 270); and the persons entitled under it are those only who were in esse at the date of the will: *Northey v. Strange* (16). If the court cannot give complete effect to the bequest as the testator intended, the doctrine of *cy-près* will apply: *Humberston v. Humberston* (17); *Chapman v. Brown* (18). As to the period of vesting, a contingent interest may vest in right though it does not in possession: *Barnes v. Allen* (19); *Hanson v. Graham* (20); *Kirkpatrick v. Kilpatrick* (21). Here the testator has given a legal estate to his trustees whom he has directed to pay to the objects specified, and thus the gift to those objects is incorporated with the time of payment. The fund is a mixed fund, consisting of real and personal. If it were a direct gift at law, those only would take who are capable, to the exclusion of those who are not capable, and *equitas sequitur legem*. *SIR EDWARD COKE* (*CO. LITT.*, fo. 100) recognises the principle laid down in the *YEAR BOOK*, 17 *Edw. 3.* fo. 29, pl. 30, and the case in *LITT. s. 352*, establishes the doctrine of *cy-près* as applicable to cases of this description—*ut res magis valeat quam pereat*. Suppose that, on the death of *William Rowe Robinson*, one of the children had attained twenty-five and had filed a bill, how could the court, upon the principle in *Ellison v. Airey* (22), have refused to give him a share? If the testator had directed

payment to be made first to children in esse and afterwards to unborn children, the court would have adopted the one and rejected the other class; then why not in the case now before the court?

Horne (for the children of Mr. and Mrs. Mitford): The only material question, as it respects our interest, is that which is raised on the residuary clause. The testator gives to trustees through whom and by way of trust only all the limitations to the children are to operate. This was considered as a circumstance of great importance in *Branstrom v. Wilkinson* (23), where Your Honour observed, as to the appointment of a trustee for the children: "How could there be a trustee for them of nothing?" For whom can these persons be trustees, if not for those who take a vested interest?

Pepys (for the children of Mr. and Mrs. Robinson born after the death of the testator) contended, in like manner, for the legacies having vested in interest, although not in possession; and cited *Booth v. Booth* (24), and *Montgomerie v. Woodley* (25).

Feb. 27, 1817. **SIR WILLIAM GRANT, M.R.**—The first point to be determined in this case is: Who are included in the description of brothers and sisters of William Rowe Robinson, and that of the children of Mr. and Mrs. Robinson and Mr. and Mrs. Mitford—whether those only who are in being at the time of the testator's death or all who might come in esse during the lives of the respective tenants for life? Upon that point I do not see how a question can possibly be raised. Not only is the rule of construction completely settled, but in this case, I apprehend the actual intention of the testator to be perfectly clear. Indeed, I believe, wherever a testator gives to a parent for life with remainder to his children he does mean to include all the children such parent may at any time have. That is not an artificial rule. It is the rule which excludes any of the children that is, and has been called, an artificial rule, namely, the rule in *Andrews v. Partington* (26) and other cases of that description which excludes all who may be born after the eldest attains twenty-one. *Ellison v. Airey* (22) might have been decided the other way without at all affecting this, for there it was the death of one person that determined what children of another person were entitled to take. It is impossible to impute to this testator an intention to exclude all the children of his grandson William Rowe Robinson who should not be living at his (the testator's) own death, that grandson having no children at the time the will was made. All the bequests to the children of his daughters are made in as comprehensive terms.

As to the brothers and sisters of William Rowe Robinson, I do not apprehend that it is at all necessary to speculate on the question who would, within the meaning of the will, come under the description of brothers and sisters — whether only the children of both parents, or such as one of them might have after the death of the other. Our question is whether the testator's bounty was confined to such brothers and sisters (in whatever sense these words may be taken) as should be living at his own death. According to the established rule of construction, and what I conceive to have been the actual intention of the testator, all who were living at the time of William Rowe Robinson's death must be held to be comprehended in the description.

Having ascertained the persons intended to take, the next question is at what time the interests given to them were to vest. There is no direct gift to any of these classes of persons. It is only through the medium of directions given to the trustees, that we can ascertain the benefits intended for them. The trustees have a discretionary power to apply what portion of the income they think fit for the support, maintenance, and advancement of the infant legatees. Except in one instance the testator does not say what is to become of the surplus interest. In the case of the property first given to William Rowe Robinson for life, the surplus interest is to accumulate and to be paid with the capital, either to himself, or to his children, or to his brothers and sisters, when they shall have attained the age of twenty-five. No

direction being given as to the surplus interest of the two moieties of the mortgage money, it will make part of the residue, for although the interest of residue goes with the capital, that of particular legacies does not, even supposing it be the payment, and not the vesting, that is postponed. It is a mistake to suppose that the trustees are authorised to apply any part of the capital for the benefit of any legatee not attaining twenty-five. It is only in the residuary clause that produce is spoken of, and it is evident that the direction relates only to the income of the property, or of the produce thereof when it should be sold. A

As to the capital, there being, as I have already said, no direct gift to the grandchildren, we are to see in what event it is that the trustees are to make it over to them. There is, with regard to this, some difference of expression in the different parts of the will. In some instances the testator directs the payment to be to such child or children as shall attain twenty-five. In others the payment is to be made upon attainment of the age of twenty-five. In the residuary clause it is from and immediately after such child or children shall attain the age of twenty-five that the trustees are to transfer the property. But I think the testator in each instance means precisely the same thing, and that none was to take vested interests before the specified period. The attainment of twenty-five is necessary to entitle any child to claim a transfer. It is not the enjoyment that is postponed, for there is no antecedent gift, as there was in *May v. Wood* (27), of which the enjoyment could be postponed. The direction to pay is the gift, and that gift is only to attach to children that shall attain twenty-five. *Batsford v. Kebbell* (28), was much more favourable for the legatee, for the interest of the fund was given to him absolutely until he should attain the age of thirty-two at which time the executrix directed her executors to transfer to him the principal for his own use. He died under thirty-two. LORD ROSSLYN, L.C., said (3 Ves. at p. 364): B

"There is no gift but in the direction for payment, and the direction for payment attaches only upon a person of the age of thirty-two. Therefore, he does not fall within the description." C

It was supposed that the clauses in the will where the word "such" is left out might be construed differently from those in which it is inserted, and that, although where the payment is to be to "such" child or children as shall attain twenty-five nothing could vest in any not answering that description, yet where the payment is to be to children upon the attainment of twenty-five or from and after their attaining twenty-five the vesting is not postponed. If there were an antecedent gift, a direction to pay upon the attainment of twenty-five certainly would not postpone the vesting. But if I give to persons of any description "when" they attain twenty-five, or upon their attainment of twenty-five, or from and after their attaining twenty-five, is it not precisely the same thing as if I gave to "such" of those persons as should attain twenty-five? None but a person who can predicate of himself that he has attained twenty-five, can claim anything under such a gift. D

I am aware, however, that although, with regard to particular legacies, this doctrine has not been controverted, yet *Booth v. Booth* (24) may be considered as throwing some doubt upon it when it is a residue that is the subject of the bequest. There is certainly a strong disposition in the court to construe a residuary clause so as to prevent an intestacy with regard to any part of the testator's property. With all that disposition it is evident that LORD ALVANLEY felt that he had a difficult case to deal with. Some violence was done to the words in favour of what he conceived to be, and what in all probability was, the intention. That intention, however, was collected from circumstances that do not occur in the present case. Both the legatees were adults at the time the will was made. LORD ALVANLEY admits that, if it had been otherwise, it might have made some ingredient in the argument. Then the whole interest was given to them absolutely, a circumstance which has always been held to furnish a strong presumption of intention to vest the capital and is not afforded by a direction for maintenance out of the interest, as was decided in E

A *Pulsford v. Hunter* (29). The legatees might both live to extreme old age, without the event ever happening on which the legacy was made payable. There was no survivorship between them nor was there any bequest over in the event of the death of both or either, so that intestacy must have been the consequence of death before marriage. In every one of these particulars this case differs from *Booth v. Booth* (24). They agree in nothing except that the words "from and immediately after" occur in both.

B *Booth v. Booth* (24) is, therefore, not merely no authority for what is contended for by the grandchildren, but it is a strong authority the other way. For it shows that, where there is no gift but by a direction to transfer "from and after" a given event the vesting would be postponed till after that event had happened, unless, from particular circumstances, you are enabled to collect a contrary intention. For otherwise LORD ALVANLEY would only have had to say: "These words can have no such effect as is ascribed to them. They operate only as a postponement of the enjoyment." Here, interest is not given to children dying before twenty-five. Children attaining twenty-five are to take the whole. There is not even a provision for the case of a child dying under twenty-five, leaving issue. All is to go to those who do attain twenty-five. How is it possible, therefore, that a child can be said to have a vested interest before twenty-five when it has neither a right of enjoyment, a capacity of transmission, or a ground of claim, until after it shall have attained that age? When the vesting is so clearly and expressly postponed, it is in vain to endeavour to infer from other expressions, used without any reference to that object, that the testator did not conceive himself to have postponed the vesting.

C **E** That he has unnecessarily provided for survivorship; that he has spoken of "shares" of grandchildren dying under twenty-five, and, in the last proviso, given over the moiety of the residue only in the event of either of his daughters dying without leaving any issue or any children of such issue, are all of them circumstances that appear to me not at all to affect the question of vesting, as none of these clauses makes any new gift to the grandchildren, nor can they alter the terms or conditions of that which had been already made.

F Then, assuming that after-born grandchildren were to be let in and that the vesting was not to take place till twenty-five, the consequence is that it might not take place till more than twenty-one years after a life or lives in being at the death of the testator. It was not at all disputed that the bequests must for that reason be wholly void unless the court can distinguish between the children born before and those born after the testator's death.

G On what ground can that distinction rest? Not on the intention of the testator, for we have already ascertained that all are included in the description he has given of the objects of his bounty. And all who are included in it were equally capable of taking. It is the period of vesting and not the description of the legatees, that produces the incapacity. How am I to ascertain in which part of the will it is that the testator has made the blunder which vitiates his bequests?

H He supposed that he could do legally all that he has done, i.e., include after-born grandchildren and also postpone the vesting till twenty-five. But, if he had been informed that he could not do both, can I say that the alteration he would have made would have been to leave out the after-born grandchildren rather than abridge the period of vesting? I should think quite the contrary. It is very unlikely that he would have excluded one half of the family of his daughters in order only that the other half might be kept four years longer out of the enjoyment of what he left them. It is much more probable that he would have said: "I do mean to include all my grandchildren, but as you tell me that I cannot do so and at the same time postpone the vesting till twenty-five, I will postpone it only till twenty-one." If I could at all alter the will, I should be inclined to alter it in the way in which it seems to me probable that the testator himself would have altered it. That alteration would at least have an important object to justify it, for it would give validity to all the bequests in the will. The

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other alteration would only give them a partial effect, and that too by making a distinction which the testator himself never intended to make between those who were the equal objects of his bounty. In the latter case, I should be new-modelling a bequest which, standing by itself, is perfectly valid, while I left unaltered that clause which alone impedes the execution of the testator's intention in favour of all his grandchildren.

Perhaps it might have been as well if the courts had originally held an executory devise transgressing the allowed limits to be void only for the excess, where that excess could, as in this case it can, be clearly ascertained. But the law is otherwise settled. In the construction of the Accumulations Act, 1800, passed after the *Thellusson* cause [*Thellusson v. Woodford* (10)] I thought myself at liberty to hold that the trust of accumulation was void only for the excess beyond the period to which the act restrained it, and the Lord Chancellor afterwards approved of my decision. But there the Act introduced a restriction on a liberty antecedently enjoyed, and, therefore, it was only to the extent of the excess that the prohibition was transgressed. Whereas an executory devise is itself an infringement on the rules of the common law and is allowed only on condition of its not exceeding certain established limits. If the condition be violated, the whole devise is held to be void.

To induce the court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, they are made to classes, and what I have to determine is whether the class can take. I must make a new will for the testator if I split into portions his general bequest to the class, and say that because the rule of law forbids his intention from operating in favour of the whole class I will make his bequests, what he never intended them to be, viz., a series of particular legacies to particular individuals, or what he had as little in his contemplation, distinct bequests in each instance to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death.

If the present case were an entirely new question, I should doubt very much whether this could be done. But it is a question which appears to me to be perfectly settled by antecedent decisions, and in cases in which there were grounds for supporting the bequests that do not here exist. In *Jee v. Audley* (7), there were no after-born children—no distinction, therefore, to be made between persons capable and persons incapable—(all were capable)—no difficulty, consequently, in adjusting the proportions that the capable children were to take, or in determining the manner, or the period, of ascertaining those proportions. I am asked why the existence of incapable children should prevent capable children from taking. But in *Jee v. Audley* (7), the mere possibility that there might have been incapable children was sufficient to exclude those who were capable. It is said that the devise there was future. Certainly, but only in the same sense in which these bequests are future, that is, so conceived as to let in after-born children which was the sole reason for its being held to be void. Unless my decision on the first point be erroneous, the bequests in this case do equally include after-born children of the testator's daughters, and are, therefore, equally void.

Routledge v. Dorril (6) appears to me to be also an express authority on the point now in question. I think that the circumstance that there the will was an execution of a power was rather favourable than adverse to the court's making a distinction between the two sets of grandchildren. For it might have been contended that after-born grandchildren were not proper objects of the power—that the appointment was, therefore, void quoad them, but good quoad those who were capable of taking under the power. Whatever might be the value of that argument, it would have no application to the question now before the court. For in this case it could not be said that any one grandchild was, more or less than another, the proper object of the testator's spontaneous bounty, and, therefore, we have not the line which the power

A might have furnished for making a distinction between the two classes of grandchildren. If, even in such a case, the distinction could not be made, a fortiori is it impossible to make it in this.

B *Blandford v. Thackerell* (9) has no application to the present question. There was no vice or excess in the testator's bequest which the court had to cure by excluding some of the objects in whose favour it was conceived. It was a sort of charitable intention for the benefit of children and grandchildren of relations of a specified description. As it was not a future bequest or by way of remainder it would, according to the established rules of construction, extend only to children and grandchildren living at the testator's death. LORD ROSSLYN thought fit (probably because it was in the nature of a charity) to extend it to all the objects to whom the testator might legally have extended it—that is, children or grandchildren born during the lives of the different relations. Whether that was or was not a correct execution of the particular will, the case has no bearing at all on the point now under discussion.

D *Wilkinson v. Adam* (11) was referred to as furnishing an instance of a distinction made between those who were and those who were not capable of taking under the same devise. That was merely a question of description who were or were not included under the denomination of children. If it could be shown that after-born grandchildren are not entitled to the appellation of grandchildren, there would be a short end of the present case. On the whole, my opinion is that all the bequests to the grandchildren as classes (for I have nothing to do with the bequests to individuals) are wholly void.

E A question has been made whether the particular bequests thus declared void do or do not fall into the residue. I have always understood that with regard to personal estate everything which is ill given by the will does fall into the residue, and it must be a very peculiar case indeed in which there can at once be a residuary clause and a partial intestacy unless some part of the residue itself be ill given. It is immaterial how it happens that any part of the property is undisposed of, whether by the death of a legatee, or by the remoteness and consequent illegality of the bequest. Either way it is residue, i.e., something upon which no other disposition of the will effectually operates. It may in words have been before given, but, if not effectually given, it is, legally speaking, undisposed of, and consequently included in the denomination of residue.

G A testator supposes that each part of his will is to take effect, and, consequently, cannot be said to have any intention to include in his residue anything that he has before given. I do not see, therefore, how such arguments as might be used in cases of the description of *Roe d. James v. Avis* (30), *Church v. Munday* (31), and *Welby v. Welby* (32), can be here applicable. The limitations of a particular bequest and those of the residue may be quite incongruous, for the testator supposes that each is to have its separate effect. But what eventually turns out to be undisposed of will not the less constitute residue because some of the provisions contained in the residuary clause may be inapplicable to a case of which the testator did not foresee the existence.

I I am of opinion that, in so far as any of the particular bequests are ill disposed of, they fall into the residue. But then, according to what I have already determined, there is no good disposition of the residue itself after the death of the tenants for life excepting in so far as the ultimate proviso may operate upon the subject of it. As to that proviso, one half of the residue is placed out of the reach of its operation by Mrs. Mitford's having left children at her death. The consequence is that, subject to Mr. Mitford's life interest, it belongs to the testator's next of kin. The fate of the other half rests in contingency. If Mrs. Robinson should die without leaving issue, it is well given over to the children of Mrs. Mitford, there being nothing in this bequest to make it too remote and it being evident that the testator used the words "surviving sister" in the same sense as "other" sister. But if Mrs.

Robinson shall leave issue, this half also will, at her death, be undisposed of, and divisible among the next of kin.

The question as to the widow's right to share in the property which turns out to be undisposed of, I take to be settled by *Pickering v. Lord Stamford* (33).

Order accordingly.

Re LIGHTOLLER. Ex parte PEAKE

[VICE-CHANCELLOR'S COURT (Sir Thomas Plumer, V.-C.), March 5, 27, 1816]

[Reported 1 Madd. 346; 2 Rose, 455; 56 E.R. 128]

Bankruptcy—Secured creditor—Equitable lien of unpaid vendor against bankrupt.

A vendor has a lien for his purchase-money on the estate sold although he has received bills from the purchaser in payment of the estate and although the purchaser becomes bankrupt.

Partnership—Share—Sale to partner of share in insolvent partnership.

One partner may agree with a retiring partner to give him a sum for the business although they know it to be insolvent, provided that no fraud is intended.

Notes. As to the effect of taking security on equitable lien, see 24 HALSBURY'S LAWS (3rd Edn.) 171, 172; and for cases see 32 DIGEST (Repl.) 352. As to assignment of a share to a partner, see 28 HALSBURY'S LAWS (3rd Edn.) 536; and for cases see 36 DIGEST (Repl.) 546.

Cases referred to:

- (1) *Chapman v. Tanner* (1684), 1 Vern. 267; 28 E.R. 461; 32 Digest (Repl.) 335, 641.
- (2) *Nairn v. Prowse* (1802), 6 Ves. 752; 31 E.R. 1291; 32 Digest (Repl.) 352, 744.
- (3) *Mackreth v. Symmons* (1808), 15 Ves. 329; 33 E.R. 778, L.C.; 32 Digest (Repl.) 331, 598.
- (4) *Hughes v. Kearney* (1803), 1 Sch. & Lef. 132; 32 Digest (Repl.) 353, *955.
- (5) *Grant v. Mills* (1813), 2 Ves. & B. 306; 2 Rose, 81, n.; 35 E.R. 335; 32 Digest (Repl.) 352, 746.
- (6) *Gibbons v. Baddall* (undated), 2 Eq. Cas. Abr. 682; 22 E.R. 573; 32 Digest (Repl.) 334, 634.
- (7) *Bowles v. Rogers* (1800), 6 Ves. 95, n.; 1 Cooke's Bkpt. Laws, 8th ed., p. 146; 31 E.R. 957, L.C.; 32 Digest (Repl.) 335, 642.
- (8) *Cowell v. Simpson* (1809), 16 Ves. 275; 33 E.R. 989, L.C.; 32 Digest (Repl.) 275, 207.
- (9) *Anderson v. Maltby* (1793), 2 Ves. 244; 4 Bro. C.C. 428; 30 E.R. 616; 5 Digest (Repl.) 1054, 8521.
- (10) *Ex parte Ruffin* (1801), 6 Ves. 119; 31 E.R. 970; 4 Digest (Repl.) 461, 4037.
- (11) *Ex parte Kensington, Ex parte Taylor* (1808), 14 Ves. 447; 33 E.R. 592; 4 Digest (Repl.) 479, 4199.
- (12) *Ex parte Fell* (1805), 10 Ves. 347; 32 E.R. 879, L.C.; 4 Digest (Repl.) 493, 4334.
- (13) *Ex parte Williams* (1805), 11 Ves. 3; 32 E.R. 988; 4 Digest (Repl.) 461, 4038.
- (14) *Ex parte Slow* (1782), Cooke's Bkpt. Laws.
- (15) *Re Ancell, Ex parte Rowlandson* (1813), 2 Ves. & B. 172; 1 Rose, 416; 35 E.R. 284, L.C.; 4 Digest (Repl.) 465, 4076.

Petition presented by Samuel Peake praying that certain property of Thomas Lightoller, a bankrupt, might be sold and that out of the purchase-money the sum of £2,009 with interest at £5 per cent. might be paid to the petitioner, and that

A the partnership debts owing by the petitioner and the bankrupt might be paid out of the residue.

In May, 1814, the petitioner and the bankrupt agreed to enter into partnership as calico-printers and to purchase bleaching works and premises in Halliwell, Lancashire, to carry on the business at the price of £5,050. The premises were conveyed jointly to the bankrupt and the petitioner in consideration of the sum of £5,050 by B a lease and a release dated May 27 and 28, 1814. The petitioner and the bankrupt entered into possession and carried on the business as partners until September, 1814, when by agreement they dissolved their partnership and the petitioner agreed to sell the bankrupt his interest in the premises. By a lease and release dated Oct. 10 and 11, 1814, made between the petitioner of the first part, the bankrupt of the C second part, and Thomas Hewit of the third part, which recited the above-mentioned facts, and that the bankrupt had repaid or secured to be repaid to the petitioner the money and other effects advanced by him to the partnership concern, the petitioner granted the bankrupt his undivided moiety in the works, premises and imple- D ments. The bankrupt did not pay the consideration of £2,009, but gave drafts payable at different dates. The first became due on Dec. 14, 1814, and was for the sum of £509 9s. but was dishonoured. The petitioner then became alarmed and insisted on security. The bankrupt agreed, deposited the deeds of the premises with the petitioner and directed him to borrow money on mortgage upon security of the premises to discharge his debt. The deeds remained in the petitioner's possession. The remainder of the bills were dishonoured. Besides the sum of £2,009, a sum of E £670 was due to the creditors from the late firm, which was to have been paid according to the contract at the dissolution, by the bankrupt alone. On Dec. 20, 1814, after the deeds had been deposited by the bankrupt and while they were in the hands of the petitioner, the bankrupt entered into and signed the following memorandum :

F "Memorandum of an agreement, made Dec. 20, 1814, between [the bankrupt and the petitioner] : It is agreed that on sale or mortgage of the print works of the parties, occupied by them in their late co-partnership concerns, the sum of £2,009 owing to [the petitioner by the bankrupt] shall be paid and discharged."

In May, 1815, the bankrupt stopped payment, and in June following became bankrupt. The assignees of the bankrupt opposed the petition.

G The affidavits of the bankrupt and others in effect were that on examining the state of the account in September and October, 1814, the estate of the partnership was at that time insolvent to a very considerable amount; that if the whole affairs had then been wound up and examined into, it would have appeared and did then appear, by examining their books, that the debts and receipts at that period, and allowing even the value of the premises to be part of the partnership property H applicable to the payment of the joint debts, there still would be a great deficiency of debt exceeding credit to the amount of about £7,000 or £8,000, and that if the accounts had been then settled, there would have been found to be between £3,000 and £4,000 or between £4,000 and £5,000 of surplus debt which the petitioner was jointly liable to pay, if the affairs had been then wound up, all the debts paid and all the effects applied to the payment of the joint debts. With respect to the deposit I of the title deeds, the affidavits applied to show that they were improperly obtained by the petitioner out of the hands of Cromshaw, a clerk who had the care of them, and who was instructed to retain them only for the purpose of their being delivered to a person who was to raise money on them; it being alleged that the petitioner, in the absence and behind the back of the bankrupt, possessed himself not of all, but of two of the title deeds without the authority of the bankrupt; and that with respect to the subsequent agreement of the bankrupt, he made it on account of being pressed for the payment of his debt and as a conditional agreement on the express promise that the deeds should be delivered up for the purpose of raising

money to answer his necessities, which never were complied with, the deeds being afterwards demanded and not delivered up. A

The petitioner denied the fact of the insolvency of the partnership at the time of the dissolution and insisted that there was enough joint property to pay the debts as he understood them. With respect to the deposit of the title deeds, he swore positively that they were fairly deposited with him; that it was by the authority of the bankrupt he obtained them; and, that though there was an intention to raise money, if it could have been raised by means of them, yet that the bankrupt had expressly in the presence of witnesses acknowledged that he had deposited the deeds as security for the debt; and he denied that there was any express promise to deliver them up. He stated further that he was always ready to co-operate in any means to raise money on them, but not in the way represented by the bankrupt. B

Sir Samuel Romilly and *Heald* for the petitioner. C

Leach, Bell and *Montagu* for the bankrupt.

SIR THOMAS PLUMER, V.-C., stated the facts, and continued: The ground of this petition is: (i) that Peake has a lien on the premises, as being the vendor of them, and not paid the purchase-money, and has in that respect a preference to be paid the purchase-money, before all the other creditors; (ii) that he is an equitable mortgagee by the deposit of deeds; and (iii) that there was an express agreement in writing by the bankrupt in December, 1814, by which he agreed that the premises should be sold and the £2,009 paid. D

Affidavits have been filed on the part of Peake, and on behalf of the assignees of Lightoller; and if it were necessary to decide between the different statements, I should have thought it proper to have adopted some course for that purpose; but, I think sufficient facts are admitted to enable me to decide on the question of lien, without putting the parties to any further expense. E

It is not disputed that Peake was in September, 1814, the owner in fee of one moiety of the estate in question, Lightoller being the owner of the other moiety; and that they at that period agreed to dissolve the partnership. I will take it (though that fact has been disputed) that the two partners were each cognisant at that period that the effects of the partnership were greatly insufficient to pay its debts, and that Lightoller chose separately to remain, conducting the business, and to buy out the retiring partner, there being no deception, no misrepresentation, no concealment, no fraud on the part of the retiring partner. The first question is: Is it not competent to two partners to make such a bargain, however advantageous or disadvantageous it may be to either party? May not one co-partner dissolve publicly his partnership with the other, he knowing the then state of it but having a better opinion of it, or choosing for his own advantage to give a sum of money if the other will convey his interest to him? They certainly might make such an agreement, no fraud being practised or intended. Suppose the case of a trade attended with great risk, one partner despairing, the other confident and willing to buy the share of his partner, and agreeing to give him £2,000 for it; on what possible ground could that contract be invalidated? The fact of the contract is agreed, and Peake and Lightoller both concur that on Oct. 10 and 11, 1814, a deed was executed by the parties, by which Peake conveyed to Lightoller all his moiety of the estate in question for £2,009. Lightoller does not say any advantage was taken of him in this transaction, but only says that he was induced to enter into the contract under an expectation that time would have been given by Peake gradually to pay the money. Drafts were given for the purchase-money which were not paid; nor has any of the money been paid. F

In the next place, it is not disputed that immediately after the dissolution of the partnership, Lightoller separately and ostensibly carried on the concern. Peake never interfering, and held himself out as the sole owner of the property, obtaining credit with his different creditors upon the credit of the property belonging to him separately and as his own estate. It next appears that the assignees of Lightoller's G H I

A separate estate, he being alone a bankrupt and Peake solvent, claim this property, which was before joint property responsible to the joint creditors, as the separate property of Lightoller, applicable in discharge of his separate debts. None of the quondam joint creditors appear, at present at least, to oppose this, but the opposition given to it is on the part of the separate creditors of Lightoller.

B The first question is whether upon these admitted facts there is, as between vendor and vendee, anything to prevent the vendor claiming a lien upon the estate. A great variety of cases, from *Chapman v. Tanner* (1) and *Nairn v. Prowse* (2) to *Mackreth v. Symmons* (3), establish it as a clear equity that a vendor has in all cases a lien upon the estate sold for his purchase-money, unless there has been a special agreement extinguishing that equity. The taking the drafts which were subsequently dishonoured does not affect the lien; that clearly appears from *Hughes v. Kearney* (4)* and *Gibbons v. Baddall* (6), which show that taking a draft or a note for the purchase-money does not per se deprive the vendor of his right of lien. It is equally clear this right of lien applies also, where the vendee becomes a bankrupt, against his assignees†, they being in no better condition than the bankrupt.

D The ground on which the assignees have endeavoured to defeat the contract is upon an idea that they have a right to go back to the transaction in October, 1814, and that finding the partnership involved at that period and the affairs not then wound up, they have a right to take the account against Peake, and to make him responsible for part of the joint debts afterwards paid by Lightoller, those debts being so paid by the sale of goods furnished to Lightoller by the new creditors; those creditors having, it is contended, with respect to such joint property, an equity, which the bankrupt himself had not. I admit that if two co-partners enter into a contract for the purpose of defrauding their joint creditors, the one agreeing to permit the other to withdraw money out of the reach of the joint creditors, such a contract is fraudulent and invalid. That I take to be the principle upon which *Anderson v. Maltby* (9) was decided. It has been said that case has been shaken by the Lord Chancellor; however that may be and whatever may be its authority, it does not appear to me to affect the present case. In that case there was strong ground to believe a fraud was intended; and it does not warrant me in declaring generally that the mere circumstance of the partnership being at that time in such a state that their joint effects were not sufficient to pay their joint debts, will per se be sufficient to invalidate a dissolution of partnership made fairly between the partners themselves. No fraud was intended by Lightoller—he paid the joint creditors—there was, therefore, no contrivance with Peake to put the joint effects into a state to benefit Peake; *Anderson v. Maltby* (9), therefore, does not apply.

G Since *Anderson v. Maltby* (9) there is a long string of cases: *Ex parte Ruffin* (10), *Ex parte Kensington*, *Ex parte Taylor* (11), *Ex parte Fell* (12), *Ex parte Williams* (13), *Ex parte Slow* (14), and *Re Ancell*, *Ex parte Rowlandson* (15), in which it is established that joint creditors have no equity as against the joint effects, but what they claim through the medium of the partners themselves—that a joint creditor, if he does not take the remedy that the law gives him by action and by proceeding to seize upon the joint effects, has no lien upon them; his equity to have the joint effects applied to the joint debts is through the medium of the partner, and for the sake of the partner, except in those cases where a bankruptcy or a death takes place, in which case the equity operates through the medium of the deceased partner, or the partner who has become a bankrupt: then you arrange for the payment of the debts by the joint effects and they become divisible in that way. But if joint creditors do not interpose, the two partners, if they make a fair contract inter se; if they do actually dissolve the partnership; if they

* And see *Grant v. Mills* (5).

† See *Grant v. Mills* (5) (2 Ves. & B. at p. 309); *Bowles v. Rogers* (7); *Cowell v. Simpson* (8) (16 Ves. at p. 278); *Chapman v. Tanner* (1), but see what is said of that case in AMBLER, at p. 726.

fully effect a dissolution with a contract for division of the property; if they make an actual assignment by deed; if possession is delivered upon that and enjoyment makes it perfect, if all these circumstances take place, and there is nothing of fraud impeaching the transaction, then of consequence, as is determined in all those cases, the joint property becomes separate property by virtue of that contract, and the joint property is throughout to be treated as separate property, and the joint creditors cannot follow it afterwards, but it becomes the separate estate of the partner remaining, and the retiring partner has lost all his benefit from it, and the joint creditors, although they may undoubtedly proceed against the two partners (for their agreement to dissolve does not deprive the joint creditors of their right of applying for payment to those who are responsible to them), but with respect to the effects, they become from that moment the separate property of the party who has bought them, just as much as if he had acquired them in market overt of any stranger.

These principles are all wrong if this contract is not good. How can the separate creditors in June, 1815, go back to the transaction in October, 1814, and say that the contract then entered into was not good? They must claim and operate their equity through Lightoller to invalidate it, and I have shown he had no equity to impeach it. Upon what ground do these assignees impeach it? They are the assignees of the separate estate. What right have the assignees to this as separate estate? If the contract is good for nothing, it is joint estate. All this freehold property and all the utensils and everything else ought to be considered as joint property if this deed is good for nothing. How can that possibly be? They receive it, and so did Lightoller; he obtained credit upon it as his separate property—it is impossible to undo it after an interval from October to the June following, when he was held out as the sole owner; when he acted as the sole owner; when there was a conveyance which put him in possession as sole owner. They cannot be made joint effects, but they must be the separate property of Lightoller. Then you must apply that principle throughout. How do they become so? By virtue of this contract. Then is not this contract good? Can you in one breath say: I take it as a separate estate, and yet say the contract is good for nothing and I will not pay for the separate estate I have thus acquired? But if they are willing to say: We abandon it, and take it as joint property, they cannot do that, it has become separate property; and if it has once become separate property it must be treated so throughout. If it has become separate property, what is the simple result? Why, that you must pay for it according to the ordinary case. You have bought an estate and have not paid for it—it has become yours; it is yours absolutely—it is to go as your separate property, but subject to the equity always attaching upon property bought, to answer for the purchase-money if it has not been paid. In that view of it, it appears to me a very simple case, and that supposing the circumstances of the state of the account at the time, and the manner in which it was bought, and the dissolution to be as stated, those facts make no difference provided there be no circumstances of fraud, which are put out of question in this case. The separate creditors of Lightoller are bound to consider this (as they do consider it) as separate property, and their debts have been contracted upon the footing and faith of this being separate property: to that extent they have a clear right to hold it as separate property against the joint creditors; but upon the same principle that I secure to them all this property as becoming the separate property of Lightoller from the moment of this contract, of necessity they must pay for the estate, upon the principle that the estate must pay for that contract by virtue of which it has become separate property.

With respect to the equity endeavoured to be set up by the separate creditors, because they have become so by the sale of goods to Lightoller and the money arising from them has been applied to pay off antecedent joint debts, that was an equity which never was heard of. In such a case you cannot go back and inquire what was the money for which the separate debts were contracted, and so follow it as to undo the antecedent transactions. If according to all the cases, the joint

A creditors have no equity but through the medium of the partners, must less can the separate creditors of Lightoller take advantage of an equity of the joint creditors of Lightoller and the antecedent partner, and say that they are to have that sort of equity which even the joint creditors themselves could not have: that seems to me to be going one step farther than any of the cases.

B Viewing it in this way, it does not seem to me that any of the controverted facts in this case are at all material to its determination; but it becomes a simple case of vendor and vendee, with the additional circumstance of the vendor being in possession of the title deeds, and of an agreement that the lien upon it should be satisfied. I think by an affidavit it appears that the estate has been sold, and it is stated to have been sold with his concurrence, on a promise that it should be made responsible to the lien if it turned out to be a good lien. It appears to me C that under the circumstances stated, there is no reasonable doubt that the vendor of this estate has a claim to the extent of £2,009 to be paid out of the proceeds of the estate.

D With respect to the other part of the case, that which relates to the application of the purchase-money to pay off the joint debts, to the amount of £600 odd that remain due, I see no ground for it, because that is perfectly inconsistent with the whole principle of the cases, for that is attempting on the part of the petitioner to consider some lien that the creditors have, or he has, to apply the joint property to the payment of the joint, in preference to the payment of the separate, debts—that is directly impeaching the ground upon which he stands on the other part of the petition, that it became, by virtue of the dissolution, the separate property E of Lightoller. He cannot set up the equity of it as a joint property; he must take the whole of it together and say it has become separate property, and is applicable to the separate creditors. That part of the prayer, therefore, he cannot succeed in, but the rest I think he is entitled to.

*Order that £2,009 be paid to the petitioner.
Order for payment of partnership debts refused.*

ATTORNEY-GENERAL *v.* BROWN AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), April 10, 11, November 25, 1816, April 3, 1818]

[Reported 1 Swan. 265; 1 Wils. Ch. 323; 36 E.R. 384]

Charity—Charitable purpose—Parliamentary grant of duty to protect town from encroachment of sea—Pecuniary liability of inhabitants.

By Acts of Parliament of 1772 and 1810 commissioners were appointed and authorised to levy a rate (not exceeding a certain proportion of the poor-rate) on the occupiers of all houses, etc., in Brighton, for paving, lighting and watching the town, and another rate, not exceeding a fixed sum, on every chaldron of coal landed on the beach or otherwise brought into the town for repairing or building works to protect the coast of Brighton against the encroachment of the sea (the Acts reciting that the inhabitants were unable to raise money sufficient for that purpose without the aid of Parliament), with power of distress for non-payment, and liberty to apply any surplus of the coal-rate, after payment of the debt contracted on the security of that rate, and the expenses of repairs, etc., in aid of the rate for paving, etc. The Attorney-General, at the relation of an inhabitant, filed an information against the commissioners, stating that they had levied the coal-duty at its maximum and applied a large proportion of the produce in aid of the town-rate for paving, etc., instead of the construction and repair of works for the protection of the coast and the discharge of the debt contracted on the security of the coal-duty, and had distrained the goods of the relator for non-payment of the duty. The information prayed an account of the money levied and expended, an injunction against an undue levy, and a direction that the commissioners should replace any sums which they had applied to purposes not warranted by the Acts. On a general demurrer for want of equity it was alleged that the Attorney-General could not sue in such a case.

Held: a Parliamentary grant of a duty on coal imported into a town in aid of the pecuniary inability of the inhabitants to protect the town from the encroachment of the sea was a gift to a charitable use, and, accordingly, the Attorney-General was entitled to sustain the information and to the relief sought.

Notes. Considered: *A.-G. v. Dublin Corpn.* (1827), 1 Bli. N.S. 312; *A.-G. v. Eastlake* (1853), 11 Hare, 205. Referred to: *A.-G. v. Heelis* (1824), 2 Sim. & St. 67; *A.-G. v. Carlisle Corpn.* (1828), 2 Sim. 437; *A.-G. v. Compton* (1842), 1 Y. & C. Ch. Cas. 417; *Nightingale v. Goulburn*, [1843-60] All E.R. Rep. 420; *A.-G. v. Magdalen College, Oxford* (1854), 18 Beav. 223; *Re St. Botolph Without Bishops-gate Parish Estates* (1887), 35 Ch.D. 142; *A.-G. and Spalding Rural Council v. Garner*, [1907] 2 K.B. 480; *Re Astor's Settlement Trusts, Astor v. Scholfield*, [1952] 1 All E.R. 1067.

As to charitable purposes generally, see 4 HALSBURY'S LAWS (3rd Edn.) 213 et seq.; as to actions concerning charities, see *ibid* 439 et seq. For cases see 8 DIGEST 342 et seq.

Appeal from SIR THOMAS PLUMER, V.-C., on demurrer by the defendants to an information filed by the Attorney-General, on the ground that the Attorney-General was not entitled to the relief sought.

The Attorney-General, at the relation of the inhabitants of Brighton, filed an information against certain commissioners appointed by Acts of Parliament of 1772 and 1810, stating that they had misapplied certain funds levied by them on the inhabitants of Brighton and seeking the following relief, namely, an account of the moneys, an injunction against an undue levy and a direction to replace moneys misapplied.

By an Act of Parliament passed in 1772 for paving, lighting and cleansing the

A town of Brighton, and removing and preventing nuisances and annoyances; for holding and regulating a market within the town; for building and repairing groynes, in order to render the coast safe and commodious for ships or vessels to unload and land sea coal, culm, and other coal for the use of the inhabitants of the town, and for laying a duty thereon, commissioners were appointed for carrying the Act into execution, with power (among other things) for seven or more of them to direct the streets, lanes and ways within the town to be cleansed and lighted in such manner as they should think necessary, and, for defraying the expenses so incurred in every year after passing the Act, to make one or more rate or assessment on the tenants or occupiers of all houses, shops, warehouses, etc., within the town, not exceeding in any one year three shillings in the pound on the rate made for the relief of the poor, the money so raised to be paid to the collector, with powers of distress and sale in case of non-payment.

After certain provisions for enabling any person, under an order from the commissioners, to inspect the poor-rates and for authorising the commissioners to borrow money on the credit of the rates arising under the Act, one section after reciting that

D "the town of Brighton is situated by the seaside, and within six miles of the port or harbour of Shoreham, and belongs to the said port, and that great part having been destroyed by the breaking in of the sea, several groynes were some years since erected which have preserved the town, and the coast is now safe and commodious at several times of the year, for ships and vessels to unload and land sea-coal, culm, and other coal, on the beach of the town, for the use of the inhabitants; and that the said groynes are become greatly out of repair, and the inhabitants of the town are not able to raise money sufficient to repair the same without the aid and authority of Parliament,"

appointed the commissioners trustees for repairing, improving, maintaining and preserving the groynes and erecting and building any new groynes, or such other works as to them should seem most proper.

F The following section enacted that,

"for the better effecting and support of the premises, there should, from June 24, 1773, be paid to the said trustees and their successors, or such persons as seven or more of them should appoint, the sum of sixpence for every chaldron of sea-coal, culm, and other coal, that should be landed on the beach of the coast at the town of Brighton,"

G and the trustees were authorised and empowered to collect and receive the said sum of sixpence from the masters or owners of every vessel, for every chaldron of sea-coal, etc., landed and discharged out of any vessel on the beach of Brighton, or otherwise brought into the town. The Act also authorised the trustees to distrain for non-payment of the rate and to assign the rate as a security for money borrowed not exceeding the sum of £1,500.

H The information filed Nov. 26, 1814, stated that the Act of 1772 had been repealed by an Act of 1810 (53 Geo. 3, c. xxxviii) except so far as related to the market, that certain persons named were constituted commissioners for putting the Act of 1810 into execution, with power to appoint a treasurer and clerk and a collector of the rates or assessments to be levied by virtue of the Act, and a surveyor and such other officers for the necessary execution of the Act as they should think proper. Such persons were to deliver correct accounts to the commissioners who were to record all proceedings concerning the Act, and keep account of all moneys assessed, raised, received or payable by virtue thereof, and of the application and payment thereof, and of all contracts to be made by virtue of the Act. Such books were to be kept by the clerk for the time being and were to be at all convenient times open to the inspection of all persons concerned.

I It was enacted, further, that for raising money for defraying the expenses of paving, watching, cleansing, and lighting the town, and all other charges and

expenses attending the execution of the Act, it should be lawful for the commissioners once a year or oftener if necessary to make one or more rate assessment on the tenants or occupiers of all hereditaments in the town, so as such assessments did not exceed in any one year the sum of 4s. in the pound on the scale for the time being, on which rates were raised for the relief of the poor of the parish. The commissioners were empowered to borrow at interest on the credit of the rate for paving, etc., and to mortgage or assign the rate, or any part thereof, provided that they did not borrow more than £3,000, until the sum already borrowed on the credit of the rate was reduced to £2,000. A

It was further enacted that it should be lawful for the commissioners to continue the market and to collect the rents or tolls payable under the Act of 1772 which empowered the commissioners, for the purpose of improving the market, to borrow any further sums of money, not exceeding in the whole the sum of £5,000, on the credit of the market, and the rents, profits and tolls thereof. It was further enacted that after the moneys which were then due, or which should be afterwards borrowed, on the credit of the market, or the rents, profits and tolls thereof, should have been fully paid and satisfied, it should be lawful for the commissioners, and they were thereby required, to pay and apply any surplus that might have arisen from the market, or the rents or tolls thereof, either in aid of the rate for paving, etc., or the duty thereafter directed to be levied on coal and culm, as to them should seem reasonable and proper. B

The Act recited the provision of the Act of 1772, that the commissioners named therein should be trustees for repairing, improving, maintaining and preserving the groynes that had been erected for the preservation of the town, and erecting and building any new ones, or such other works as should appear to them most proper for that purpose, and that the sum of sixpence should be paid for every chaldron of sea-coal, etc., landed on the beach of the town, and that the commissioners might borrow any sum not exceeding £1,500 on the security of the said duty; and, further reciting that the commissioners had accordingly borrowed the sum of £1,500 on the security, part of which was then due; and that since the passing of the former Act, great encroachments had been made by the sea on the coast adjoining the town, and that the said duty had been found inadequate to the charges and expenses of erecting new groynes, walls, and other fences or works which were necessary for the safety and protection of the town against such encroachments. The Act then authorised and required the commissioners from time to time as to them should seem necessary and expedient, to repair, improve, and maintain, add to, alter or remove the groynes, fences or works then already erected and built or to be erected and built, or to cause to be made, new groynes or other works whatsoever, which might appear to them necessary or proper for the safety of the town or any part thereof, or any part of the beach or shore within the town, and enacted that there should be paid to the commissioners or to their collector, any rate or duty which they should think fit to direct, not exceeding the sum of three shillings for every chaldron of sea-coal, culm, or other coal, landed on the beach, or in any other manner by land-carriage or otherwise brought or delivered within the limits of the town. C D E F

The Act, after divers clauses for enforcing the payment of the last-mentioned tolls and for other matters relative thereto, authorised the commissioners for the purpose of maintaining, repairing or improving the present groynes or works for the protection of the town and for erecting new groynes or works, and for making, repairing and improving the same, to borrow on the credit of the said rate £5,000 in manner therein mentioned. G

The information further stated that the acting commissioners under the Act of Parliament of 1810 were the defendants. At a meeting of the commissioners held on May 2, 1810, it was resolved that Thomas Attree of Brighton should be appointed clerk and treasurer to the commissioners, and that William Gates should be appointed collector of the tolls and the rates. Attree and Gates had ever since acted H I

A in the respective offices and at the meeting, the commissioners directed that from that day (May 2, 1810) until May 1, 1811, the duty on coal should be three shillings per chaldron; and at successive annual meetings of the commissioners, the coal-duty was continued at three shillings, until May 1, 1815.

B The duty of three shillings per chaldron was accordingly levied by Gates in each of the years from 1810 to 1815, on all the sea-coal, culm and other coal landed on the beach, or brought to the town, and Attree received from Gates the sums so levied; that after payment of the interest which accrued due on the residue of the debt of £1,500, contracted on the credit of the former duty on coal, and of all the expense incurred in erecting or repairing groynes under the Acts, there was at the end of each of the years a very large surplus of the moneys, which on Nov. 29, 1813, amounted to £4,808 15s. 7d.

C It was the duty of the commissioners to apply a sufficient part of the surplus in payment of the debt of £1,140, and the surplus or remainder of the sum of £4,808 15s. 7d. would have been more than sufficient to answer the expenses of erecting or repairing groynes for some years to come; but the commissioners, in breach of their duty, and without any necessity, on or about Dec. 10, 1813, resolved that the sum of £2,000 should be borrowed, at 5 per cent., on the credit of the coal-duty, and should be repaid by the treasurer thereout as follows, viz., £500 and interest at the expiration of six months, £500 and interest at the expiration of twelve months, £500 and interest at the expiration of eighteen months and the remaining £500 and interest at the expiration of twenty-four months, from the time such moneys should be advanced.

E The information further stated that on Jan. 12, 1814, the commissioners, in pursuance of the said resolution, signed three several debentures for £500 each, which money was paid to the commissioners or to their treasurer Attree, for their use, by Thomas West, one of the commissioners. The commissioners, on Mar. 2, 1814, signed another debenture for £500 to West, which money was also paid to them or to Attree their treasurer, for their use. The commissioners had in every
F year, from the passing of the Act to the present time, misapplied a very considerable part of the money arising from the duty on coal and although the Act of 1810 gave power to the commissioners to impose a duty on coal to repair, etc., the groynes, etc., for the safety of the town, yet the commissioners had constantly applied a very considerable part of the moneys arising from the duty, in aid of the rate for paving, etc., the town; and the commissioners imposed the duty of three shillings per
G chaldron on coal, not merely for the purpose of erecting and repairing the groynes as aforesaid, but that they might have a much larger fund to apply, in case of the town rate.

H The information proceeded to state, that on June 4, 1810, the balance of the money arising from the coal-duty, from November, 1810, to November, 1813, after payment of the charges of erecting and repairing groynes and other incidental expenses, amounted to £4,808 15s. 7d.; and the total of the duty on coal from Nov. 29, 1813, to the present time, amounted to a very considerable sum, in addition to £4,808 15s. 7d. It appeared from the treasurer's account, that the expenses of paving the town exceeded the receipts under the town rate by £7,592 13s 0d. on Nov. 29, 1813.

I The annual deficiencies of the town rate to answer the expenses were in a great measure made good out of the general balances of the coal-duty. It appeared by the respective statements that very large sums arising from the coal-duty had been unjustly and improperly applied by the commissioners in aid of the rate for paving, etc., whereby persons not resident in the town, but occasional visitors thereto, and who greatly contributed to the support thereof, had been compelled to pay a large proportion of the expenses which ought to have been borne by the resident inhabitants, namely, the expenses of paving, lighting, cleansing, and watching the town.

Although the Act confined the sums of money arising from the coal-duty and the

other tolls and duties thereby made, and the town rate, to the respective purposes before mentioned, yet the commissioners, in breach of their duty, had lately out of the funds arisen from the rate on coal, caused to be erected a bathing-house on the beach of the town, the building of which was attended with a very considerable expense and had applied the said trust fund to several other improper purposes, in violation of the Act. A

The information then stated that according to the books kept by the commissioners, on May 21, 1811, it was resolved by them that W. R. Nott (one of the acting commissioners) should be paid £500 in addition to the £70 paid by Attree, on account of his expenses relative to the Act, and that Attree should be paid £300 on account of the Act; and on June 11, 1810, it was resolved that £73 18s. 9d. should be granted to Nott as a remuneration for his active services; and accordingly the said sums, or a considerable part thereof, were paid to those persons out of the fund from the coal-duty. No part of the £2,000, borrowed by the commissioners on the credit of the coal-duty, had been applied by them to the repairing of any groynes or other works for the safety of the town or any part of the beach or shore; but the last-mentioned sum had been applied by the commissioners to very different purposes, contrary to and in violation of the Act and of their duty in the due execution of the same. The relator had applied to and required the commissioners, and Attree and Gates, not to proceed to compel payment of the duty on coal so directed by the commissioners to be raised until the whole amount of the money collected and levied as aforesaid had been justly and fairly expended according to the meaning of the Act; but the commissioners, their treasurer and collector, had notwithstanding, proceeded to levy a distress on the goods of the relator for the duty on coal claimed by them to be due from him, and had actually seized and carried from off the premises of the relator coal to a larger amount than the duty so claimed. B C D E

The information charged that the Act meant and intended that the commissioners, before they imposed any duty on coal, should calculate or procure an estimate of the probable amount of the expenses to be incurred in the then current year, for repairing the groynes, etc., and that such a duty only ought to be imposed on coal as would be sufficient to raise a sum equal to such expense, but for no other purposes; and that if it should happen that the commissioners were mistaken in their calculations, or that the estimate should exceed the sum expended, and that such excess should leave an inconsiderable surplus of the coal-duty after payment of the sums borrowed thereon, and expenses, and if there was no probability that any further sum would be immediately wanted for the erection and repair of the groynes then, but not otherwise, such inconsiderable surplus might be applied in aid of the town rate. F G

The commissioners did not make any estimate prior to imposing the coal-duty for ascertaining the amount of the probable charges and expenses that would be necessary in erecting and repairing the groynes, etc., so that in imposing the duty of three shillings a chaldron on coal, they did not regulate themselves by the amount of such expenses, but, on the contrary, always imposed such duty in order to raise a sum of money to be applied in aid of the town rate, and well knew at the respective times when they imposed the duty on coal, that for the mere purpose of repairing the groynes, etc., and erecting or building any new ones or other works, there was no necessity to impose such duty, and that the money in hand arising from the previous duty levied, was more than sufficient to answer such expenses, or that at least a much less rate or duty than three shillings per chaldron would have been sufficient. The expenses of repairing the groynes, etc., never, in one year, were equal to the sum raised for that purpose but, on the contrary, the duty in every year greatly exceeded the expenditure. In no case were the commissioners at liberty, under the Act of 1810 to apply any part of the duty arising from coal in aid of the town rate, until they had paid off all moneys which had been borrowed upon the credit of the coal-duty. H I

A Attree, the treasurer to the commissioners, by their direction, had carried the amount of duties arising from coal and the rents and tolls of the market, and the rates and assessments made on the inhabitants of the town, to one general account, and they had thereby appropriated the balance in their hands, or in the hands of Attree, on account of the duties arising from coal, to the payment of the deficiency in the rates and assessments on the inhabitants of the town. The
B receipts of the duty on coal ought to be applied exclusively to the payment of the moneys properly charged on such duty by the commissioners, and the expenses of erecting and repairing the groyns, etc., and that no further rate or duty should be imposed upon coal, but for such purposes. Though the money in hand, arising from the receipts of the coal-duty, was more than sufficient to answer the above
C purposes for a considerable time to come, yet the commissioners threatened to levy three shillings per chaldron under the rate last made, and likewise to impose another similar rate on the expiration of the old one; and the commissioners ought to be decreed to replace to the account of the coal-duty all such sums of money which they had improperly taken from the produce of that duty, and applied to purposes to which they were not applicable under the Act of 1810.

D The information prayed, (i) a declaration that the commissioners are not entitled under the Act of 1810 to impose any duty on coal landed at Brighton, except for the purpose of repairing the groyns, etc., for the safety of the town; (ii) an injunction to restrain the commissioners from imposing any duty or assessment on the coal so landed except for the purposes last mentioned, and to restrain the commissioners from levying any duty or assessment on such coal which except for such
E last-mentioned purposes; (iii) an account of all the moneys collected by Gates, Attree, or by the commissioners, in each year from the passing of the second Act to the present time, in respect of the duty on coal, and of the application thereof in each of the said years, and of the expenses incurred in each year, in the repairing the groyns, etc., and an account of the money borrowed by the commissioners, and then due, on the credit of the coal-duty, and what money had been applied
F in payment of the interest on such debt; (iv) an order that the balance of the coal-duty so received by Attree or by the commissioners, after deducting the expenses of supporting and erecting fences against the encroachment of the sea, and the payment of the principal, if any, and the interest of the debt contracted on the said duty, might be ascertained and applied in payment of the debt due thereon, and that the residue of such balance might be applied exclusively to the payment of
G the expenses of supporting, maintaining, and erecting fences necessary to prevent the encroachment of the sea; (v) if it should appear that the money arisen from, or borrowed on the credit of, the duty on coal, since the passing of the second Act, had been applied purposes not warranted by the Act, then an order that the commissioners might be decreed to replace such money to the account of the duty on coal, and that in the meantime they might be restrained from borrowing any
H further sum on the credit of the coal-duty, and that all the commissioners might be directed to keep distinct accounts of all moneys hereafter to be levied under the Act.

I In addition to the clauses stated by the information, the Act of 1772 enacted, that all actions or suits which the commissioners might find necessary to prosecute, for the recovery of any damage or sum of money due to them, by virtue of the Act, should be commenced and prosecuted in the name of their treasurer for the time being, and that all actions and suits which it might be necessary for any other person to commence or prosecute, on account of any contract made by the commissioners, or any of them, as such, or by any other person on their behalf, in pursuance of the Act, for the non-performance of such contract, or for any other act or thing done by the commissioners, or any of them, or any other person by their order, in pursuance of the Act, should be commenced and prosecuted against the treasurer for the time being. Section 112 authorised the churchwardens and overseers of the poor to grant a drawback of the duty to such poor persons as

were not able to pay the same, on any coal for their own use, not exceeding two chaldrons in one year. Section 116 enacted that after the money then due, or which should thereafter be borrowed, upon the credit of the duty arising from coal, and the expenses incurred in erecting and maintaining the groynes and other works, should have been fully paid, it should be lawful for the commissioners to apply any surplus that might thereafter arise from the said duty, in aid of the rate for paving, etc., as to them should seem reasonable and proper. A

In December, 1814, the defendants filed a general demurrer, showing that the Attorney-General had not made out a case entitling him to relief against them in a court of equity. They also alleged, *ore tenus*, as another cause of demurrer, a want of parties. The demurrer, having been allowed by the vice-chancellor, was now argued on appeal. B

Leach and Horne for the defendants, supported the demurrer. C

Sir Arthur Pigott, Sir Samuel Romilly, Bell and Newland for the Attorney-General, supported the information.

Cur. adv. vult.

April 3, 1818. **LORD ELDON, L.C.**, delivered the following judgment.—The question in this case turns on the powers and duties of commissioners against whom an information has been filed by the Attorney-General. The Act of 1772 appoints certain persons commissioners for paving, lighting and cleansing the town of Brighton, with directions for the execution of their duty and a provision that actions may be maintained in the name of one commissioner or of the clerk or treasurer. After a variety of clauses for effecting its objects, the Act authorises the commissioners (seven or more of them) for defraying the expenses of paving, lighting and cleansing the town, to impose on the tenants of all houses and other property, a rate not exceeding three shillings in the pound on the rate made for the relief of the poor. It confers a power of inspecting that rate on inhabitants having an order under the hands of five of the commissioners. The Act then empowers the commissioners to borrow money on the credit of the rate, and it is, I think, in the statement of the security for money so borrowed that the first mention is made of building or repairing groynes. D

The provisions for this purpose are prefaced by a recital that Brighton is situate near the sea, within six miles of the harbour of Shoreham, and that a great part of the town having been destroyed by the breaking in of the sea, several groynes (by which I understand buttresses constructed for the purposes of supporting the shore) were some years since erected, which had preserved the town and the coast was then safe and commodious for ships to land coal, etc., that the groynes were greatly out of repair and the inhabitants were not able to raise sufficient to repair the same without the aid and authority of Parliament. It is, therefore, enacted that the commissioners (or any seven or more of them) should be trustees for repairing the old or building new groynes, and that for effecting the premises, from June 24, 1773, a definite sum should be levied, namely, sixpence on every chaldron of coal landed at the town. A subsequent clause authorises the trustees to give security by assignment of the rate for any sum borrowed not exceeding £1,500. E

This Act continued in force till 1810, when another Act was passed, by which, after a recital of the insufficiency of the former rate to provide against the inroads of the sea, certain individuals are appointed to repair and maintain the groynes already built and, if necessary, to build new groynes or works, and are authorised to levy a sum not exceeding three shillings for every chaldron of coal, etc., landed on the beach or otherwise brought into the town; and the Act authorised *ipsisimis verbis* for the safety and protection of the town, the inhabitants of which have been described as unable to protect themselves against the ravages of the sea. F

It appears extremely difficult to maintain that there does not exist, in some court in this kingdom, an authority, not to punish for misapplying or to replevy in case of unduly levying, but to compel the trustees properly to apply the money G

A which, by these Acts, they were authorised to raise for specific purposes. I have not yet satisfied myself that the recital preceding the power given to the trustees may not, within the doctrines often heard in this court, be represented as the recital of a charitable use. It is clear that the fund is set apart for the purpose of aiding the pecuniary inability of the inhabitants to protect themselves from the ravages of the sea.

B The Act of 1810 contains a clause requiring observation that all actions or suits by or against the commissioners shall be prosecuted in the name of the treasurer or against the treasurer. It then orders books of account to be kept, with liberty of inspection to persons interested, and directs the application of any surplus of the coal-rate but without a similar direction relative to a surplus of the paving rate. Next follows a clause fixing the quantum of the latter rate, by saying that
C it should not exceed the proportion of four shillings in the pound on the rate for the relief of the poor, and authorising the imposition of a duty on coal to the extent of three shillings a chaldron.

In my view of this Act, it is no more than a continuance and augmentation of the provisions of the former Act [of 1772] in aid of that pecuniary inability which, though not recited in the second Act, was the avowed ground of the first and must be considered as the ground of the second. It is clear that, though the legislature has given to the commissioners a power of raising any sum not exceeding three shillings in the chaldron, yet that power can be duly exercised only to the extent which shall appear to them requisite for the protection of the town or of the shore; a purpose which limits their discretion. The clause itself restricts
D the authority which it confers, by describing that purpose as its object. Considering the impracticability of precisely ascertaining what sum would be required, where the wisest calculations might be immediately falsified by the violence of the sea, it was reasonable to anticipate that the rate imposed on a probable opinion of propriety and necessity, might produce a surplus and directions are given for the application of that surplus, in aid of the other duties, but not till the debt contracted
E had been discharged.

On the clause entitling poor persons who have paid the duty to a drawback, it is said that the Act seems designed for the taxation of the rich in aid of the poor. That representation is not correct. The principle of the Act was the inability of the inhabitants of Brighton to provide for their own safety. Whether right or wrong I am not to inquire, but that is the paramount principle. It directs that
F an aid shall be given to all which, in a certain way, is a charge on each, and from which, therefore, a portion of them, the poorer, are exempted.

The information is filed at the relation of Izard, an inhabitant, and for the present purpose of deciding the validity of the demurrer I must assume the allegations of the information to be true. The demurrer extends to the whole relief prayed and if, therefore, to any single part it cannot hold, it is bad. Although, for instance, for
G one of the grievances stated the relator has a remedy by replevin, and although a portion of the prayer is founded on that statement, yet if any other allegation entitles the relator to relief, the demurrer must be overruled. On what principle it can be contended that it was not the duty of the commissioners to apply the surplus of the coal-rate in discharge of the debt contracted by works for resisting the encroachments of the sea, before any application in aid of the town rate, is
H incomprehensible. Whether I am competent on this record to enforce the performance of that duty is another question, but the information, stating the fact of the misapplication, of so much, whatever becomes of the rest, the defendants must answer.

I It has been argued, that the commissioners are not amenable to the jurisdiction of a court of equity in respect of transactions which, according to the allegations, constitute a crime at law. But let it be recollected that a party accountable cannot protect himself from an account in this court by the mere suggestion that the duty of accounting is blended with duties of another kind. The information

contains a charge which I must at present assume to be true, of misapplication of the funds, and on that the question again arises, what can be done here? A

It is impossible to maintain that, admitting the truth of the allegation, the Act of Parliament has been duly executed. Can it be contended that £4,000 ought to have been applied in reduction of the town rate, while the debt not only remained unpaid but was increased by new loans? I assent to the doctrine of SIR THOMAS PLUMER, V.-C., that the relator might have obtained redress by replevin provided he could establish a case of illegal distress; but the statement of that fact by the Attorney-General will not deprive him of his right to relief on other grounds. In determining the validity of this demurrer, the court is bound to consider the whole relief sought because, if any part is due, the circumstance of having prayed too much will not support a demurrer to the whole. If, on the true construction of these Acts, the commissioners can be considered in the sense in which I use the term, as trustees, putting out of the case all that has been done, except as inducements to the court to look at the balance in hand, the information stating the existence of such a balance, the question would be, whether the court has not jurisdiction to secure its due application for the purposes of the Acts. B C

One of the grounds on which this demurrer has been supported at the Bar, is not necessarily connected with the fact that the suit is instituted by the Attorney-General. I mean that the information calls for disclosure of acts which would constitute criminality in the defendants. My answer is, that as to parts, the objection may prevail but as to other parts it cannot, and the defendants being competent, not only by demurrer but by answer, to protect themselves from answering, the demurrer as to the whole information cannot be supported because an answer is required to some questions tending to criminate, if an answer is required to other questions not tending to criminate. How would it be possible, were this an ordinary suit, to sustain on such grounds a demurrer to the whole relief? D E

I observe that it has been considered as mischievous for the Attorney-General to come in aid of the relator in this case, with respect to the distress; but if the relator is not allowed to require the assistance of the Attorney-General, yet it will not be the less necessary for the defendants to answer the information in other parts provided the suit can be maintained by the Attorney-General. The circumstance of his joining as relator, a person who is not entitled to the equitable relief which he seeks, will not vitiate the proceeding; that point has been so determined in a late case before the House of Lords. F

The defendants then insist on a defect of parties. I am of opinion that that objection cannot prevail. On the contrary, it is apparent that if the information can be sustained at all, as the information of the Attorney-General, and if the acts complained of are the acts of the commissioners, they are the proper parties to the record. The circumstance that the acting commissioners of the time past may not be the acting commissioners during the progress of the suit may, indeed, present a formidable obstacle to its successful prosecution; but undoubtedly as commissioners, they may be compelled to bring forward, from time to time, those accounts for which they were originally brought here; and the Act having provided a mode in which their successors are to be appointed, when an injunction is required against the body so formed, the suit, if it can be maintained at all, may certainly be maintained against them. If the Attorney-General can sustain the information, the parties may from time to time be changed. That part of the case presents difficulties but no objection to the progress of the suit. The argument that the treasurer should have been, in that character, the sole defendant, is untenable; the directions in the Act are not applicable to such a case as this, in which the relief sought could not have been granted against the treasurer. G H

We come then to the most material question, whether this is a case in which the Attorney-General can sue? On the best consideration, recollecting the judgment already pronounced, and expressing an opinion subject to review elsewhere, and in I

A order to teach us the delicacy of legislating on such matters, I shall not regret if
this case is carried to a higher court, I think that the Attorney-General may
sustain this information. The first Act authorises me to say that Parliament inter-
fered in favour of persons whose circumstances were such that they could not, by
B their own means, support the town and, on that ground, directed a sum to be
levied and applied to the special purpose of erecting groynes for the preservation
of the coast. It was, therefore, an aid given to a deficiency in the pecuniary circum-
stances of the inhabitants who must submit to be considered as having represented
themselves too poor to make this provision from their own funds. Parliament having
by the first Act appointed certain persons under the denomination of trustees, to
levy and apply specific sums, I repeat here, that if the question had occurred
C between the date of that Act [1772] and 1810, it would have been impossible to
contend that the persons so appointed were anything less than trustees, for the
purpose of applying these sums; and although the Act of 1810 renders it somewhat
more difficult to adopt that construction, yet I say that the two Acts are in *pari*
materia; and that though the commissioners are entitled, under the last Act, to
raise a larger sum, they are so entitled in precisely the same character of trustees,
D and for the same purposes, as were expressed in the first Act, namely, for the
benefit of the poor inhabitants of Brighton.

On this question the court has been referred to DUKE'S LAW OF CHARITABLE USES,
which I have always heard quoted as a book of high authority. It contains the
readings of a man of great eminence in his profession, and I believe that the passage
cited was a construction of the Act by the very individual who drew it. The
E question comes to this, whether here is a charitable use, a grant within the terms
of the Statute of Elizabeth (43 Eliz., c. 4)? If it is, *cadet quæstio*. On the words
of the statute the following commentary is extracted from the READINGS ON THE
STATUTE OF USES of SIR FRANCIS MOORE (DUKE, p. 135):

F "Ports and havens; such only as tend to safety of ships of sail, not other
vessels; and creeks for harbour, which are implied to find lights to guide
ships into the haven is a charitable use within these words. An imposition
granted upon commodities imported or transported, to be employed upon repair
of ports or havens, where they shall land, is a charitable use, and within this
statute."

G I should be glad to know whether an impost in aid of the poor inhabitants of
Brighton to repair groynes for the preservation of the town, and enabling ships to
land goods there, is not within the terms of this construction of the statute? I
have heard nothing which prevents my concurring in the opinion that a Parlia-
mentary grant, destined to such purposes, is a gift to charitable uses. If that
doctrine is to be contradicted, it must be done by higher authority than mine.

Demurrer overruled.

CULLEN v. BUTLER

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Bayley, Abbott and Holroyd, JJ.), November 23, 1816]

[Reported 5 M. & S. 461; 105 E.R. 119]

Insurance—Marine insurance—Risks insured against—"All other perils, losses, and misfortunes" damaging ship and cargo—Ship sunk by ship mistaking her for enemy.

By a policy of marine insurance cargo and ship were insured against perils of the sea and "all other perils, losses, and misfortunes which had or should come to the hurt, detriment, and damage of the said goods and merchandise and ship." The vessel was sunk and the cargo lost when another ship fired on her in the mistaken belief that she was an enemy.

Held: the assured was entitled to recover under the above words of the policy.

Notes. See Sched. 1, rule 12 of the Maritime Insurance Act, 1906 (13 HALSBURY'S STATUTES (2nd Edn.) 62) which states that the term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.

Considered: *Butler v. Wildman* (1820), 3 B. & Ald. 398; *West India and Panama Telegraph Co. v. Home and Colonial Marine Insurance* (1880), 6 Q.B.D. 51; *Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.*, [1886-90] All E.R. Rep. 241; *Steamship Knutsford, Ltd. v. E. Tillmanns & Co.* (1908), 99 L.T. 399. Explained: *Thorman v. Dowgate Steamship Co., Ltd.*, [1908-10] All E.R. Rep. 174. Considered: *P. Samuel & Co., Ltd. v. Dumas*, [1924] All E.R. Rep. 66. Referred to: *Jones v. Nicholson* (1854), 10 Exch. 28; *Davidson v. Burnard* (1868), L.R. 4 C.P. 117; *Antony v. Etna Insurance Co.* (1869), 21 L.T. 473; *Hamilton, Fraser & Co. v. Pandorf & Co.*, [1886-90] All E.R. Rep. 220; *Wilson, Sons & Co. v. Xantho (Cargo Owners), The Xantho*, [1886-90] All E.R. Rep. 212; *Jackson v. Mumford* (1902), 8 Com. Cas. 61; *Stott (Ballie) Steamers v. Marten*, [1916] 1 A.C. 304; *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1917] 1 K.B. 873; *Akt. Frank v. Namaqua Copper Co.* (1920), 90 L.J.K.B. 36; *The Stranna*, [1938] 1 All E.R. 458.

As to clauses in marine insurance policies in respect of other perils, see 22 HALSBURY'S LAWS (3rd Edn.) 84; and for cases see 29 DIGEST (Repl.) 260.

Cases referred to in argument:

- (1) *Pickering v. Barkley* (1648), Sty. 132; 82 E.R. 587; 41 Digest (Repl.) 291, 1045.
- (2) *Buller v. Fisher* (1799), 3 Esp. 67; Peake, Add. Cas. 183; 170 E.R. 540, N.P.; 41 Digest (Repl.) 290, 1038.
- (3) *Barton v. Wolliford* (1686), Comb. 56; 90 E.R. 341; 41 Digest (Repl.) 291, 1046.
- (4) *Hadkinson v. Robinson* (1803), 3 Bos. & P. 388; 127 E.R. 212; 29 Digest (Repl.) 241, 1820.
- (5) *Rohl v. Parr* (1796), 1 Esp. 445, N.P.; 29 Digest (Repl.) 285, 2157.
- (6) *Lubbock v. Rowcroft* (1803), 5 Esp. 50, N.P.; 29 Digest (Repl.) 241, 1819.
- (7) *Hunter v. Potts* (1815), 4 Camp. 203, N.P.; 29 Digest (Repl.) 235, 1766.

Action of assumpsit on a policy of insurance.

Goods on board the ship *Industry*, at and from London to the Canary Islands were insured on a policy for £200, the interest being averred in the plaintiff. The relevant clause of policy is fully stated in the judgment. The plaintiff declared in the first count upon a loss by the perils and misfortunes of the seas. In the second count, he averred that the ship, with the goods on board, departed from London in prosecution of her intended voyage, and on the night of July 7 before her arrival at the Canary Islands, the master and crew of a certain British ship called the

A *Midas*, believing the *Industry* to be an enemy's ship, about to attack and board the *Midas* and take her as prize, for the purpose of defending themselves and the *Midas* against such apprehended attack, but without any fault on the part of the master or crew of the *Industry*, fired at the *Industry* whereby she was pierced with shot and sunk with the goods on board, and lost. The defendant pleaded non assumpsit.

B At the trial before LORD ELLENBOROUGH, C.J., the jury found that the ship and cargo were lost in the manner, and under the circumstances stated in the second count: they found a general verdict for the whole subscription, subject to the opinion of the court upon a Case stating the above facts. The question was whether this was a loss covered by the policy under the words "perils of the seas," or under the general words, "all other perils, losses . . ."

C *Parke* for the plaintiff in support of the first count cited *Pickering v. Barkley* (1), *Buller v. Fisher* (2), and *Barton v. Wolliford* (3), from which he deduced that this loss was properly to be accounted a peril of the sea. As to the second count, he contended that it was not necessary to aver the loss in the very words of the policy, but if the fact alleged came within the meaning of the words of the policy, it was sufficient; and, therefore, per fraudem et negligentiam magistri was good, without using the word "barratry." The general words in the policy ought to be construed to extend to losses of the like nature as those mentioned before, according to the rule *noscitur a sociis*. Collision, according to EMÉRIGON, was a loss of this nature; and according to the Ordonnance de la Marine, art. 6, the risk of the assurer extends to

E "toutes pertes et dommages qui arriveront sur mer par tempêtes, naufrages, échouements, abordages, changement de route, de voyage ou de vaisseau, jet, feu, prises, pillages, arrêt de Prince, déclaration de guerre, représailles et généralement toutes autres fortunes de mer,"

upon which latter words the commentator observed :

F "Divers auteurs ont prétendu que les assureurs ne sont pas tenus, des cas, tout à fait extraordinaires, à moins que la police ne soit générale pour tous les cas, exprimés et non exprimés. Mais cette exception, qui ne pourrait que donner matière à des discussions fréquentes, n'est pas admissible parmi nous, à la vue de notre article, qui comprend absolument toutes fortunes de mer, s'il n'y a quelque restriction par une convention expresse."

G Also, according to EMÉRIGON, "Abordage" is of three kinds: "1. par cas fortuit" 2. par la faute des gens de l'un des navires; 3. sans qu'on sache par la faute de qui 'c'est une fortune de mer;'" and further: "On entend 'par fortune de mer,' toutes les pertes, et toutes les dommages, qui arrivent sur mer par cas fortuit." He concludes: "Mais l'opinion commune est, que les assureurs répondent de tous les accidents, quelque insolites, inconnus, ou extraordinaires qu'ils soient."

H *Barnewall* for the defendant, argued, as to the first count, that by "perils of the sea," must be understood perils arising from the sea, or sea damage, and not such as were merely perils on the sea; neither could it be said to be a peril of the sea where the loss is occasioned, as it was here, by the fault of one of the parties. As to the second count, he said that it had not been the practice in this country, whatever might be the opinion of foreign jurists, to extend the general words of the policy beyond the risks enumerated in it; and he cited *Hadkinson v. Robinson* (4), *Rohl v. Parr* (5), *Lubbock v. Rowcroft* (6), *Hunter v. Potts* (7), and 1 MARSHALL ON INSURANCE (2nd Edn.), p. 218.

Cur. adv. vult.

LORD ELLENBOROUGH, C.J., delivered the following judgment of the court. —As the court is of opinion that the plaintiff is entitled to recover upon the second count of this declaration, framed upon the special circumstances of this case, which clearly seem to fall within the general and comprehensive words in the policy

subjoined to the particular causes of loss therein specified, viz.: "all other perils, losses and misfortunes, which had or should come to the hurt, detriment and damage of the said goods and merchandises and ship . . . or any part thereof," it becomes less material to consider whether the plaintiff would be entitled to recover as for a loss "by perils of the sea," in the proper and strict sense of the words, i.e., "*ex marinæ tempestatis discrimine*," as described by EMÉRIGON; which loss by perils of the sea is the specific loss stated in the first count. If it be a loss by perils of the sea, merely because it is a loss happening upon the sea, as has been contended, all the other causes of loss specified in the policy are, upon that ground, equally entitled so to be considered; and it would be unnecessary as to them ever to assign any other cause of loss, than a loss by perils of the sea. But as that has not been the understanding and practice on the subject hitherto, and inasmuch as the very insertion of the general or sweeping words, as they are called, in the policy after the special words, imports that the special words were not understood to include all perils happening on the sea, but that some more general words were required to be added, in order to extend the responsibility of the underwriters unequivocally to other risks not included within the proper scope of any of those enumerated perils, I shall think it necessary only to advert shortly to some of the reasons upon which we think that the general words, thus inserted, comprehend a loss of this nature.

The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes.

EMÉRIGON, in chap. 12, s. 1, p. 360, of his *TREATISE ON INSURANCES*, in discussing the general rule that assurers answer for all loss and damages that happen on the sea, says, that it is to prevent doubts and vain disputes that in the printed formulas (of policies) the following words have been inserted; and then he instances the general words to be found in the formulas of most of the principal commercial ports on the Continent: "All inconveniences, perils, and cas fortuits [which may be translated as misfortunes, accidents, etc.] which may happen;" and generally of "all perils and fortunes which may happen in what manner soever, and which can be imagined," is the provision to be found in the formulas of Bordeaux and Antwerp. Generally of "all perils, fortunes, or accidents which may happen, in what manner soever, foreseen or unforeseen," is the formula of Nantes; and that of Rouen and Genoa, "generally of all inconveniences foreseen or unforeseen." The formula of Hamburg is of all "*Cogitatis vel imaginatis, usitatis vel inusitatis, nullis exceptis*." But although there be an express exclusion of any exception by the terms of the last-mentioned policy, the reason of the thing engrafts an implied exception, even upon these words, general as they are, that is, in the case of damage occasioned by the fault of the assured; as to which the rule is: "*Si casus e venerit culpâ assecurati, non tenentur assecuratores*." EMÉRIGON (s. 2, p. 364) says: "This is a general rule, from which it is not allowed to derogate by a pact to the contrary," "*nulla pactione effici potest ut dolus prestetur*;" and he quotes Pothier, who says: "I cannot effectually [valablement] contract with anyone that he shall charge himself with the faults which I shall commit."

This is a case in which the assured is, by the terms of the declaration and finding thereupon, expressly exempted from the imputation of blame in respect to the loss in question. It is no objection to the plaintiff's right to recover against the underwriters in this case, that he may have also a right to recover against the persons by whose immediate act the damage was occasioned; that has been decided in the

A case of a damage at sea by collision. The only inconvenience which can be suggested as likely to arise from a limited construction of the words perils of the seas, occurring in policies of assurance, and from the effect attributed to the general words, is, that in doubtful cases the plaintiff will feel it necessary to introduce a special count, stating the particular circumstance by which the loss was occasioned, instead of relying upon a count framed upon the special head of loss in the policy, viz., by perils of the seas or the like. But this inconvenience will be well compensated to the assured, by the advantage of certainty, by which the risk of nonsuit at the trial, and the expenses attendant thereupon, will be avoided.

Judgment for plaintiff.

MARSHALL AND ANOTHER v. HOLLOWAY AND OTHERS

D LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), February 28, March 7, 10, May 26, 30, July 1, 3, 4, 1818, April 22, 1820]

[Reported 2 Swan. 432; 36 E.R. 681]

Executor—Trustee—Remuneration—No provision in will—Special circumstances—Administration requiring much time—Executor with particular knowledge of estate.

E Although no provision is made in a will for the remuneration of an executor and trustee the court may make an order that he shall have compensation from the estate in special circumstances as, for instance, when carrying out the trusts of the will requires the application of a great deal of time and an executor is better acquainted with the estate than any other person, but cannot afford the necessary time from the conduct of his own affairs unless he receives compensation.

F *Trust—Infant—Maintenance—No provision in will—Power of court to grant maintenance.*

G Although the terms of a will do not authorise the application of income of the estate for the maintenance of infant devisees and legatees the court, when it is necessary, will grant an allowance for maintenance where it can collect before it all the individuals who are or may be entitled to the fund.

I *Will—Vesting—Direction to accumulate income—Effect on vesting—Accumulation to pay legacies—Trust for payment of debts.*

H Per LORD ELDON, L.C.: A trust under a will to accumulate for the payment of legacies will not prevent the creation of vested interests in the corpus of the estate any more than would a trust for the payment of debts.

Notes. Approved: *Morison v. Morison* (1838), 4 My. & Cr. 215. Considered: *Bainbrigg v. Blair* (1845), 8 Beav. 588; *Martelli v. Holloway* (1872), L.R. 5 H.L. 532; *Re Masters, Coutts & Co. v. Masters*, [1953] 1 All E.R. 19. Referred to: *Ibbetson v. Wilson* (1845), 4 Hare, 344; *Broune v. Stoughton* (1846), 14 Sim. 369; *Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; *Turvin v. Newcome* (1856), 3 K. & J. 16; *Christie v. Gosling* (1866), L.R. 1 H.L. 279; *Tewart v. Lawson* (1874), L.R. 18 Eq. 490; *Re Stamford and Warrington, Payne v. Grey*, [1911] 1 Ch. 255; *Re Lewis, Bush v. Lewes*, [1918] 2 Ch. 308.

As to the administration of estates generally, see 16 HALSBURY'S LAWS (3rd Edn.) 296 et seq.; and for cases see 24 DIGEST (Repl.) 815 et seq.

Cases referred to:

(1) *Greenwell v. Greenwell* (1800), 5 Ves. 194; 31 E.R. 541, L.C.; 23 Digest (Repl.) 460, 5313.

- (2) *Collis v. Blackburn* (1804), 9 Ves. 470; 32 E.R. 684; 28 Digest (Repl.) 588, **A**
1014.
- (3) *Fairman v. Green* (1804), 10 Ves. 45; 32 E.R. 760; 28 Digest (Repl.) 605,
1157.
- (4) *Lomax v. Lomax* (1805), 11 Ves. 48; 32 E.R. 1005, L.C.; 23 Digest (Repl.)
460, 5317.
- (5) *Ex parte Kebble* (1805), 11 Ves. 604; 32 E.R. 1223, L.C.; 23 Digest (Repl.) **B**
468, 5402.
- (6) *Errington v. Chapman* (1806), 12 Ves. 20; 33 E.R. 8; 23 Digest (Repl.) 460,
5316.
- (7) *Aynsworth v. Pratchett* (1807), 13 Ves. 321; 33 E.R. 314; 28 Digest (Repl.)
587, 1004.
- (8) *Errat v. Barlow* (1807), 14 Ves. 202; 33 E.R. 498; 23 Digest (Repl.) 460, **C**
5318.
- (9) *Haley v. Bannister* (1820), 4 Madd. 275; 56 E.R. 707; 28 Digest (Repl.)
574, 879.
- (10) *Mole v. Mole* (1758), 1 Dick. 310; 21 E.R. 288; 23 Digest (Repl.) 467, 5395.
- (11) *Lord Southampton v. Marquis of Hertford* (1813), 2 Ves. & B. 54; 35 E.R.
239; 37 Digest (Repl.) 59, 41. **D**
- (12) *Griffiths v. Vere* (1803), 9 Ves. 127; 32 E.R. 550, L.C.; 37 Digest (Repl.)
155, 742.
- (13) *Longdon v. Simson* (1806), 12 Ves. 295; 33 E.R. 113; 37 Digest (Repl.)
155, 743.
- (14) *Tregonwell v. Sydenham* (1815), 3 Dow, 194; 3 E.R. 1035; 37 Digest (Repl.) **E**
97, 315.
- (15) *Portington's Case* (1613), 10 Co. Rep. 35 b; 77 E.R. 976; sub nom. *Porting-*
ton v. Rogers, 2 Brownl. 65, 138; 38 Digest (Repl.) 851, 665.
- (16) *Carter v. Barnardiston* (1718), 1 P. Wms. 505, H.L.; 44 Digest 1049, 9026.
- (17) *Jee v. Audley* (1787), 1 Cox, Eq. Cas. 324; 29 E.R. 1186; 37 Digest (Repl.) **F**
57, 15.
- (18) *Leake v. Robinson* (1817), ante p. 363; 2 Mer. 363; 35 E.R. 979; 37 Digest
(Repl.) 94, 299.
- (19) *Routledge v. Dorril* (1794), 2 Ves. 357; 30 E.R. 671; 37 Digest (Repl.) 133,
599.
- (20) *Cambridge v. Rous* (1802), 8 Ves. 12; 32 E.R. 254; 44 Digest 1161, 10054.
- (21) *Proctor v. Bishop of Bath and Wells* (1794), 2 Hy. Bl. 358; 126 E.R. 594; **G**
44 Digest 1180, 10202.
- (22) *Baker v. Hall* (1806), 12 Ves. 497; 33 E.R. 188; 8 Digest (Repl.) 365, 463.
- (23) *Gravenor v. Hallum* (1767), Amb. 643; 27 E.R. 417; sub nom. *Grosvenor v.*
Hallam, 1 Bro. C.C. 61, n., L.C.; 20 Digest (Repl.) 402, 1224.
- (24) *Pulsford v. Hunter, Jennings v. Hunter* (1792), 3 Bro. C.C. 416; 29 E.R.
618, L.C.; 28 Digest (Repl.) 575, 886.
- (25) *Hanson v. Graham* (1801), 6 Ves. 239; 31 E.R. 1030; 44 Digest 1087, 9382.
- (26) *May v. Wood* (1792), 3 Bro. C.C. 471; 29 E.R. 649; 44 Digest 1061, 9138.
- (27) *Batsford v. Kebbell* (1797), 3 Ves. 363; 30 E.R. 1055, L.C.; 44 Digest 1087,
9380.
- (28) *Sansbury v. Read* (1805), 12 Ves. 75; 33 E.R. 29; 44 Digest 1061, 9139.
- (29) *Booth v. Booth* (1799), 4 Ves. 399; 31 E.R. 203; 44 Digest 1087, 9381.
- (30) *Mackell v. Winter* (1797), 3 Ves. 536; 30 E.R. 1144, L.C.; 44 Digest 1055,
9086. **I**
- (31) *Bromfield v. Crowder* (1805), 1 Bos. & P.N.R. 313; 127 E.R. 483; affirmed
(1811), cited in 14 East, at p. 604, H.L.; 44 Digest 1042, 8986.
- (32) *Boraston's Case* (1587), 3 Co. Rep. 16 a; 76 E.R. 664; 44 Digest 1041, 8972.
- (33) *Johnson v. Gabriel and Bellamy* (1588), Cro. Eliz. 122; 78 E.R. 380; sub
nom. *Johnson and Bellamy's Case*, 2 Leon. 36; sub nom. *Grant's Case*,
cited in 10 Co. Rep. at p. 50 a; 44 Digest 1037, 8949.

A Bill by executors for an order that the rights of certain persons in the estate of the testator might be ascertained and other relief in carrying out the administration.

By his will, dated Sept. 2, 1813, Thomas Holloway, after some pecuniary legacies, devised and bequeathed all his real and personal estate to S. Marshall, V. Lawes, and F. Croft, their heirs, executors, and administrators, upon trust to convert his personal estate into money, and after payment of his debts and legacies.

C “to lay out and invest in their names the clear surplus moneys arising from my personal estate in the purchase of stock in some of the government or Parliamentary funds, or upon real securities in England, and, in like manner, to lay out and invest the dividends, interest, and annual proceeds of such stocks and securities and the rest of my personal estate, and also the clear yearly rents and profits of my real estates from time to time as and when and so often and during all such times as any person or persons beneficially interested in or entitled to any real and personal estates under the trusts hereinafter declared thereof shall be under the age of twenty-one years, adding all such investments to my personal estate in order to accumulate the same; and upon further trust as and when each and every of my grandchildren who shall not become entitled to my real and personal estates or some part or share thereof under the trusts hereinafter declared shall attain the age of twenty-one years to raise and pay out of my personal estate, to each and every such grandchild not so entitled the sum of £1,000; and, subject to the trusts hereinbefore declared, as to for and concerning all my freehold copyhold and leasehold and real and personal estates.”

F The stocks and securities to be purchased as aforesaid were left upon trust for the eldest son, then living, of his daughter Catherine, then of the age of five years, during his life, and from and after his decease upon trust for the first and every other son of his body, lawfully to be begotten and the heirs of their bodies, with like remainder to his second and third (who was the youngest then living) grandsons, and in failure of such issue upon trust for his granddaughter, the eldest daughter of his daughter Catherine, during her life, and from and after her decease in trust for her first and every other son and the heirs of their bodies, with like remainder to his second and third (or youngest living) granddaughter, and on failure of such issue, in trust, for all and every other the son and sons of his daughter Catherine, lawfully begotten, successively according to seniority, and the heirs of their respective bodies, and on failure of such issue upon trust for all and every the daughter and daughters of his eldest grandson as tenants in common and the heirs of their respective bodies, with benefit of survivorship, with like remainders to the daughters of his second and youngest grandsons, and on failure of such issue upon trust for all and every the daughter and daughters of his eldest granddaughter as tenants in common and the heirs of their respective bodies, with benefit of survivorship, with like remainders to the daughters of his second and youngest granddaughters, and

I “in failure of such issue upon trust for all and every other the daughter and daughters of my said daughter Catherine, lawfully begotten, or to be begotten and hereafter to be born, if more than one as tenants in common, and the heirs of their respective bodies, and failing issue of any such after-born daughter or daughters, then, as to her or their share or shares, upon trust for the other daughter and daughters of my said daughter Catherine hereafter to be born, if more than one as tenants in common, and the heirs of their respective bodies, and in failure of such issue, upon trust for my right heirs and next of kin according to the nature and tenure of the said trust estates, respectively: Provided always, and I declare it to be my will and meaning that such person or persons as shall, under this my will, be entitled to an estate tail in possession in my said real estate shall not be absolutely entitled

to my leasehold and personal estates until he, she, or they, respectively, shall attain the age of twenty-one years, and that my said leasehold and personal estates shall absolutely belong only to such person or persons as shall first attain the age of twenty-one years and become entitled to an estate tail in possession in my real estate under the trusts aforesaid; and, in the meantime, the said leasehold and personal estates shall remain subject to the trusts hereinbefore declared thereof, notwithstanding anything hereinbefore contained to the contrary."

The will then directed that the testator's grandchildren and every person who should become entitled to the possession or the receipt of the rents and profits of his real and personal estates should, within a year after attaining the age of twenty-one years and so becoming entitled, assume the surname and arms of Holloway, and empowered the trustees to renew the leases of the leasehold estates, and the several tenants for life, when they attained the age of twenty-one years and became actually entitled to the possession of the estates or receipt of the rents, to grant leases. By three codicils the testator devised property purchased since the date of the will upon the same trusts, and bequeathed some legacies.

The bill filed by S. Marshall and V. Lawes stated the death of the testator on Jan. 22, 1816, leaving Ann Holloway, his widow, Catherine Martelli (wife of Horatio Martelli) his only child and heiress-at-law and next of kin, and Charlotte Ann Martelli, Anna Isabella Martelli, Catherine Ansley Martelli, Horatio Francis Kingsford Martelli, Charles Henry Ansley Martelli, Thomas Chessher Martelli, of the respective ages of seventeen, fifteen, fourteen, nine, five, and three years, and Mary Anne Martelli (born after the date of the will), his grandchildren, and the birth of Elizabeth Martelli, another daughter of Horatio and Catherine Martelli, since the testator's death. The bill further stated that the defendant Faithful Croft declined to prove the will or act as trustee, and, being the person best acquainted with the testator's affairs, had been employed by the plaintiffs as their agent, and it prayed that the defendants might respectively set forth the rights and interests which they claimed in the real and personal estate of the testator, that the will and codicils of the testator might be established and the trusts thereof performed and carried into execution, that the rights of the several parties in his real and personal estate might be ascertained, and that the plaintiffs might be indemnified in carrying into execution the trusts of the will and codicils, the plaintiffs offering to account for the personal estate and rents possessed by them and to act in the execution of the trusts of the will, on being indemnified. If the court should be of opinion that the defendant Faithful Croft ought to be discharged from being a trustee, the bill asked that proper directions might be given for that purpose and for his conveying or releasing the testator's real estates, and for ascertaining the compensation to be made to him for his time and trouble in the conduct of the testator's affairs.

Feb. 28, Mar. 7, 10, 1818. A petition was presented for an allowance for maintenance of the infant children of Mrs. Martelli.

Hart, Roupel and Raithby, in support of the petition.

LORD ELDON, L.C.—The court has never gone further than this, that though the words of the will do not authorise the application of interest to the maintenance of the infants, yet if it can collect before it all the individuals who may be entitled to the fund so as to make to each a compensation for taking from him part, it will grant an allowance for maintenance, but if the will contains successive limitations under which persons not in being may become entitled, it is not sufficient that all the parties then living and presumptively entitled are before the court, for none of the living may be a party eventually entitled to the enjoyment of the property. In such a case, the order would be, in effect, to give for the maintenance of one person the property of another: *Greenwell v. Greenwell* (1); *Collis v. Blackburne* (2); *Fairman v. Green* (3); *Lomar v. Lomar* (4); *Ex*

A *parte* *Kebble* (5); *Errington v. Chapman* (6); *Aynsworth v. Pratchett* (7); *Errat v. Barlow* (8); *Haley v. Bannister* (9). Some early authorities (see 11 Ves. 606) are collected in *Mole v. Mole* (10).

The hearing of the bill was then proceeded with.

B *Sir Arthur Piggott, Preston and Maddock* for the eldest grandson of the testator :
(i) The estate of the eldest son is vested; (ii) the proviso for accumulation is void;
(iii) the eldest grandson, as tenant of the first vested estate, is entitled to the
C interest and rents. If accumulation is directed during a period tending to a
perpetuity, that direction, not the gift to which it is annexed, is void. No difficulty
can arise as to the realty. An estate for life is clearly vested in the grandson,
subject to the clause of accumulation. With regard to the personalty, the will
contains two inconsistent clauses, one giving the property, the other directing
accumulation. The court will reject the direction as far as it is repugnant to the
gift. It is not necessary, on behalf of the first taker, to argue the effect of the
proviso with regard to other persons. The will contains nothing to extend the
accumulation, as to him, beyond twenty-one. At that age it ceases, during the
remainder of his life. The latter clause, on which the heir and next of kin rely,
D does not contain words to take from the tenant for life the estate already bequeathed
to him. *Lord Southampton v. Marquis of Hertford* (11) closely resembles the
present case. The direction of accumulation there being void at common law,
not under the statute [Accumulations Act, 1800, repealed by Law of Property Act,
1925], the court could not divide it into portions, but held it as one entire gift,
void in toto. Under the statute, so far as the trust of accumulation is void, the
E court will reject it, not impeaching the remainder: *Griffiths v. Vere* (12) *Longdon v. Simson* (13). In *Tregonwell v. Sydenham* (14), the accumulation was estab-
lished for the benefit of the heir as a resulting trust. In this case, if the direction
of accumulation is good, it must be for the benefit of the tenant for life, but we
contend that the direction is void. The gift is distinct from the proviso, which is
superadded; being separate and independent, it is governed by the rule in *Porting-*
F *ton's Case* (15), that a subsequent condition or limitation, when repugnant, is
void. At what time, according to the language of the testator, is this proviso of
accumulation to cease? The persons claiming in an opposite interest must mark
out clear boundaries. A decision in favour of the next of kin must define the
time for which the accumulation shall continue for their benefit. In *Tregonwell*
G *v. Sydenham* (14), the time was defined by a limited sum of money. The distinction
between that case and *Lord Southampton v. Marquis of Hertford* (11) is that in
the latter no period could be assigned during which the accumulation was to
continue for the benefit of the heir. According to the argument of the heir, the
accumulation is good, but the trust of the accumulation is void. The direction
for accumulation does not suspend the vesting in the tenant for life. It cannot
be contended that the whole gift is void; that proposition would be contrary to
H *Carter v. Barnardiston* (16), and other cases, in which the inheritance is given
after the payment of debts: such gifts are construed to be vested remainders,
subject to prior chattel interests. The estate of the tenant for life is not avoided
by the trust for accumulation; and that trust being void, and the gift to him good,
there is nothing to deprive him of the rents and profits. We conclude that the
I estate of the tenant for life is not impeached by the trusts, and that he is entitled
to the rents.

Trower and Wetherell for the younger children.

Sir Samuel Romilly, Bell, Raithby and Sugden for Mrs. Martelli, heiress-at-law
and next of kin of the testator. *Lynch* for Mrs. Holloway: The intention of the
testator is unequivocal; the question is whether that intention is conformable to
law. On the clause of accumulation, this case cannot be distinguished from *Lord*
Southampton v. Marquis of Hertford (11). The period during which the
accumulation may continue is indefinite. The question in these cases is whether

accumulation may not by possibility, not whether it must not necessarily, extend beyond the limit prescribed by law. It is a general rule that trusts for accumulation and gifts by limitation are subject to the same principles—that a gift to a class of persons, some capable and some at the death of the testator incapable, though there is only a possibility of their existence, is void in the whole, the clause being entire: *Jee v. Audley* (17) and (to omit intermediate cases) *Leake v. Robinson* (18), establish this proposition. Some passages in the judgment in the latter case, show the difficulty to be encountered in modelling this will.

Some of the provisions of the Accumulations Act, 1800, involve great difficulty. The statute was designed merely to reduce within certain bounds the power of accumulation as it existed at the common law, and was co-extensive with the power of making gifts by limitation, but not to give validity to any provision previously void. The clauses in *Griffiths v. Vere* (12), and *Longton v. Simson* (13) would have been good in the whole if that Act had not passed, and the court was of opinion that they remained good so far as they were not impeached by it, but in cases which contravene the rule of law against perpetuities as *Lord Southampton v. Marquis of Hertford* (11), the whole is bad. In that respect there is no distinction between this case and the cases in which limitations, including persons capable and persons incapable, are void, as well with regard to the first as to the last: *Routledge v. Dorril* (19); *Cambridge v. Rous* (20). Of the personal estate, it is said, there is a gift subject to an illegal proviso, but, in fact, nothing is given. The persons described are not to have either the real estate, or the corpus of the personal estate, or the rents and dividends, until they attain twenty-one. By the proviso, a minor tenant in tail has no interest in either the principal or the rents and dividends of this property.

No property vests either in enjoyment or in right. The court cannot sever the intention, and, recognising one part as valid, reject another part as void. The intention is clear—that no person shall derive any benefit from the estate before twenty-one. The proviso gives a direction and operation to every clause of the will. To omit it and execute the rest of the will would be to contradict the intention. The gift of £1,000 to each of the grandchildren, etc., is clearly contingent and evinces the testator's design that no devisee or legatee should take any benefit before he attained twenty-one. The words "subject to the trusts" mean after performance of them. The proviso is part of the gift. The leases granted by the trustees, and the after-purchased lands given by the codicils, are declared to be subject to all the trusts. The period at which the testator's name and arms are to be assumed, one year after the devisee attains twenty-one, ascertains the period at which he meant the gift to vest. Had he intended an immediate gift he would have directed an immediate assumption of the name.

There being two distinct intentions, one that the property should accumulate during minority, the other that no minor should take an absolute interest, the latter applying to those taking by descent as well as by purchase, the limits prescribed by law are exceeded. With regard to the real estates, the manifest intention of the testator was that no person should have any interest either in the capital or the profits, till he attained twenty-one. The gift, therefore, contravenes the rules of law. There is no devise till the grandson attains twenty-one; and, therefore, a trust results for the heir. The court cannot separate the gifts from the proviso. All the limitations of the real estate after the first estate for life are void. The gifts to unborn persons were not designed to take effect till after the performance of a previous trust, which was too remote and void. All limitations after a void limitation are void: *Proctor v. Bishop of Bath and Wells* (21). In *Lord Southampton v. Marquis of Hertford* (11) this point was not discussed, because the Marquis of Hertford would have been entitled as heir in the alternative event, but on the subject of accumulation SIR WILLIAM GRANT, M.R., seems to have entertained opinions not consonant to prior authorities. *Baker v. Hall* (22) is opposed to *Grosvenor v. Hallam* (23), cited in *Tregonwell v. Sydenham* (14). The

A life estate may be good, but the direction to accumulate being void, the accumulations belong to the heir or next of kin.

The argument that the personal estate is not vested is enforced by the direction that interest shall be accumulated till twenty-one. A gift of maintenance is not equivalent to a gift of interest for the purpose of vesting the fund: *Pulsford v. Hunter* (24); *Hanson v. Graham* (25); *Leake v. Robinson* (18). Upon all the authorities the gift is contingent: *May v. Wood* (26); *Hanson v. Graham* (25); *Batsford v. Kebble* (27); *Sansbury v. Read* (28); *Booth v. Booth* (29); *Mackell v. Winter* (30). In no case has a gift when, or if, the donee should attain a particular age, been held to be vested without other circumstances as an ulterior gift if the first donee should die under twenty-one which renders the condition subsequent instead of precedent: *Bromfield v. Crowder* (31), *Boraston's Case* (32); *Johnson and Bellamy's Case* (33).

Preston replied.

LORD ELDON, L.C.—I shall not decide this case without referring to the authorities cited, but I have a strong inclination of opinion that it is impossible to declare that, at present, either the heir or the next of kin have any claim. The testator undoubtedly meant not only to exclude his heir and next of kin from all interest, but to render it impossible that, during the minority of the grandchild, any part of this property should be applied even for the benefit of those for whom he eventually designed the beneficial enjoyment.

Whatever may be thought of the morality of that intention, the question to be decided is: What is the law? The scheme of the will is this. Having first given pecuniary legacies, the testator in one clause devises and bequeaths all his property of whatever nature (there can be no doubt, however, that the terms of a single clause may have very different effects, according to the nature of the property on which it operates) in trust to sell, etc., and to retain and pay the pecuniary legacies before bequeathed. He then proposes to create an accumulation fund during the minority of the persons whom he describes, expressing, in terms perfectly clear, that a person under the age of twenty-one years was beneficially interested or entitled to the estate devised and bequeathed, and undoubtedly this is a clause of repetition which directs the accumulation to take place during the minority of all the persons who should become entitled.

It has been argued that the legacies of £1,000 are contingent. Supposing that to be so, it will not prove that there were no vested interests in the corpus of the estate. The trust to accumulate for this purpose will not, more than a trust for the payment of debts, prevent the vesting. This is a devise of the real and personal estate to trustees, who, subject to accumulation for a limited period, are, by the effect of this will, at the death of the testator, to stand seized and possessed for persons described. How can it be said that they are not to stand so seized and possessed when the testator expressly says they are, and takes notice that the *cestui que* trust is only of the age of five years?

We all know that with respect to freehold estates given to a person and the heirs of his body he is tenant in tail, but, as personalty so given does not go to the heir, the old rule of law, possibly to serve the intention, is that the donee under the same limitation which gives the real estate to the heir of his body takes it absolutely. The testator proceeds to limit to unborn grandsons, and, being aware that he could not limit estates for life, he limits to them and the heirs of their bodies, meaning that they should be all in this succession. He has then declared that the persons named are by him considered as beneficially interested and entitled during their minority, although he has, in that very clause in which he so considered them, directed that accumulation out of those estates in which they are so interested, and although he takes notice that the more immediate objects of the trusts are under the age of five years and till twenty-one they could not make any alienation. They did not, in that sense, take an absolute interest,

because, at twenty-one, they would have a power of making it their own, but the testator seems to have recollected that the limitation of the personal estate to them and the heirs of their body made it absolutely theirs, so much so that, if an infant was born and died in infancy, his administrator, not the heir of his body, would be entitled.

He has not said that they shall not be beneficially interested, but shall not be absolutely entitled. Had it stopped there, I should be glad to know whether there might not be many injuries for which the minors might have demanded compensation or acts of ownership which they might have exercised, as felling timber, or whether timber felled by a wrongdoer would not have belonged to them. Then follows the clause relating to the remoteness of the accumulation, and it concerns not the real estate. It is possible that some of the devisees who have not attained twenty-one might leave issue. Then the personal property would have gone over if it had stopped there, but the testator proceeds in the terms of the proviso.

It seems clear, on the language of the proviso, that, although the person was under the age of twenty-one years the testator thought him tenant in tail in possession, otherwise it is nonsense. Certainly the testator means to say that no person, tenant in tail in possession of the real estate, however beneficially he takes, shall take an absolute, unqualified estate in the personalty during his minority. Then, considering the period which may elapse before a tenant in tail may attain twenty-one, when, by virtue of both conditions, he is to take an absolute interest in the leasehold, two questions arise: whether the antecedent limitations are good and the subsequent bad, or whether all without exception are bad. I have had no difficulty about the real estate. We have heard in tithe causes of a dancing modus: this is a clause of accumulation of the same description.

The question which I have to determine today is whether, when the testator has said that the tenant in tail in possession shall not have an absolute estate in the personalty till he attains twenty-one, I am to say that the case is the same with the tenant for life with regard to the real estate, the testator not having, as to him, said any such thing. A further question is whether, because the accumulation is directed with respect to some persons to whom the limitation is too remote, it is not only void in itself, but shall defeat the effect of the other gifts. In the cases of powers the testator has meant to give a power which could be exercised among all the objects, and did not mean to give it if it could not be so exercised. This testator expressly states the case to which he meant the proviso to apply, but he has not said that he meant it to apply to the case of the tenant for life. At present, therefore, the vested interest is in the eldest grandson; whether the heir-at-law or next of kin may not at some future time have an interest is a question to be considered when the event occurs. The life estate being good, it would not become me now to decide the validity of the ulterior limitations. If the whole devise was void, the heir or next of kin would have a right to call on the court to make that declaration, but the whole is not void, and the present interest does not belong to the heir. The court is not accustomed to declare the effect of trusts until the time arrives.

July 1, 1818. In consequence of Mrs. Martelli's death since the hearing, application was made for judgment. The LORD CHANCELLOR observed that his opinion on the argument was that whatever might become of the subsequent limitations, the first limitation to the testator's grandson was good, and that it would be very difficult to hold the next limitation bad.

July 3, 1818. LORD ELDON, L.C.—There cannot be any fund for the present maintenance of the infant unless the income is undisposed of prior to his attaining the age of twenty-one. If accumulation is well directed till he attains that age, then during the interval there is no fund undisposed of. The court must, therefore, determine whether the trust of accumulation is throughout bad, and, if so, whether

A the accumulation between the death of the testator and the time of the grandson
attaining twenty-one is undisposed of, in which case of ineffectual gift so much as
consists of rents and profits belongs to the heir, and so much as arises from
personal estate belongs to the next of kin. It is very difficult to distinguish this
case from *Lord Southampton v. Marquis of Hertford* (11). The true doctrine seems
B [Accumulations Act, 1800], would have been good, so much as is now within the
Act will be good, but the excess will be bad, but if there be a trust for accumula-
tion, and part of it would have been bad before the Act, that part remains bad
notwithstanding the Act. *Lord Southampton v. Marquis of Hertford* (11) seems
to have decided that, if property is given subject to a trust which is bad, the gift
of the property takes effect exempt from the trust. The trust for accumulation in
C this case, I think, bad, because it may last for ages. I cannot distinguish this
case from *Lord Southampton v. Marquis of Hertford* (11).

April 22, 1820.—**HIS LORDSHIP** doth declare, that the will of Thomas Holloway
. . . and the three several codicils of the testator . . . are respectively well
executed and proved, and that the trusts thereof ought to be carried into execution,
D except in so far as the said will directs the laying out and investing the dividends,
interest, and annual proceeds of the stocks and securities in and by the said will
directed to be purchased, with the surplus of the said testator's personal estate
after the payment of his debts, funeral, and testamentary expenses, and legacies,
and the rest of his personal estate, and also the clear yearly rents and profits of
his real estates from time to time, and when and so often and during all such
E times as any person or persons beneficially interested in or entitled to his real or
personal estates under the trusts thereafter declared thereof, should be under the
age of twenty-one years and the adding all such investments to his personal estate
in order to accumulate the same. **HIS LORDSHIP** doth declare, that such direction
to lay out and accumulate the said rent and profits, interest and dividends, is too
remote and void in law, and that the defendant, the infant Horatio Francis
F Kingsford Martelli is entitled in possession to the rents and profits of the testator's
freehold, copyhold and leasehold estates, and to the dividends, interest, and annual
proceeds of his personal estate and effects, for and during the term of his natural
life, with remainder to the first and other sons of his body lawfully to be begotten,
successively according to seniority of age, and the heirs of their bodies respectively,
with such remainders over as in the said will and codicils in that behalf respectively
G contained.

The decree, after the usual directions for an account of the personal estate of
the testator, and the rents and profits of his real estates received by the plaintiffs,
proceeded thus :

"It appearing that the defendant Horatio Martelli, the father of the said
H defendants, the infants, is dead, it is ordered that the Master do inquire and
state to the court by whom the defendant, the infant Horatio Francis Kings-
ford Martelli, has been maintained since the decease of the testator, and
what sums of money have been paid in respect thereof and by whom, and
what will be proper to be allowed for his maintenance and education for the
time past, and to whom, and also what will be proper to be allowed for his
I maintenance and education and out of what fund for the time to come and
to whom, and in making such allowance the Master is to have regard to the
situation and circumstances of the other defendants, the younger brothers
and sisters of the said Horatio Francis Kingsford Martelli. The defendant
Ann Holloway, having elected to take the provision made for her by the
indenture of settlement in the pleadings in this cause mentioned to bear date
Nov. 17, 1798, in lieu of her dower, thirds, and freebench, in and out of the
testator's freehold and copyhold estates, **HIS LORDSHIP** doth declare that the
said defendant Ann Holloway is barred of all claim in respect of such dower

or thirds and freebench, and doth order that the said defendant do execute a proper and sufficient release of such claims, such release to be settled by the Master.

“And HIS LORDSHIP doth declare that the defendant Faithful Croft is entitled to the leasehold house and premises in Chancery Lane given and bequeathed to him in and by the codicil of the testator bearing date Jan. 20, 1816, for the remainder of the term of years now to come therein, from the death of the testator, for his own use and benefit, and it being alleged by the plaintiffs, the trustees, that the nature and circumstances of the estate of the testator require the application of a great proportion of time by and on the part of the trustees for the due execution of the trusts of his will in regard to his estate, and that they cannot undertake to continue the execution of the trusts without the aid and assistance of the said Faithful Croft as a co-trustee, he having, during the life of the testator, had the principal and confidential management thereof and being better acquainted therewith than any other person, and, therefore, it will be for the benefit of the testator's estate that he should continue to be a trustee thereof, and the said Faithful Croft alleging that due attention to the affairs and concerns of the testator will require so much of his time and attention as will be greatly prejudicial to his other pursuits and concerns in business, and, therefore, that he would not have undertaken to act therein, but under the assurance that an application would be made to this court to authorise the allowance and payment of a reasonable compensation out of the testator's estate for such his labour and time, and that he cannot continue to act therein without such reasonable allowance being made to him, it is ordered that it be referred to the Master to settle a reasonable allowance to be made to the said Faithful Croft out of the testator's estate, for his time, pains, and trouble in the execution of the trusts for the time past, and in settling such allowance the Master is to have regard to the legacy of £200 given and bequeathed to the said Faithful Croft by the will of the testator on the execution of the trusts thereby reposed in him, and it is ordered that the Master do inquire whether it will be for the benefit of the testator's estate that the said Faithful Croft should continue to be a trustee under the will, and to receive a compensation for the future employment of his time and trouble; and in case the Master shall be of opinion that it will be for the benefit of the testator's estate that the said Faithful Croft should be continued a trustee, then the said Master is to settle a reasonable allowance to be made to the said Faithful Croft therein . . .”

PEARSE v. GREEN AND OTHERS

[ROLLS COURT (Sir Thomas Plumer, M.R.), December 16, 17, 1819]

[Reported 1 Jac. & W. 135; 37 E.R. 327]

Account—Duty to account—Duty of agent, trustee, receiver, or executor—Liability to be charged interest.

It is the first duty of an accounting party, whether an agent, a trustee, a receiver, or an executor, to be constantly ready with his accounts. Neglect in this respect is a ground for charging interest to such party.

Notes. Applied: *Springett v. Dashwood* (1860), 2 Giff. 521. Followed: *Fry v. Fry* (1864), 10 Jur. N.S. 983; *Blogg v. Johnson* (1867), 2 Ch. App. 225. Explained: *Turner v. Burkinshaw* (1867), 2 Ch. App. 488; *Rishton v. Grissell* (1870), L.R. 10 Eq. 393. Approved: *Harsant v. Blane Macdonald* (1887), 56 L.J.Q.B. 511. Referred to: *Re Whitehead, Ex parte Burnand* (1860), 2 L.T. 776.

As to the duty of an agent to keep accounts, see 1 HALSBURY'S LAWS (3rd Edn.) 186; and for cases see 1 DIGEST (Repl.) 497 et seq. As to the duty of trustees to keep accounts, and their liability for interest, see 38 HALSBURY'S LAWS (3rd Edn.) 1048, 1049; and for cases see 47 DIGEST (Repl.) 481 et seq.

Cases referred to:

- (1) *Good v. Blewitt* (1807), 13 Ves. 397; (1815), G. Coop. 197, L.C.; 19 Ves. 336, L.C.
- (2) *Earl of Hardwicke v. Vernon* (1808), 14 Ves. 504; 33 E.R. 614; 1 Digest (Repl.) 519, 1533.

Also referred to in argument:

- Creuze v. Lowth* (1793), 4 Bro. C.C. 316; 29 E.R. 911; sub nom. *Creuze v. Hunter*, 2 Ves. 157, L.C.; 39 Digest (Repl.) 205, 805.
- Deschamps v. Vanneck* (1795), 2 Ves. 716.

Action for an account.

William Green, Samuel Kelly, and Samuel Dunsterville, were the owners of a privateer, called the *Snap-Dragon*, which proceeded on a cruise in June, 1807. Articles of agreement, dated June 26, 1807, were drawn up between the owners and the officers and sailors who formed the crew. By these articles, the owners were to receive three-fourths, and the officers and sailors the other fourth, of the net proceeds of all the prizes to be taken, in different specified shares, the payment of which was to take place within three months after the settlement of all the prizes. Kelly and Dunsterville (who resided at Plymouth) were to be the managers and agents of the vessel and her prizes, and for the appraisement, sale, and disposal of them; they were to receive a commission for their agency, and none of the crew were to interfere with them in the management of the prizes. The cruise lasted from June, 1807, till November in the same year, during which period several prizes were taken, the proceeds of which were received by Green, under a power of attorney from Kelly and Dunsterville.

The bill was filed in December, 1812, by Pearse and three other seamen, on behalf of themselves and all other the unsatisfied officers and crew, against William Green, and John Green his partner, and Kelly and Dunsterville, for an account and distribution of the prize money, according to the articles. The defendants admitted that they had rendered no account to the plaintiffs, Green assigning as an excuse that Kelly and Dunsterville had only recently furnished him with the accounts: and the latter stating, that the original articles of agreement, and the proceeds of the sales were detained by Green. By the decree, dated November 20, 1815, the bill was dismissed as against John Green, and the accounts were ordered to be taken. The Master, in his report, dated Feb. 16, 1819, ascertained the sums received by Green, with which he charged the defendants, and stated the shares due to each of the seamen. After the decree, and before the report, William

Green became bankrupt, and John Green was appointed his assignee, who was by a supplemental bill again made a defendant. The cause now coming on upon further directions, it was urged that the defendants should be charged with interest on the balances in their hands.

Wetherall and Roupell for the plaintiffs.

Agar and Bickersteth for the defendant Green.

Heald and J. Martin for Kelly and Dunsterville.

SIR THOMAS PLUMER, M.R.—So much has been said about *Good v. Blewitt* (1), that, the court not being in possession of all the particulars of that case, it will be proper to look into it; but in the meantime I will state what strikes me as the course which ought to be pursued.

It appears that the cruise, in which the parties engaged, lasted about six months, and terminated in November, 1807: it would, of course, require some time to wind up the business and to ascertain the result; some of the prizes were contested, and a variety of questions arose respecting them. By the terms of the agreement, the plaintiffs and the other seamen were put in a situation very different from that of partners, and it must not be understood that the law and doctrine relating to partnerships is to be applied here. It seems that it formed part of the articles that the defendants Kelly and Dunsterville were to be the agents and managers, and the seamen were expressly excluded from all right of interfering: they were to leave it wholly to the defendants. This is not the case with partners, who have always a right to look into the management of their concerns. But here all was confided to the defendants. It was their duty to possess themselves of the prizes, to conduct them through the different stages of litigation, and finally, to receive the proceeds exclusively, without a right on the part of the others, to take any share except through the medium of them as agents. They were to conduct the business, and they were to be responsible as agents and managers; that character is fixed on them by the articles.

A period was fixed when the proceeds of the prizes were to be distributed, and the sailors to receive the result of their labour. It was reasonable that the managers should have a time allowed them, to wind up the concern, during which they might retain the funds in their hands, for they were liable to all the expenses that might be incurred. This period of payment was sufficiently postponed; each prize was not to be divided when it was settled, but the division of all was postponed till after the accounts of all were terminated. That being the case, as soon as the period arrived, it was an imperative duty on the defendants, not to postpone the payment any longer. It was hard enough upon the sailors, who were to receive their shares instead of pay, to be obliged to wait the result of all the litigation. However the defendants waited till 1812, when the bill was filed, an interval of about five years. The defendants admit that they were called upon during that period to render accounts; but neither of them did, and they shift the blame interchangeably upon one another; Kelly and Dunsterville imputing it to Green, and he on the other hand recriminating upon them.

I cannot see that it is a sufficient answer for them to say that their neglect was occasioned by the misconduct of their agent; that cannot exonerate them; if they, who were appointed agents, chose to transfer their duty to another, they must be wholly responsible for his acts. The consequence of the contrary doctrine would be, that the immediate agent not doing the duty himself, would be constantly exonerated by saying that he had appointed another to act for him, on whom the blame was to be thrown. What privity is there between the plaintiffs and Green: they employed Kelly and Dunsterville as their agents: and if they chose to appoint another, they must, for the purposes of this cause, be responsible, as between them and the persons for whom they are agents. It is on this principle that the receipts of Green are considered as theirs, and that they are charged with anything; for the Master does not find, that any of the sums were received by them personally.

A It is not necessary to make a law in favour of this description of persons; but placing them in the same situation as others, they have a right to expect that those, whose duty it is to keep accounts for them, will do it. It was said that the accounts in this case were such as could not properly be taken, except under the direction of the court: but it would be lamentable indeed, if it were to be laid down that a Chancery suit is necessary in these cases before payment of the shares to the different parties. There was no pretence for saying that the plaintiffs had, in any manner, forfeited their right to payment; and if there were any difficulty with respect to the claims of the others, that was no reason for not rendering the accounts to these.

C It is the first duty of an accounting party, whether an agent, a trustee, a receiver, or an executor, for in this respect, as was remarked by LORD ELDON, L.C., *Hardwicke v. Vernon* (2), they all stand in the same situation, to be constantly ready with his accounts. Was that the case with these persons? No. It is admitted that though called upon, they rendered no account: it cannot then be said, that in their characters of agents and managers, they performed their duty.

D Is not this a clear ground, on which the court acts in charging parties with interest? Certainly the mere circumstance of one person having money in his hands belonging to another, if the debt does not in its nature carry interest, will not make him liable; but with agents or trustees, if they neglect to account properly, if they violate their duty, the court, for the sake of compelling them to perform it, says that they ought to be charged with interest, on what they have retained. Then when agents are appointed under a contract like this, and the parties are under the necessity of coming to this court to force them to account, why are they not to be visited with the consequences, that follow with all agents or trustees who do not do their duty? I cannot but think that SIR WILLIAM GRANT, M.R., acted upon this principle in deciding *Good v. Blewitt* (1): I do not see anything to show the contrary. I think it will turn out to have been so, though the principle does not, I think, want the aid of that case.

F With respect to the costs, the court should do here what I believe was done in that cause. Sufficient is admitted in the answers, to show that the plaintiffs could not obtain any part of their shares without filing a bill. The defendants, by not keeping accounts, have rendered the suit necessary, and they ought, therefore, to pay the costs.

G Dec. 17, 1819. SIR THOMAS PLUMER, M.R.—I have not discovered any reason to alter the opinion I yesterday expressed upon this case. I have inquired into *Good v. Blewitt* (1). The particular circumstances do not entirely correspond, but the general complexion of the case is the same. In *Good v. Blewitt* (1) the bill was filed by the captain of the privateer on behalf of himself and the rest of the officers and crew, against the owner; calling, like the present, for an account. The officers and crew there were equally partners, as here, being entitled to one-third of the proceeds of the prizes; but in some respects it was not so strong a case as this, for there was no such appointment, in the articles, of the time at which the payment was to take place. The bill was filed in June, 1805; in February, 1806, the defendant put in his answer, in which he admitted the principal facts. It appears that in October, 1803, a capture had been made of a valuable Dutch East India ship, which was condemned, though the time at which the defendant received the proceeds does not distinctly appear. However, he admits that he had finally recovered them, and had received a clear balance of £28,363 13s. 10d. He said that he had paid to the plaintiff a sum of £127, and different sums of money to others of the crew, amounting, in his judgment, to nearly as much as they were entitled to, and he said that the reason why he had not accounted for the remainder of the produce was that there was still an outstanding concern, constituting a claim against him, on account of a Spanish ship that had been improperly detained by the plaintiff. The original decree on Feb. 3, 1807, referred it to the Master to

inquire into this, and upon examination of the circumstances, it appeared that the captain was authorised by his instructions, in the event of a war with any other powers, than those against whom he had letters of marque, taking place in the course of his cruise, or if he should receive information of a war, to detain all vessels belonging to those powers, and to send them into port. It seems he received intelligence of a war between Great Britain and Spain, and shortly afterwards falling in with a Spanish vessel, he detained her, and carried her into Ferrol, where he sent to the British consul to inquire into the fact whether war had been declared; the consul confirmed the intelligence he had previously received. He accordingly carried the vessel to England, and discovered that war had not commenced; however, he refused to deliver her up without the consent of the defendant; and ultimately a suit was commenced in the Admiralty Court against him, by the owners, in which he was obliged to restore the vessel, and ordered to pay costs and damages for the detention; the amount which the owners claimed was £5,742 18s. 2d. The amount to be allowed them was not settled, but the defendant in his answer, stating that he was liable for this, insisted upon retaining in his hands, while the matter was pending, a sum sufficient to meet what he might be obliged to pay on that account.

There had been an order for payment into court by the defendant of £500, in part of the plaintiff's claim, and also for him to pay in the sum of £5,742 18s. 2d., by way of indemnity and to defray what might be awarded against the captors by the Admiralty Court. Thus the court sanctioned the demand that the defendant had made, by ordering the money to be detained pending the proceedings. A compromise afterwards took place with the owners. They, through the medium of F. De Tastet, their agent, agreeing to accept £550, and to give up their claim to the costs and damages. The defendant, accordingly, paid the £550 in January, 1808. This sum, together with the other expenses occasioned to the defendant by the detention of the Spanish ship amounted to £805, and he insisted that this constituted an item of set-off against the claims of the plaintiff and the rest of the crew, for their shares.

When the cause came on upon further directions, on Mar. 7, 1811, SIR WILLIAM GRANT, M.R., gave his opinion, a note of which, taken by one of the counsel on his brief, I have now before me. It was directed that the £805 should be deducted from the proceeds arising from the sale of the prizes, and that the remainder should be distributed according to the articles. The next question was whether, under all the circumstances, the defendant should be charged with interest and costs; here the interest was not prayed by the bill. In giving his judgment on this point, I have the satisfaction of seeing that SIR WILLIAM GRANT, M.R., recognises those principles of the court, on which I acted in charging the defendants in the present case. He says that the defendant had not done his duty, for he ought to have made up his accounts, and have shown the share of each, but that such an account was not yet made up; that the defendant ought to have had his accounts ready to answer the plaintiffs, he ought to have offered all that was due to them. All these are remarks that equally apply to the present case, and SIR WILLIAM GRANT, M.R., concludes by saying, he ought to pay interest; deciding on the principle, that an accounting party not rendering accounts properly, must be charged with interest. He also decrees the defendant to pay the costs.

I was at first struck with the period, Jan. 1, 1805, from which the interest is directed to be computed. I do not exactly see the reason why that was fixed on; it is not the time of filing the bill or the answer, or that of the capture or condemnation of the prize. It was pressed that the computation should commence from the condemnation, but it was fixed at Jan. 1, 1805; there was an interval between this and the condemnation, which might perhaps be the interval before the balance was received. It does not clearly appear why this time was chosen, but it was evidently not upon any ground that varies it from the present case.

The defendants have nothing to complain of; we are now at a distance of twelve

A years from the time of the captures, and they or their agent have had the money in their hands during that time. Indeed, the circumstances are, in some respects, not so favourable to the defendants here as in the case referred to; for there a part of the plaintiff's demand had been paid, here the entire fund has been retained. On the whole, I think the opinion I gave yesterday perfectly right.

BATTLE AND ANOTHER v. FAULKNER AND ANOTHER

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), Jan. 24, 1820]

[Reported 3 B. & Ald. 288; 106 E.R. 668]

Limitation of Action—Accrual of action—Breach of contract—Breach occurring more than six years prior to action—Special damage occurring within six years.

In 1810 the defendants under a contract to deliver spring wheat for seed to the plaintiffs delivered winter wheat which the plaintiffs re-sold as spring wheat to a third party S. The wheat, when sown by S., was unproductive and he lost the use of his land for that year. He, therefore, brought an action in Scotland, in 1811, against the plaintiffs which lasted until 1818 with the result that the plaintiffs were compelled to pay S. damages. The plaintiffs now brought an action against the defendants for their breach of the contract alleging as special damage the damages they had been compelled to pay S.

Held: although such special damage had occurred within six years before the commencement of the present action yet the breach of contract, which was the gist of the action, having occurred and become known to the plaintiffs more than six years before that period, the defendants might properly plead *actio non accrevit infra sex annos*.

Notes. For the period of limitation for actions for breach of contract see now s. 2 (1) (a) of the Limitation Act, 1939 (13 HALSBURY'S STATUTES (2nd Edn.) 1160).

Applied: *Brown v. Howard* (1820), 2 Brod. & Bing. 73. Considered: *East India Co. v. Oditchurn* (1849), 7 Moo. P.C.C. 85. Applied: *Violet v. Simpson* (1857), 8 E. & B. 344. Referred to: *Davis v. Bank of England* (1824), 2 Bing. 393; *Rhodes v. Smethurst* (1838), 4 M. & W. 42; *Collinge v. Heywood* (1839), 9 Ad. & El. 633; *Gibbs v. Guild* (1881), 8 Q.B.D. 296; *Lynn v. Bamber*, [1930] 2 K.B. 72; *Welch v. Bank of England*, [1955] 1 All E.R. 811.

As to when cause of action arises for breach of contract, see 24 HALSBURY'S LAWS (3rd Edn.) 213; and for cases see 32 DIGEST (Repl.) 386.

Cases referred to in argument:

Saunders v. Edwards (1662), 1 Sid. 95; 82 E.R. 991; 32 Digest (Repl.) 384, 141.
Fitter v. Veal (1701), 12 Mod. Rep. 542; 88 E.R. 1506; sub nom. *Fetter v. Beale*, Holt, K.B. 12; 1 Salk. 11; sub nom. *Ferrer v. Beale*, 1 Ld. Raym. 692; 17 Digest (Repl.) 84, 57.

Van Sandau v. Corsbie (1819), 3 B. & Ald. 13; 106 E.R. 568; 4 Digest (Repl.) 300, 2726.

South Sea Co. v. Wymondsell (1732), 3 P. Wms. 143; 24 E.R. 1004, L.C.; 32 Digest (Repl.) 412, 358.

Weall v. King (1810), 12 East, 452; 104 E.R. 176; 1 Digest (Repl.) 21, 158.

Roberts v. Read (1812), 16 East, 215; 104 E.R. 1070; 38 Digest (Repl.) 138, 971.

Rule Nisi obtained by the plaintiffs to set aside a nonsuit and for a new trial of an action for breach of contract.

The declaration stated, that in consideration that the plaintiffs would buy of the defendants a certain quantity of spring wheat for seed, the defendants undertook that the same should be spring wheat. The breach alleged was that the wheat was not of that description; but, on the contrary, was, at the time of the sale, winter wheat. It then stated as special damage, that the plaintiffs had sold the wheat to one Shepard as spring wheat, and that he had caused it to be sown as such wheat in the spring of 1810, and that the wheat became and was unproductive, and would not ripen or bring crops to maturity in that year, whereby Shepard lost the use of his land. It then stated that an action was brought by Shepard against the plaintiffs in the Court of Session in Scotland for the damage sustained by him in consequence of the wheat not being spring wheat, and that he recovered damages and costs. The defendants pleaded, first, the general issue; secondly, that the cause of action did not accrue within six years.

At the trial before ABBOTT, C.J., at the London sittings after last Trinity Term, it appeared on the statement of plaintiffs' counsel, that in the early part of the year 1810, the plaintiffs, who reside in Scotland, bought the wheat in question of the defendants as spring wheat, and sold it as such to one Shepard, who having sown his land with it, and having discovered in the autumn that it was almost wholly unproductive, gave notice to the plaintiffs that he considered them responsible to him for the loss of his crop from the lands where it was sown. The plaintiffs communicated this to the defendants; and, after Shepard had commenced proceedings in the Scottish court against them, in June, 1811, gave the defendants notice that he had done so, and was about to assess damages against them. Nothing more passed between the parties till the beginning of 1818, when the suit in Scotland being then completed, the plaintiffs paid Shepard his damages and costs, and commenced the present action against defendants to recover such damages and costs as special damage resulting from the breach of the warranty.

The Chief Justice, on this statement, which was agreed to on both sides, asked if there was any promise to take the case out of the Statute of Limitations; and being answered in the negative, nonsuited the plaintiffs. In the last term, *Scarlett* obtained a rule to show cause why the nonsuit should not be set aside, and a new trial had.

Marryat and *F. Pollock*, for the defendants, showed cause against the rule.

Scarlett and *Tindal*, for the plaintiffs, supported the rule.

ABBOTT, C.J.—It appears to me that the nonsuit in this case was right. The cause of action which the plaintiffs have brought arose out of the delivery to them of wheat of a different kind from that which the defendants had contracted to deliver. The wheat delivered was not only useless, but worse than useless, because it did not grow, and consequently the profit which might have arisen from the land on which it was sown was lost. When did these matters occur? They occurred in 1810 and 1811, and undoubtedly it was then that the cause of action accrued. The Statute of Limitations was intended for the relief and quiet of defendants, and to prevent persons from being harassed at a distant period of time after the committing of the injury complained of. It seems to me that this case falls within the very words of the statute, and that the cause of action existed more than six years before the action was brought. It is true that the particular damage sustained was not all known till a considerable time afterwards. It would be extremely dangerous to inquire in every particular case, the precise period of time when the damage first came to the knowledge of the plaintiff, and in many instances it would deprive the party of the benefit which the legislature intended to confer upon him. The plaintiff in this case, might, as soon as they knew of the defective quality of the wheat, or at any time within the six years have sued out a writ, and have thus obtained an efficient remedy against the defendants, it is by their own negligence that they are deprived of their remedy, and they have no right to complain.

A BAYLEY, J.—The statute says that you shall bring your action within six years next after the cause of action and not after. This is an action for a breach of contract, and the cause of action arises at the time when the contract is broken. Since that time certain damages have resulted from that breach of contract. The breach of the contract, however, is the gist of the action, and the special damage is stated merely as a measure of the damages resulting from that cause of action. If the plaintiffs had failed in proving the special damage in this case, it would not have been a ground of nonsuit. One of the objects of the Statute of Limitations was that actions should be brought to trial at a period of time when the defendant could be prepared with his witnesses to meet the charge, which would not be the case if the action might be postponed to an indefinite period.

C Now see what the consequences might be if the party was bound only to sue out his writ at the time when the measure of damages was ascertained, and not when the contract was broken. Suppose, for example, the present plaintiffs had sold the wheat to Shepard, and he had sold it again to A., and A. to B., and B. to C.; then suppose C. to wait for five years, and then to bring an action against B. and recover, and that at the end of five years more B. should bring an action against A. and that A., at the end of another five years brought an action against Shepard, and that Shepard took five years more before he brought his action against the present plaintiffs. Then, according to the agreement, each party having acquired a new cause of action the present plaintiffs might, twenty-five years after the original transaction, bring an action against the present defendants. It is by putting an extreme case, that you often try the propriety of a rule. If the plaintiffs in this case had released the defendants from the breaches of contract, that release would have been a bar to the present action for the special damage subsequently accruing; and this shows that the foundation of the action is the breach of contract. It was, therefore, from the period when the contract was broken that the cause of action accrued; and as that happened more than six years before the commencement of the present action, I think the nonsuit was right.

F HOLROYD, J.—In this case the breach of the contract is the very gist of the action; and the reason why special damage is stated is because mere collateral damage must be stated in the declaration in order to entitle the plaintiff to give it in evidence, lest otherwise the defendant might be taken by surprise. It is true that assumpsit is a species of action on the case; but it differs materially from an action on the case founded on a wrong. In the latter form of action the plea is not guilty; in the other, it is non-assumpsit. Assumpsit will lie against executors; but case does not; nor can assumpsit be joined with counts founded upon a tort. It does not, therefore, follow, that because assumpsit is an action on the case, and that special damage is stated, that the breach of contract is not the gist of the action. It is said, however, that although the action might be maintained upon the breach of promise, yet that the damage subsequently sustained forms a substantive ground of action: but it cannot be so considered in this form of action. According to that argument, the action ought to have been brought for the tort. Supposing, however, that the pleadings had been differently framed, I do not know that the party would be benefited, for it seems to me, in this case, that the damage has originated substantially out of a breach of contract, and, therefore, the plaintiff could not have gained any advantage by changing the form of remedy. It is sufficient, however, to say that this action is particularly founded on the breach of contract, and that being so, the nonsuit was right.

I BEST, J.—It appears to me that the terms of the statute are extremely clear and unambiguous. It says that the action must be brought within six years after the cause of action, and not after. The only question, therefore, is, when the cause of action accrued; for the statute then attached. I think that the cause of action accrued the moment the defendants failed to perform that which they agreed to do. They contracted to sell wheat of a particular quality, and the

wheat is, in fact, of a different quality. The cause of action was, therefore, complete, and the statute began to operate from the time of the delivery of the wheat. It is said, however, that the plaintiffs might have adopted a different form of action, and proceeded for the fraud. If, however, the action had been founded on fraud, it seems to me that the fraud was complete when the wheat was forwarded to Scotland. In this case the plaintiffs might have issued his writ for the purpose of keeping the action alive. The object of the Statute of Limitations was to prevent persons from being charged with claims, who, in consequence of the lapse of time, might have no means of proving a discharge. If a party is served with a writ, he knows it is necessary to preserve the evidence; and, therefore, he is on his guard. If, however, there be no legal proceedings against him, he imagines that there is no cause of complaint. If a long period of time elapse, his witnesses may die, and he may be unable to give an answer to the claim. It seems to me much better that parties should be put to bring their action as soon as they can; and, upon the whole, I think that this nonsuit was right.

Rule discharged.

R. v. WILKINSON AND ANOTHER

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Abbott, C.J., Dallas, C.J., Richards, C.B., Garrow, B., Holroyd, J., Park, J., Bayley, J., Richardson, J., Burrough, J., Wood, B., and Graham, B.), Michaelmas Term, 1821]

[Reported Russ. & Ry. 470]

Criminal Law—Larceny—Larceny by owner of goods from his bailee—Bailee having interest in possession—No intent to charge bailee with loss—Intent to defraud Crown.

If a man takes his own goods from his bailee, though he has no intention of charging the bailee with the loss of the goods but his intention is to defraud the Crown, yet, if the bailee had an interest in the possession and could have withheld it from the owner, the taking is larceny.

Per some of the court: The taking would be larceny even though there was no intent to defraud the bailee, but only some third person, i.e., the Crown.

Notes. For the definition of larceny see s. 1 of the Larceny Act, 1916 (5 HALSBURY'S STATUTES (2nd Edn.) 1012), sub-s. (2) (iii) of which defines the expression "owner" to include any part owner, or person having possession or control of, or a special property in, anything capable of being stolen.

Considered: *Rose v. Matt*, [1951] 1 All E.R. 361.

As to larceny by owner of own goods not in his possession, see 10 HALSBURY'S LAWS (3rd Edn.) 772; and for cases see 15 DIGEST (Repl.) 1073.

Indictment for larceny.

The prisoners were tried before PARK, J. (present ABBOTT, C.J.) at the Old Bailey sessions October, 1821, on an indictment for stealing six thousand six hundred and ninety-six pounds of weight of nux vomica, value £30, the property of James Marsh, Henry Coombe, and John Young in a certain boat belonging to them in the port of London, being a port of entry and discharge.

It appeared in evidence that the prosecutors were lightermen and agents, and were employed by a Mr. Cooper, a merchant, who delivered them warrants properly filled up, to enable them to pass the nux vomica through the Custom House, for

A exportation to Amsterdam. The quantity was thirty bales of nux vomica, consisting of seven hundred and fifty bags. For exportation this commodity paid no duty, but for home consumption there was a duty of two shillings and sixpence on the pound weight, though the article itself was not worth above one penny per pound. Messrs. Marsh & Co. entered the bales for a vessel about to sail to Amsterdam, called the *York Merchant*, then lying in the London dock; and having
B done what was necessary delivered back the cocket bill and warrants to Cooper, considering him, as the owner, and Marsh & Co. gave a bond to the government with Cooper, under a penalty, to export these goods. Marsh & Co. were to be paid for lightorage and for their services.

After this, Marsh & Co. employed the prisoner Wilkinson as their servant, who was a lighterman (and who had originally introduced Cooper to them, to do what
C was necessary respecting the nux vomica), to convey the goods from Bon Creek, where they were, to the *York Merchant* at the London docks, and lent their boat with the name "Marsh & Co." upon it, to enable him so to do. The prisoner Wilkinson accordingly went and got the nux vomica, by an order commanding the person who had the possession of it to deliver it to Mr. John Cooper. The
D bales were marked C. 4 to 33. When Wilkinson received the cargo, instead of taking it to the *York Merchant*, he, one William Marsden, and the other prisoner Joseph Marsden, took the boat to a Mr. Brown's a wharfinger, at Lea Cut in the county of Middlesex, and there unloaded it into a warehouse, which William Marsden had hired three weeks before, and which they had used once before. The two prisoners and William Marsden were there employed a long time in
E unpacking the bales, taking out the nux vomica, repacking it in smaller sacks, and sending it by wagon to London, and refilling the marked bales with cinders and other rubbish, which they found on the wharf. The prisoner Wilkinson then put the bales of cinders, etc., on board the boat, took them to the *York Merchant*, hailed the vessel, and said he had thirty bales of nux vomica, which were put on board, and remained so for two or three days, when the searcher of the customs
F discovered the fraud. Marsh & Co. admitted that they had not been called on for any duties, nor sued upon the bond though the bond remained uncanceled.

The defence was, which Cooper was called to prove, that the goods were not his (Cooper's), but that he had, at William Marsden's desire, lent his name to pass the entry, and that he had done so, but did not know why, and that he did not know it was a smuggling transaction, or that the object was to cheat the
G government of the importation duties. If these were to be considered as the goods of Cooper, it would seem that a felony was committed upon them by Wilkinson and the two Marsdens by taking them in the manner described out of the hands of Marsh & Co., without their knowledge or consent, who, as lightermen or carriers, had a special property in them, and were also liable to the government, to see the due exportation of them. Even if they were the goods of
H William Marsden, who superintended the shifting of them from the bales to the sacks, the question for the judges to consider was whether this can be done by an owner against a special bailee, who has made himself responsible that a given thing shall be done with the goods, and which the owner, without the knowledge or consent of such bailee, had by a previous act entirely prevented.

The learned judge told the jury that he would reserve this point for the opinion
I of the judges, but desired them to say whether they thought the general property in the goods was in Cooper or William Marsden. The jury found the prisoners guilty, and that the property was William Marsden's.

In Michaelmas Term, 1821, eleven of the judges (BEST, J., being absent) met, and considered this case. Four of the judges, viz., RICHARDSON, J., BURROUGH, J., WOOD, B., and GRAHAM, B., doubted whether this was larceny, because there was no intent to cheat Marsh & Co., or to charge them, but the intent was to cheat the Crown. Seven of the judges, viz., GARROW, B., HOLROYD, J., PARK, J., BAYLEY, J., RICHARDS, C.B., DALLAS, C.J., and ABBOTT, C.J., held it a larceny, because

Marsh & Co. had a right to the possession until the goods reached the ship. They also had an interest in that possession, and the intent to deprive them of their possession wrongfully and against their will, was a felonious intent as against them, because it exposed them to a suit upon the bond. In the opinion of some of the seven judges, this would have been larceny, although there had been no felonious intent against Marsh & Co., but only an intention to defraud the Crown.

WOOD v. VEAL

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), January 28, 1822]

[Reported 5 B. & Ald. 454; 1 Dow. & Ry. M.C. 11; 1 Dow. & Ry. K.B. 20; 106 E.R. 1257]

Easement—Right of way—Grant—Highway—Dedication—Capacity of lessee.

A lessee cannot grant a right of way and dedicate a way to the public without the consent of the owner of the fee.

Notes. Where presumption of dedication of user cannot be established at common law dedication of a way as a highway is presumed after public user for twenty years by s. 34 of the Highways Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 450).

Distinguished: *Bishop v. Springett* (1831), 1 L.J.K.B. 13. Considered: *Barraclough v. Johnson*, [1835-42] All E.R. Rep. 606. Referred to: *Cross v. Lewis* (1824), 2 B. & C. 686; *Harper v. Charlesworth*, [1824-34] All E.R. Rep. 66; *Jarvis v. Dean* (1826), 3 Bing. 447; *Baxter v. Taylor*, [1824-34] All E.R. Rep. 309; *R. v. Bliss*, [1835-42] All E.R. Rep. 372; *Bateman v. Bluck* (1852), 19 L.T.O.S. 95; *Bailey v. Jamieson* (1876), 1 C.P.D. 329; *Hall v. Bootle Corp'n.* (1881), 44 L.T. 873; *A.-G. v. Chandos Land and Building Society* (1910), 74 J.P. 401.

As to capacity of leaseholders to dedicate land as a highway at common law, see 19 HALSBURY'S LAWS (3rd Edn.) 45; and for cases see 26 DIGEST (Repl.) 297, 298.

Cases referred to:

- (1) *Rugby Charity Trustees v. Merryweather* (1790), 11 East, 375, n.; 103 E.R. 1049; 26 Digest (Repl.) 305, 253.
- (2) *Woodyer v. Hadden* (1813), 5 Taunt. 125; 128 E.R. 634; 26 Digest (Repl.) 347, 639.

Also referred to in argument:

- R. v. Lloyd* (1808, 1 Camp. 260, N.P.; 26 Digest (Repl.) 274, 43.
R. v. Barr (1814), 4 Camp. 16, N.P.; 26 Digest (Repl.) 302, 224.

Motion by the defendant for a rule nisi for a new trial of an action for trespass by breaking and entering the plaintiff's yard and close in the parish of St. John, Westminster, and pulling down his fence there erected. The defendant justified the trespass under a public right of way.

At the trial at the Westminster sittings, after last Michaelmas term, before ABBOTT, C.J., it appeared that the locus in quo, which was called Little Abingdon Street, Westminster, was not a thoroughfare, but that, as far back as living memory could go, it had been used by all persons desirous of going there, and that in 1771 it had been enumerated among other streets in the Act of 11 Geo. 3, c. 22 (Westminster Streets, 1771) then passed for paving, cleaning, and lighting the squares, streets, etc., of Westminster. The commissioners had accordingly paved and lighted it, and watchmen had been stationed there, etc. On the part

A of the plaintiff, it appeared that in 1719 a lease for ninety-nine years of the plaintiff's premises, including the yard in dispute, had been granted by the then owner of the fee; which having expired in 1818, the plaintiff, in 1820, having for twenty-four years previously lived in the neighbourhood, erected the fence in question.

B ABBOTT, C.J., left it to the jury to say whether they thought there had been any dedication to the public previously to 1719, telling them that in that case they ought to find for the defendant; but if not, then he told them that there could be no dedication to the public except by the owner of the fee; and that the permission by the tenants for ninety-nine years would not bind the landlord; and that the circumstance of the lease for ninety-nine years, which had been proved, explained, in a great degree, the use by the public, as not being referable to a dedication by the landlord. Under this direction, the jury found a verdict for the plaintiff. The defendant moved for a new trial and contended that the jury ought to have been directed to presume a dedication to the public.

Gurney for the defendant.

D ABBOTT, C.J.—I have great difficulty in conceiving that there can be a public highway which is not a thoroughfare, because the public at large cannot well be in the use of it. In this case, however, I left it to the jury to consider, whether there had been a dedication to the public, telling them that a highway might exist although it was not a thoroughfare. Nothing done by the lessee without the consent of the owner of the fee would give the right of way to the public. Here, E as the land was demised by the lease of 1719, which expired in 1818, it seems to me that the proper question to consider was whether there had been a dedication to the public before 1719, or, subsequently to that period, with the consent of the owner of the fee. I am still of opinion that the case was presented properly to the consideration of the jury, and I think they have found a right verdict.

F BAYLEY, J.—It is not necessary to decide upon the present occasion whether there can be a highway which is not a thoroughfare. For the point in this case is whether, supposing that to be so, there has been a dedication of this way to the public. In order to give the public that right, it must be done with the consent of the owner of the fee; for where it is given by an individual having a limited right, it can only continue for a limited period. Here, upon the evidence, G it appears that the permission was given, if at all, by the lessee for ninety-nine years. I think, therefore, that the case was properly left to the jury, and that they have found a proper verdict.

H HOLROYD, J.—I am of the same opinion. The opinion of LORD KENYON, C.J., in the *Rugby Charity Trustees v. Merryweather* (1) is somewhat shaken by the observations of MANSFIELD, C.J., in *Woodyer v. Hadden* (2). But it is not necessary to determine that question here, for this case has been determined upon principles which assume *Rugby Charity Trustees v. Merryweather* (1) to be good law.

I BEST, J.—I am quite satisfied with the verdict which the jury have found in this case, and with the manner in which the question was left to them. No man has a greater respect for the learned judge who decided *Rugby Charity Trustees v. Merryweather* (1) than I have, but I think that that decision was a departure from principles usually received in the law. If a road be for the accommodation of particular persons only, it is not a public road, and, therefore, I can see no reason why the inhabitants in a street which is not a thoroughfare should not put up a fence at the end of it and exclude the public. It is not, however, necessary to decide that question in this case, because, independently of it, the plaintiff was entitled to the verdict.

Rule refused.

GILBERT v. BUZZARD AND ANOTHER

[CONSISTORY COURT OF LONDON (Sir William Scott), July 19, November 8, 1820, May 4, 1821]

[Reported 2 Hag. Con. 333; 3 Phillim. 335; 161 E.R. 761]

Burial—Coffin—Metal coffin—Legality of use—Extra burial fees.

A burial ground in a churchyard is not the property of one generation, those who are now dead; it is the common property of the living and of the generations yet unborn, and is subject only to temporary appropriations. Accordingly, while the use of coffins made of iron or other metals is not unlawful, their greater durability as compared with coffins made of wood results in their longer occupation of the ground in which they are placed, and, in view of the additional charge and trouble on the parish, those desiring the use of such coffins can properly be called on to pay fees larger than the normal.

Notes. Considered: *R. v. Price* (1884), 12 Q.B.D. 247. Referred to: *Haig v. Barlow, Re St. Mary, Islington, Burial Fees* (1891), Trist. 149; *Re Dixon*, [1892] P. 386.

As to burial in churchyards, see 4 HALSBURY'S LAWS (3rd Edn.) 7 et seq.; and for cases see 7 DIGEST (Repl.) 557 et seq.

Articles exhibited against the defendants, churchwardens of the parish of St. Andrew, Holborn, for preventing the interment of a parishioner in an iron coffin.

Dr. Arnold, Dr. Jenner and Dr. Phillimore for John Gilbert, the promoter of the office of the judge.

Dr. Swabey, Dr. Lushington and Dr. Dobson for the defendants.

Nov. 8, 1820. **SIR WILLIAM SCOTT.**—This suit is brought by John Gilbert, parishioner of Saint Andrew's, Holborn, against John Buzzard and William Boyer, churchwardens of that parish, for the offence of obstructing the interment of his wife, Mary Gilbert. The criminating articles state in substance that she died on Mar. 2, 1819, and that her body was deposited in an iron coffin, proper notice was given of the intended interment, and the usual fees were paid for such a burial, but the churchwardens prevented by force the burial from taking place, and, in consequence thereof the body was deposited in the bone-house, where it remains. It is also stated that the iron coffin would take up less space than a wooden one, and is so constructed, as to prevent the body from being taken out; that on April 14, 1820, a written notice was given to the rector, churchwardens, and sexton, of an intended funeral on April 18, and a written answer was returned by the churchwardens saying that they would not permit the interment unless the body was taken out of the iron coffin, and forbade any grave to be prepared for its reception.

The defensive allegation states in substance that a select vestry, which governs the parish concerns, being assembled, took the subject into consideration, and passed a resolution not to admit the iron coffin. The parish is very large and populous, containing an increasing population of 30,000 persons, the annual burials are above 800, and are increasing, they have three burial grounds besides the churchyard all nearly filled with corpses, they would soon be rendered useless by the introduction of iron coffins, it is impossible to obtain new burial grounds, but at an enormous expense, and with grievous inconvenience, and their proceedings had all been guided and authorised by the select vestry and the parish at large.

The suit appears to have begun under strong feelings of mutual irritation, which have now properly subsided, and the parties have agreed to take the opinion of the court upon the dry question of right, without introducing into it any imputation of misconduct on either side or engrafting upon it any demand of penalties to be inflicted or costs to be decreed. In this act of amnesty the court willingly concurs, and, therefore, forbears to repeat any observations upon the strange

A wanderings, into which the case has strayed since the transaction happened, which appears now in its regular form of proceeding. Before entering into the immediate question it may not be entirely useless or foreign to remark that the most ancient modes of disposing of the bodies of the dead mentioned by history are by burial or by burning, of which the former appears to be the more ancient. Many proofs of this occur in the sacred history of the patriarchal ages in which places of sepulture appear to have been objects of anxious acquirement, and the use of them is distinctly and repeatedly recorded. The example of the Divine Founder of our religion in the immediate disposal of his own person, imitated by that of his disciples and followers, has confirmed the indulgence of that natural feeling, which appears to prevail, against the instant and entire dispersion of the body by fire, and has very generally established sepulture as the customary practice of Christian nations.

The mode of depositing in the earth has varied in the practice of nations. CICERO says (DE LEGIBUS, lib. 2, s. 22):

“Mihi quidem, antiquissimum sepulturæ genus id videtur fuisse, quo apud Xenophontem Cyrus utitur.”

D That great man is made by his historian to declare in his celebrated dying speech “that he desired to be buried neither in gold nor in silver, nor in anything else, but to be immediately returned to the earth; for what can be more blessed, than to mix at once with that which produceth and nourisheth everything excellent and beneficial to mankind.”

E There, however, occurs very ancient mention of sepulchral chests, or what we call coffins, in which the bodies, being enclosed, were deposited so as not to come into immediate contact with the earth. It is recorded specially of the patriarch Joseph, that “when he died, he was put into a coffin and embalmed,” both of these being, perhaps, marks of distinction to a person, who had acquired high and merited honours in that country. It is thought to be strongly intimated by several passages in the sacred writings, both old and new, that the use of coffins, in our meaning of the word as enclosing chests deposited in the earth, was not familiar among the Jews, and it is an opinion not lightly entertained by some of the learned that such was the case likewise in the practice of the Greeks and the Romans. It is some confirmation of that opinion, that there is, perhaps, no word in the language of either of them, that is exactly synonymous with our word coffin, though the word itself is borrowed from both languages, though in another signification. The Grecian terms usually adduced referring rather to the feretrum or bier on which the body was conveyed, than to a chest, or trunk in which it was shut up, and the Roman terms are either of the like signification or are mere general words (such as *arca*, *loculus*, and the like) without any funeral meaning, and without implying any final destination of the substances which compose them, to a deposition in the earth along with a human body.

H The practice of sepulture has also varied with respect to the places where performed. . . . In our own country the practice of burying in churches is said to be anterior to that of burying in what are now called churchyards, but was reserved for persons of pre-eminent sanctity of life. Men of less memorable merit were buried in enclosed places not connected with the sacred edifices themselves. I But a connection, imported from Rome by Cuthbert, Archbishop of Canterbury, took place about the year 750, and spaces of ground adjoining the churches were carefully enclosed, solemnly consecrated, and appropriated to the burials of those who had been entitled to attend Divine Service in those churches and now became entitled to render back into those places their remains to earth, the common mother of mankind, without payment for the ground which they were to occupy or for the pious offices which solemnised the act of interment.

In what way the mortal remains are to be conveyed to the grave and there deposited, I do not find any positive rule of law or religion that prescribes. The

authority under which the received practices exist is to be found in our manners rather than in our laws. They have their origin in natural sentiments of public decency and private affection. They are ratified by common usage and consent, and, being attached to a subject of the gravest and most impressive nature, remain unaltered by private caprice and fancy, amid all the giddy revolutions that are perpetually varying the modes and fashions that belong to the lighter circumstances of human life. That bodies should be carried in a state of naked exposure to the grave would be a real offence to the living, as well as an apparent indignity to the dead. Some involucra, or coverings, have been deemed necessary, in all civilised and Christian countries, but chests or trunks containing the bodies, descending along with them into the grave and remaining there till their own decay, cannot plead either the same necessity nor the same general use. . . .

In our country the use of coffins is extremely ancient, though, most probably, by no means general. They are actually found of great antiquity, of various forms, and of various materials, wood, stone, metals, marble, and even glass. Coffins, says Dr. JOHNSON, in his explication of the word, are made of wood and various other matters. From the original expense of some of these materials, or from the labour requisite in the preparation of them for this use, or from both, it is evident that most, if not all of them, must have been occupied by persons who had filled the loftier stations of life. In modern practice, chests or coffins of wood or lead, or both, are commonly used by persons who can afford to pay for them. For persons in abject poverty (whom the civil law technically calls the *miserabiliter egeni*), what is called a shell, which, I understand, to be an imperfect coffin is successively used for different individuals in some very populous parishes, unless public or private charity supplies something better as the vehicle. Persons dying at sea are not infrequently consigned to the deep wrapped in their hammocks or sleeping beds, but I know not that any of these are directly required by any authority.

A statute of Charles II [1678, 30 Car., c. 3] requires that coffins shall be lined with woollen, but it does not require that coffins shall be used. It is to be observed, that in the funeral service of the Church of England, there is no mention—indeed, there is rather an apparently studious avoidance of any mention—of coffins. It is throughout the whole service, the corpse or the body. The officiating priest is to meet the corpse at the gate of the churchyard—at a certain part of the service, dust is directed to be thrown, not upon the coffin, upon the body. In another part, certain portions of the holy writ, or of pious admonition, are to be recited, while the corpse is making ready to be put into the grave. I observe likewise that in old tables of burial fees, a distinction of payment is made for coffined funerals and uncoffined funerals. There is one of 1627, exhibited by SIR H. SPELMAN in his *TRACT DE SEPULTURA*, in which a certain sum is charged for a coffined funeral, and about half that sum for an uncoffined funeral. From which I draw the conclusion of fact that uncoffined funerals were, at that time, by no means so infrequent as not to require a particular notice and provision. I think I might also venture to deduce the conclusion, a conclusion by no means impertinent to the present inquiry, that, even at that time it was recognised as not unjust that where the deceased, by the use of his coffin, took a longer occupancy of the ground, he should compensate the parish by an increased payment.

The argument, therefore, that rests the right of admission for particular coffins upon the naked right of the parishioner to be buried in his parish churchyard seems to stop short of that which is requisite to be proved, the right of being buried in a large chest or trunk of any materials, metallic, or other, which his executors may think fit. The rule of law which says that a man has a right to be buried in his own churchyard, is to be found, most certainly, in many of our authoritative text writers, but it is not quite so easy to find the rule which gives him the right to buying a large chest or trunk in company with himself. That is no part of his original and absolute right, nor is it necessarily involved in it.

A That right, strictly taken, is to be returned to his parent earth for dissolution, and to be carried thither in a decent and inoffensive manner. When these purposes are answered, his rights are, perhaps, fully satisfied in the strict sense in which any claim, in the nature of an absolute right, can be deemed to extend. At the same time, it is not to be denied that very natural feelings prompt to something beyond this—to a continuation of the frame of the body beyond its immediate
B consignment to the grave. An indulgence of such feelings, highly allowable in themselves, naturally enough engrafts itself upon the original right, so as to appear inseparably connected with it, in countries where the practice has been habitually indulged, for, however men may feel, or affect to feel, an indifference about the fate of their own remains, few have firmness, or rather hardness of mind, sufficient to contemplate, without pain, the total and immediate extinction of
C the remains of those who were justly dear to them when living. A sentiment of this kind has been supposed, as I have intimated, to have led in part to a preference of burial to the process of burning. It has likewise given birth to extravagant means for preserving human remains for a period of time long after the term, at which any memory of the individuals, or any affection of their survivors, can be supposed to extend. Among such extravagancies the use of coffins is, certainly,
D not to be numbered. They are merely temporary themselves, though of much longer duration than is necessary for their primary intention, that of preserving the body from the ravages of the reptiles of the earth, if any such ravages are at all to be apprehended. In later times and in populous cities ravages of a more formidable kind are to be dreaded against which they afford no security. Those
E of the persons engaged in the employment of furnishing bodies for dissection; an employment which, whatever be its necessity, is, certainly, not conducted without lamentable violation of natural feelings and occasionally of public decency itself.

It is particularly, I presume, with a view to prevent such spoliations of the dead that the use of iron coffins is pressed, in this application to the court. The purpose of security against such spoliations is, I understand, proposed to be effected by some ingenious mechanical contrivance, which prevents the coffins
F from being opened, when once effectually closed. I do not find that any objection is taken to the contrivance itself on the ground of inefficiency or on any other ground. The objection is to the metal, iron, of which the whole coffin is composed, and I must say that, knowing of no rule of law that prescribes coffins, and certainly of none which prescribes wooden coffins exclusively, and knowing that
G modern and frequent usage admits coffins of lead, a metal much more indestructible than iron, I find some difficulty in pronouncing that the use of this latter metal is clearly, and universally, unlawful in the structure of coffins, and that coffins so composed are inadmissible upon any terms whatever. Such coffins, being composed of thin laminæ, occupy, as I presume and as I see it is alleged, rather less space than those of wood itself. There is no objection, therefore, on that
H ground, and the objection that they may be magnified to any size however inconvenient, seems to apply to coffins composed of this substance not at all more than to those of any other. The real truth is that the claim on the part of these coffins which is quarrelled with is neither more nor less than that they shall be admitted upon the same terms of pecuniary payment as those of wood. This claim cannot, I think, be reasonably urged, but under shelter of one of two propositions—either
I that there is no difference in the duration of coffins of wood and those of iron, or that the difference of duration ought to make no difference in the pecuniary terms of admission.

Upon the first of these questions, that of comparative duration, a wish was expressed by the court that it might be assisted by opinions obtained from persons more scientifically conversant with such subjects that I can describe myself to be, but, being left to my own unassisted apprehensions on such a matter, I must confess that it was not without a violent revolt of every notion that I entertain that I heard it rather insinuated in argument than directly asserted or maintained

that iron coffins do not keep a longer possession of the ground than those of wood. To me it appears, without any experimental knowledge that I can claim, that upon all common theory it must be otherwise. Rust is the process by which iron travels to its decomposition. If an iron coffin deposited in the earth contracts no rust at all from want of air or moisture, in that case it preserves its integrity unimpaired. But if, from the moisture of the soil in which it is deposited, or from the access of a little air, it contracts rust, that rust, until it scales off, forms an external covering which protects the interior parts, and retards their decomposition, whereas the decay of the external parts of the wood propagates inwardly its corruption and promotes and hastens the dissolution of the whole. It is the fault of the complainant if, being left to judge upon this matter without sufficient information, I judge amiss in holding that coffins of iron are much more durable than those of wood.

It being assumed that the court is justified in holding this opinion upon the fact of comparative duration, the pretensions of these coffins to an admission upon the same pecuniary terms as those of wood must resort to the other proposition, which declares that the difference of duration ought to produce no difference in those terms. Accordingly, it has been argued that the ground once given to the body is appropriated to it for ever. It is literally in mortmain unalienably, it is not only the *domus ultima*, but the *domus æterna*, of its tenant who is never to be disturbed be his condition what it may, the introduction of another body into that lodgement at any time, however distant, being an unwarrantable intrusion. If these propositions be true, it certainly follows that the question of comparative duration sinks into utter insignificance.

In support of them, it seems to be assumed that the tenant himself is imperishable, for, surely, there can be no inextinguishable title, no perpetuity of possession, belonging to a subject which itself is perishable. But the fact is, that "man" and "for ever" are terms quite incompatible in any state of his existence, dead or living, in this world. The time must come when "*ipsæ periere ruinæ*", when the posthumous remains must mingle with, and compose a part of, that soil in which they have been deposited. Precious embalmments and costly monuments may preserve, for a long time, the remains of those who have filled the more commanding stations of human life, but the common lot of mankind furnishes no such means of conservation. With reference to them, the *domus æterna* is a mere flourish of rhetoric; the process of nature will speedily resolve them into an intimate mixture with their kindred dust; and their dust will help to furnish a place of repose for other occupants in succession. It is objected that no precise time can be fixed at which the mortal remains and the chest which contains them shall undergo the complete process of dissolution, and it certainly cannot, being dependent upon circumstances that vary, difference of soils, and exposures, of seasons and climates, but observation can ascertain them sufficiently for practical use. The experience of not many years is required to furnish a sufficient certainty for such a purpose.

Founded on such facts and considerations, the legal doctrine certainly is, and has remained unaffected—that the common cemetery is not *res unius ætatis* the property of one generation now departed, but is, likewise, the common property of the living and of generations yet unborn, and is subject only to temporary appropriations. There exists in the whole a right of succession, which can be lawfully obstructed only in a portion of it by public authority—that of the ecclesiastical magistrate who gives occasionally an exclusive title in such portion to the succession of some family or to an individual who has a fair claim to be favoured by such a distinction, and this, not without a just consideration of its expedience and a due attention to the objections of those who oppose such an alienation from the common property. Even a bricked grave, granted without such an authority, is an aggression upon the common freehold interests and carries the pretensions of the dead to an extent that violates the rights of the living.

If this view of the matter be just, all contrivances that, whether intentionally or

A not, prolong the time of dissolution beyond the period at which the common local understanding and usage have fixed it is an act of injustice unless compensated in some way or other. In country parishes where the population is small, and the cemetery is large, it is a matter less worthy of consideration—more ground can be spared, and less is wanted, but, in populous parishes, in large and crowded cities, the indulgence of an exclusive possession is unavoidably limited, for, unless limited, evils of most formidable magnitude take place. Churchyards cannot be made commensurate to the demands of a large and increasing population, the period of decay and dissolution does not arrive fast enough in the accustomed mode of depositing bodies in the earth to evacuate the ground for the use of succeeding claimants, new cemeteries must be purchased at an enormous expense to the parish, to be used at an increased expense to families and at the inconvenience of their being compelled to resort to very incommodious distances for attendance on the offices of interment.

C In this very parish, three additional burial grounds are alleged to have been purchased and to be now nearly filled. This is the progress of things in their ordinary course, and if to this is to be added the general introduction of a new mode of interment, which is to ensure to bodies a much longer possession, the evil will become intolerable, and a comparatively small portion of the dead will shoulder out the living and their posterity. The whole environs of this metropolis will be surrounded with a circumvallation of churchyards, perpetually increasing by becoming themselves surcharged with bodies, if, indeed, landowners can be found who will be willing to divert their ground from the beneficial uses of the living to the barren preservation of the dead contrary to the humane maxim quoted by TULLY from PLATO'S REPUBLIC [CICERO, DE LEGIBUS, lib. 2, s. 27]:

E "Quæ terra fruges ferre, et, ut mater, cibos, suppeditare possit, eam ne quis nobis minuat, neve vivus neve mortuus."

If, therefore, these iron coffins are to bring additional charge and trouble upon the parish, they ought to bring with them a proportionable compensation. Upon all common principles of estimated value you must pay proportionably for the longer lease which you take of the ground. To this condition coffins of lead are subjected, and what is the exemption to be pleaded for iron? If you wish to protect your deceased relatives by additional securities which press upon the convenience of the parish, we do not blame the purpose nor reject the measure, but it is you, and not the parish, who must pay the whole of the charge imposed. I am aware that very ancient canons forbid the taking of money upon interment upon the notion that consecrated grounds are among the *res sacræ* and that money payments for them were, therefore, acts of a simoniacal complexion, but this has not been the way of considering that matter since the Reformation, for the practice goes up at least nearly as far. It appears founded upon reasonable considerations, and is subjected to the proper controul of an authority of inspection. In populous parishes, where funerals are very frequent, the expense of keeping churchyards in an orderly and seemly condition is not small, and that of purchasing new ones, when the old ones become surcharged, is extremely oppressive. To answer such charges both certain and contingent it surely is not unreasonable that the actual use should contribute when it is called for. At the same time the parishes are not left to carve for themselves in imposing these rates; they are all submitted to the examination of the ordinary who exercises his judgment, and expresses the result by a confirmation of their propriety in terms of very guarded caution. It is, perhaps, not easy to say where the authority could be more properly lodged, or more conveniently exercised.

I Having, I think, sufficiently declared, in these observations, my opinion generally upon the subject, I am not aware that much more remains than that I should direct the parish to compose a table of fees for the consideration of the ordinary. It will be for their own consideration in the first instance, how far these coffins should be put upon the same footing as those of lead. It is certain that they occupy less room and

that they are more temporary in duration, but it is likewise to be remembered that, being much more accessible in point of original expense, they are, therefore, likely to be much more numerous, and are more likely, on that account, to transmute the cemetery into a mine of iron than there is any hazard of its being converted into a mine of lead. It may be said that imposition of high fees may, in effect, operate as a prohibition in populous parishes and crowded churchyards, to which I answer that, even if such an effect should follow, it is better than that a parish should be robbed of the fair and convenient use of their own public cemetery. Patent rights (under which I understand these coffins are constructed) must be held by the same tenure as all other rights. *Ita utere jure tuo alienum ne lēdas*—they must not trench upon rights more ancient, more public, and such as this court is peculiarly bound to protect.

In the meantime I recommend that the body, which has lain so long unhonoured should be committed to the grave without obstruction, but without prejudice to the present question, or to the rights of the parish. No public prohibitory resolution had passed at the time of the death, and I willingly lay hold of that circumstance to recommend a measure of peace towards the living and of charity towards the dead.

May 4, 1821. On this day the cause came on again.

SIR WILLIAM SCOTT.—The general determination which I have already arrived at has decided the legal question (so far as my opinion could decide it) that, if iron coffins are more durable than those of wood, they ought to pay in proportion to their longer occupation of the ground. The question of fact that it was more durable, remained in a controverted state, to be ascertained (so far as it could be ascertained) by further evidence to be produced, and I need not add that to reach anything like exactness upon such a subject of comparison was an expectation not to be indulged. The fact itself is liable to be affected and varied by the influence of various causes acting upon both substances, so as to make any general result, even of experiments themselves, in some degree questionable. But the truth is that such experiments have not been, and cannot be, made in any time convenient for the present decision of the question. The whole of the illustration which it has received is derived from the opinions of persons scientifically conversant with such subjects, and from such exhibition of facts as may have occasionally, and incidentally, presented themselves to notice.

Of the former of these species of evidence the court is furnished with the declared opinions of eminent professors of the science of chemistry; and I should have been happy to have been able to apply, confidently, the safe and convenient judicial aphorism of "*Peritis in arte sua credendum*;" but, where such opinions disagree, a matter of no infrequent occurrence, that rule can have no application and it is a work of no small difficulty to provide another. The court cannot presume to pronounce directly a decisive judgment on a subject which the conflicting opinions of those, who understand it most familiarly, have left in the state of doubt in which they found it. Still less can the court presume to decide another comparative question of perhaps equal difficulty, and, certainly, increased delicacy, that of the skill, and experience, and judgment of the different professors. It can proceed merely "*crassa Minerva*," in looking to the opposing numbers of opinions, for the arguments by which they are supported, however just, come too little within the reach of its comprehension to authorise any dogmatical conclusion. The balance of numbers is, certainly, on the side of the greater durability of iron, and, therefore (*prima facie* at least), the balance of authority, for, supposing merely an equality of individual skill and judgment, it must be the number that should decide the weight of aggregate authority.

Having already, at the former hearing, expressed a pretty strong inclination of my own judgment (a very uninformed one, undoubtedly) on the greater durability

A of iron, I may, perhaps, be thought to be unduly influenced by my own prepossessions when I say that the opinions of Mr. Brande, who fixes the proportions of durability of iron to wood as three to one, and Mr. Aikin and the two other persons who concur, find a readier way to the conviction of my own mind, than those of their opponents. However that may be, the opinion of the court upon this matter rests finally with them, so far as this species of evidence can lead it.

B Another test by no means improper to be noticed has been suggested to me by a gentleman of much various and accurate information [communicated to the court in certain letters], founded upon the basis of the result of casual discovery of these substances in situations not unconnected with the present subject. Both substances, wood and iron, have been found in contact with or in deposit within the soil where they have been lodged either accidentally or in pursuance of the ancient usages of the inhabitants of the country, and discovered afterwards at very distant periods of time, sometimes separately and sometimes in conjunction. Three different states of the soil may be supposed in which these connections with it may have taken place.

D One is where the ground was perfectly dry and remained so during the whole period of the connection. Both substances, in such a state, may be supposed entitled to a long and sound longevity. Rust does not corrode the one where moisture and air are excluded, nor rottenness the other if insects are prevented from committing depredations. The cases of Egyptian mummies, composed, it is said, of the sycamore of the country, but ascertained to be of 2000 years standing, are among the most signal instances of the *immortale lignum*—a character which E PLINY appropriates to the larch, though it is not, perhaps, unworthy of notice that, in the interesting account given of the late disinterment of KING CHARLES I the wooden coffin is described as very much decayed though protected externally from air and moisture by being enclosed in a leaden coffin, carefully soldered up, and internally from the gaseous vapours which the chemical gentlemen mention in their affidavits as proceeding from a dead body, by cerecloths and such other F integuments.

G Another state is where they are found in contact with a soil entirely and permanently covered with water, salt or fresh, as where anchors, bolts, or chains are fished up from the bottom of the ocean where they may have lain for unknown ages. The keys of Lochleven Castle, fished up from the lake a very few years ago after having been thrown into it on the flight of the Queen of Scotland, had suffered little injury by lying there for more than 250 years. Manufactured wood is said to resist the action of moisture less perfectly, though the instances of Conway Stakes in the Thames and Trajan's Piers in the Danube are striking proofs of the durability, under some circumstances, and entire trees have been found to have continued unhurt, in point of substance, for centuries, in a submerged state.

H The third state is that which applies more immediately to the present inquiry—that in which the substances have been subjected to alternations of damp and dryness and in which they both decay, but at very different periods. It is a fact, falling within frequent observation, that of the various weapons that are found buried in the tumuli or barrows or other places of ancient sepulture in this island, the metallic heads of celts and spears and the blades of swords and daggers are in a condition from which they can easily be recovered to their ancient use or to any I other metallic use whatever, while of the wood that formed their shafts or handles or connecting parts not a particle remains, but are all associated with the soil in which they were buried. Numerous instances, authenticated in the most satisfactory manner, occur in the volumes of the *ARCHAEOLOGIA*: I owe a collection of them to the active kindness of the same ingenious person.

An affidavit, brought in by the patentee and signed by three persons, records an instance of an infant's coffin of iron plate being deposited in the churchyard of St. Giles, Cripplegate, and found, covered with rust, a very short period of time afterwards. I cannot infer much from a single instance of that kind, produced, perhaps,

by the singularity of some circumstances either in the soil or preparation of the metal not stated in the affidavit, for if it were a fact not so singularly produced, the instances would be ordinary and frequent. Besides that the covering of rust would, as has been observed, operate in some degree to protect the metal from a further hasty decomposition. Perhaps, the common practice which has been adverted to in argument of having the ends of park palings and posts shod with iron for the purpose of preserving them in the ground may be deemed more than a sufficient counterpoise to such a solitary fact, at least as far as the common apprehensions of men are of any authority upon such a subject. A

It is upon these four species of evidence (if I may so call them)—my own impressions, founded on personal observation of my own, extremely limited and superficial as it is, what appears to be the common apprehension of men generally upon this matter, the preponderating opinion of men of science, and the results of discoveries in some degree, though, perhaps, remotely, connected with this subject, that I am called upon to act, being the best, indeed the only, evidence that I can collect by any industry of my own or by the more active industry of others. I must add that, if succeeding experience shall show that these premises have led to an erroneous conclusion, it will be for the justice of the parties themselves to correct it, and if they should decline to do so, it will be for the remedial justice of this court to reduce the matter to its proper standard. B C

The remaining question is that of the proper quantum of the increased taxation. Upon that question I am satisfied by the great variety of circumstances under which both parishes and their cemeteries exist that there can be no general measure of quantum which can be deemed universally applicable, even in this town and its environs. The size of churchyards relatively to population—the possibilities of enlargement, if necessary—the facilities of obtaining additional cemeteries—the means of purchase within the possession of the parish—many circumstances, some of which occur and others escape present recollection, render what may be said respecting this particular church rate applicable to others only with such amplifications and abatements as the difference of circumstances may require. D E

I observe that there are demands that rather startle at first sight and require some consideration to reconcile them to notions of propriety. St. Dunstan's in the West rates metallic coffins at £25 extra fee. I am, however, to remember that it is a parish extremely populous, in the heart of a most busy part of the metropolis, closely occupied by buildings, with churchyards extremely circumscribed, and that it is at a great distance from the country environs of this city. Less appears to justify the demand of £21 in Islington parish, situated as it is out of this town where ground, though highly valuable, may be more obtainable for the necessary uses of the parishioners. But I cannot take upon myself to say that there may not be reasons that protect even their charges from the imputation of extravagance. F G

Upon this particular charge at St. Andrews, Holborn, an ingenious calculation was proposed by counsel for the promoter respecting the number of graves of certain dimensions and certain depths which the churchyard was capable of receiving. If I took it accurately, it assumed as a basis what I think is not to be admitted, that they were to descend to a depth below the soil of fifteen feet. As far as I could follow the calculation I did not discover other fallacies, but fallacy, I think, there must be, for it seems quite incredible, that parishes, if they could act conveniently upon such a calculation, would incur the inconvenient expense, as they very frequently do, of purchasing new cemeteries. H I

An objection was taken to the application of the fee as stated in the table. I think that this is a matter into which the present party has no right to look. If the whole demand be a proper demand for the longer occupancy of the ground, he has no right to quarrel with the public uses to which the parish immediately applies it, taking upon themselves the burden of providing additional grounds for interment, when required. The objection to the incumbent's proportion, seems entirely to forget that by the general law, it is the incumbent who has the freehold of the soil

A of the churchyard, though provided originally by the parish. By acquiescence, confirmed by usage, parishes in this town and neighbourhood have acquired concurrent rights into the validity of which it is quite unnecessary and improper for me to inquire as no adverse claim is or can be raised in the course of the present discussion in which the incumbent and parishioners stand upon one agreed footing of interest.

B The sum charged is not for an iron coffin, but generally for a metallic coffin, and, I think, without impropriety. Because having a right to know the extent of the patentee's powers, they find, that under this patent, he has just the same right to offer coffins of brass, or tin, or any metals, or mixtures of metals, which human ingenuity can devise as coffins of iron. Those which are called the precious metals may very well, from their intrinsic value, be deemed in their own nature extreme and excluded cases, but this court cannot by conjecture limit the possibilities of C human art and take upon itself to determine that by no attainable extension of discovery or improvement, other metals, and mixture of metals, may not be brought within the compass of a very reduced expense. Within our own time, other metallic bodies have been discovered and other compositions of metal invented. It is the more reasonable, in this case, to include such a supposition because it is clear from D the universality of the terms in which the patentee has sued out his own patent that he has included them himself in his own speculations of profit.

It is well worthy of observation that these coffins are, by their construction, out of the reach of all examination. The parish has no check, no means of internal search for prohibited materials. They may be internally varnished, or painted, or tinned, or otherwise prepared so as to increase their duration without betraying themselves E by any considerable increase of weight or by any other manifestation. The parish is to accept them upon the mere bona fides of the maker, guaranteed only by the general presumption that more durable coffins would not answer his purpose for a general traffic. Even that would not exclude particular bargains with many individuals, who felt particular anxiety about their relations. It would not exclude F more durable metals for his general traffic if, by the improvements of art, he could be supplied with them at a marketable price. It appears rather too much to expect that the matter should be settled upon an assumption that these coffins, liable to no inspection, should be always of the exact quality which these affidavits describe. The parish has a right to guard itself against this way of increased expense—against G the substitution of other metals and the use of other disguises, even supposing that the simple coffin of rolled iron was fairly entitled to be received on the same footing as the coffin of oak.

The state of this parish is, likewise, to be gravely considered. It is situated in a most crowded part of this town with a dense population both of the living and the dead, both populations rapidly increasing. Here are four cemeteries crammed H full of bodies, packed as close as notions of decency and convenience will permit. Here is a crying demand for more sepulchral space with great difficulty of obtaining it. Is such a parish a fit subject for an experiment, for such it must be deemed even by those who interpret the evidence most favourably for the iron side of this question, and without adding, as most persons, I think, would do, a preponderance on the other side?

I The inconvenience on one side is, that the patentee of a novel invention must postpone his ample harvest of profit till it is ascertained by experiments, made in places where no mischief can arise, whether it can be admitted in others where it may disturb the fair use of a public, an ancient, and a sacred possession. No court could, I think, hesitate upon the decision of such an alternative, if proposed. The attempt to force this novelty has certainly produced public uneasinesses which ought to be treated with indulgence, and has generated oppositions which have a right to be fairly disarmed, if to be disarmed at all. Let experience show (and not many years' experience will be required to show what really exists) that the apprehensions entertained are entertained without foundation. If that can be shown, it is to be hoped that the parishes themselves will do their duty, and, if they do not,

the courts must endeavour to do theirs. At present, the subject requires further probation before such a claim can be enforced. It is breaking ground for a novel purpose in a soil not yet sufficiently explored to be known, how far it is at all fit, and the court must see and know much more and more authentically, before it can decree present notions and existing practice founded upon such notions to be overthrown. A

The sum charged, or proposed to be charged, is £10 extra, and I observe, which adds to the authority of the measure, that St. George's, Hanover Square, a parish peculiarly well governed, has proposed to adopt the same. It is possible that if it had belonged to me to fix the measure in the first instance, I might have rated it somewhat lower. I observe that St. Saviour's, Southwark, which states similar circumstances of necessity arising from their population and the extent of their burial grounds, fixes it at £5, and St. George's, Middlesex, £6 9s. 6d., stating, likewise, the same necessities. However, I shall not disturb what the parish has done upon a deliberate consideration of all local circumstances, some of which may have escaped me, until the result of more experience is seen. B C

I hesitate more upon the expressed condition that the graves for the coffins shall be fifteen feet deep. I doubt not a little, both upon the justice and the prudence of this. If the parish accepts what it considers as a fair compensation for the longer occupancy of the ground, it should rather seem that the coffin is entitled to be received into this same ground. The condition will occasion additional expense, may produce occasional difficulties, from obstructions, and may lead to the irruption of water and so affect other interments. What weighs not lightly, it will put this question of durability too much into the hands of the other party, for these coffins, buried at such a depth, will remain out of sight, and out of attention, and the parish will have no means of observing the period of decay. But the persons who have an interest in the future reception of these coffins should be provided with means of observation upon the comparative durability, and, if the question should be revived, it will come on their side, with all the advantage of the evidence of experience to be produced by them alone. I wish this matter to be reconsidered. When I understand that it has undergone a reconsideration I shall be prepared to sign the table. D E F

On May 18, 1821, the table of fees as proposed was signed, the condition being omitted.

RANDALL AND OTHERS v. RUSSELL AND ANOTHER

[ROLLS COURT (Sir William Grant, M.R.), February 19, August 11, 1817]

[Reported 3 Mer. 190; 136 E.R. 73]

Trust — Constructive trustee — Renewal of lease — Subsequent purchase of reversion—Whether held on trusts of settlement.

A testator gave "all my stock of cattle, horses and carriages," to his wife absolutely, and his farm "and stock and crop thereon" to his wife during widowhood. The testator, who was also seised in fee of a moiety of an estate at L. and in possession of the other moiety as tenant from year to year of St. J. College (his lease from the college having expired) gave to his wife, *durante viduitate*, "all that his messuage or tenement, with the farm and lands at L. and all his estate and interest therein, she paying the rent reserved to St. J. College." The widow, after his death, obtained a new lease, and subsequently purchased the reversion from the person to whom it had been conveyed by the college under an Act of Parliament.

Held: (i) the livestock on the farm given to the wife during widowhood passed to her absolutely under the former clause; (ii) the renewed lease was taken subject to the trusts of the will, and those in remainder must contribute to the fine paid by the widow in proportions to be settled by the Master; (iii) the purchase of the reversion, not from the college but from the person to whom it had been conveyed by the college, was not, in the circumstances, to be taken subject to the trusts of the will.

Will—Gift—Consumable chattels—Limitation over after life interest.

Per SIR WILLIAM GRANT, M.R.: A gift for life, if specific, of things *quae ipso usu consumuntur* is a gift of the property, and there cannot be a limitation over after a life interest in such articles. If included in a residuary bequest for life, they are to be sold and the interest enjoyed by the tenant for life. Originally . . . there could be no limitation over of a chattel, but a gift for life carried the absolute interest. . . . A gift for life of a chattel is now construed to be a gift of the usufruct only. But when the use and the property can have no separate existence it should seem that the old rule must still prevail, and that a limitation over after a life interest must be held to be ineffectual.

Where the gift was of a leasehold farm, and the stock and crop thereon, an inquiry was directed to ascertain of what the crop and stock on the farm consisted at the time of the testator's death.

Notes. Distinguished: *Giddings v. Giddings* (1827), 3 Russ. 241. Applied: *Cockayne v. Harrison* (1872), L.R. 13 Eq. 432. Considered: *Trumper v. Trumper* (1872), L.R. 14 Eq. 295. Applied: *Longton v. Wilsby* (1897), 76 L.T. 770. Considered: *Bevan v. Webb*, [1905] 1 Ch. 620. Referred to: *Griffith v. Owen*, [1904-7] All E.R. Rep. 718; *Lloyd-Jones v. Clark-Lloyd*, [1919] 1 Ch. 424; *Phipps v. Boardman*, [1964] 2 All E.R. 187.

As to interests in consumable chattels, see 39 HALSBURY'S LAWS (3rd Edn.) 910; and for cases see 44 DIGEST 195 197. As to accretions to trust property, see 38 HALSBURY'S LAWS (3rd Edn.) 856; and for cases see 47 DIGEST (Repl.) 102 et seq.

Cases referred to:

- (1) *Porter v. Tournay* (1797), 3 Ves. 311; 30 E.R. 1027; 44 Digest 195, 240.
- (2) *James v. Dean* (1808), 15 Ves. 236; 33 E.R. 744, L.C.; previous proceedings (1805), 11 Ves. 383, L.C.; 47 Digest (Repl.) 104, 758.
- (3) *Kecch v. Sandford* (1726), Sel. Cas. Ch. 61; 2 Eq. Cas. Abr. 741; Cas. temp. King, 61; 25 E.R. 223, L.C.; 47 Digest (Repl.) 104, 749.

- (4) *Taster v. Marriott* (1768), Amb. 668; 27 E.R. 433; 47 Digest (Repl.) 103, 741. A
- (5) *Rawe v. Chichester* (1773), Amb. 715; 27 E.R. 463; sub nom. *Bromfield v. Chichester*, *Raw v. Duthelby*, 2 Dick. 480, L.C.; 47 Digest (Repl.) 104, 751.
- (6) *Pickering v. Vowles* (1783), 1 Bro. C.C. 197; 28 E.R. 1080, L.C.; 47 Digest (Repl.) 103, 742. B
- (7) *Norris v. Le Neve* (1743), 3 Atk. 26; 26 E.R. 818, L.C.; affirmed (1744), 2 Bro. Parl. Cas. 73, H.L.

Questions arising on the construction of a will.

The will of George Russell, which was duly executed to pass real estates, contained the following clauses :

"I give and bequeath all my household furniture, goods, plate, linen, china, books, pictures, implements and utensils of household, and all such wines, liquors and provisions, as shall be in and about my house at my decease, and also all my stock of cattle, horses and carriages, and also the harness, furniture and trappings, thereto belonging, unto my wife Susanna Russell, her executors, administrators, and assigns, absolutely, to and for her and their own use and benefit. Also I give and bequeath all that my messuage or tenement, with the farm and lands (and stock and crop thereon) called Longlands, situate and being at Foot's Cray, with the appurtenances, and all my estate and interest therein, unto my said wife Susanna Russell, and her assigns, for and during her natural life, if she shall so long continue sole and unmarried, she paying and discharging the rent payable to St. John's College, Oxford, and all other outgoings for the same, and keeping the dwelling-house insured and in good and tenantable repair."

After the death or second marriage of his wife, the testator gave the lands and premises to the trustees of his freehold and copyhold estates

"to the same uses, trusts, intents and purposes, as hereinafter mentioned concerning my other freehold and copyhold lands, tenements and hereditaments."

After giving other benefits to his wife, he gave all his freehold and copyhold lands to the plaintiff Randall and the defendant Handyside, his trustees, on trust, after payment of a certain annuity thereout, the income to accumulate during the minorities of his children and to be considered as part of residue; if his son, the plaintiff George Russell, should attain twenty-one years the trustees were to hold the lands on trust for him absolutely, and if he died under twenty-one years for such other son as the testator might have who should first attain that age, and in case he should have no such son for his daughters, as tenants in common in tail, with an ultimate remainder for the testator's own right heirs.

At the time of making his will and of his death, the testator was seised in fee of one moiety of an estate called Longlands, and in possession of the other moiety of the same estate, as tenant from year to year to St. John's College, Oxford, the original lease under which he held the same at a certain reserved rent having expired. After his death, the defendant, his widow, entered on the whole estate and procured a new lease to be granted to her for fourteen years at a rent of £40 in consideration of a premium of £400. Afterwards, by an Act of Parliament "for effectuating an exchange" between the college and Christopher Hull, this undivided moiety (among other lands belonging to the college) was vested in Hull who agreed to sell to the defendant the reversion expectant on the determination of her lease from the college; it was conveyed to her by indentures dated July 20 and 21, 1809.

The bill prayed an account of the stock and crops on the estate at the time of the testator's death, and a declaration that the defendant (the widow) having had

A an opportunity of purchasing the undivided moiety by reason of the interest she acquired in the property by virtue of the will, the testator's estate was entitled to the benefit of such purchase; that on being repaid the consideration money, the defendant might be declared a trustee of the premises for the benefit of the persons interested, and be decreed to do all necessary acts for conveying it; but if the court should be of opinion that the defendant was at liberty to purchase the inheritance of the moiety for her own benefit, then that the lease taken by her might be declared to be subject to the trusts of the will, and as the term thereby granted had merged in the freehold and inheritance, that she might be decreed to grant a new lease to the trustees on the trusts of the will, for so much of the term as would have been expired if she had not purchased the inheritance.

C *Hart, Cooke and Seton* for the plaintiffs.

Fonblanque and Wingfield for the defendants.

D **SIR WILLIAM GRANT, M.R.**—The first question in this case is under which of two clauses in the will the livestock on the testator's farm is comprehended—whether under that which gives an absolute interest to the widow, or that which gives her only an interest for life in the articles bequeathed to her. [His Honour here read the clauses in question.] The plaintiffs say that the livestock used upon the farm does not pass to the widow absolutely under the words “stock of cattle and horses,” but only for life, under the word “stock,” in the second of these clauses. That, to be sure, is a strong proposition; for it is saying that by the words “stock on the farm,” cattle and horses are more properly designated, than by the very words, “cattle and horses.” If the testator had spoken of horses only in conjunction with carriages, he might be supposed to mean carriage horses and not farm horses—but he gives not merely his cattle and horses, but “all his stock of cattle and horses.” Unless, therefore, it can be contended that his farm stock is not his stock, or that all his stock means something less than his whole stock, I do not see how the plaintiffs can succeed in this part of their claim.

F On the second clause a question arises as to the nature of the interest which the widow, as tenant for life, takes in articles, such as corn and hay, of which the use consists in the consumption. I doubt whether the testator really intended to confine her to a life interest in such articles; but the words, “during her natural life,” are thrown in at the end of the clause and I do not know how to restrain their application to any particular part of it. In *Porter v. Tournay* (1) Lord ALVANLEY says (3 Ves. at p. 314):

G “There has been a great doubt among judges, what a person having a limited use of such articles must do. Some learned judges have thought that they must be sold, and that a person so entitled is to have only the interest of the money. That is a very rigid construction.”

H It is, however, what is contended for by the plaintiffs in the case now before me. My conception is that a gift for life, if specific, of things quæ ipso usu consumuntur, is a gift of the property, and that there cannot be a limitation over after a life interest in such articles. If included in a residuary bequest for life, then they are to be sold and the interest enjoyed by the tenant for life. Originally we know that by our law there could be no limitation over of a chattel, but that a gift for life carried the absolute interest. Then a distinction was taken between the use and the property. The use might be given to one for life, and the property afterwards to another. A gift for life of a chattel is now construed to be a gift of the usufruct only. But when the use and the property can have no separate existence, it should seem that the old rule must still prevail and that a limitation over after a life interest must be held to be ineffectual. But I do not see how any definite declaration can be made on this subject, until it shall be ascertained of what the crop and stock on the farm consisted at the time of the testator's death. On that point some inquiries must be directed.

It has been seen, by the clauses I before read, that the testator gave his farm at Longlands to his wife, during her widowhood. Out of this bequest two questions arise. A

1. The testator was seised in fee of an undivided moiety of this estate of Longlands. The other moiety belonged to St. John's College, Oxford; but the testator was lessee under the college of that moiety also. The lease, it seems, had expired before the testator's death, but he continued to occupy as tenant from year to year, and in the year 1807 the widow (the tenant for life) obtained a lease from the college in her own name for a term of fourteen years. It is made a question whether this renewed lease is subject to the trusts of the will, or the absolute property of the widow. On that point, however, I do not see how any doubt can be entertained. According to *James v. Dean* (2), the testator had a devisable interest in the premises and a new lease became subject to the same trusts on which that interest was devised. It was attempted to take a distinction, in this respect, between a renewal by a tenant for life and a renewal by a trustee or executor. But that the principle of what is commonly called the Rumford Market Case (*Keech v. Sandford* (3)) applies to a tenant for life as well as a trustee or executor, was determined in *Taster v. Marriott* (4) and *Rawe v. Chichester* (5). It is true that in the latter case Mrs. Rawe was executrix as well as tenant for life; but it was not her character of executrix, but of tenant for life, that gave her the opportunity of renewing. In *Pickering v. Vowles* (6), LORD THURLOW takes the point to be settled. In the present case, the greatest part of the renewed term is already expired, and the widow may herself exhaust the whole interest. The plaintiffs will not, therefore, in all probability derive much advantage from the decision of this point in their favour. They have, however, a right to a declaration that the renewed lease is subject to the trusts of the will; and it must be settled by the Master what proportion of the fine paid on renewal is to be borne by them. B
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2. It appears that after the lease was granted, the college, under the authority of an Act of Parliament, conveyed this estate to a Mr. Hull in exchange for some property of his and he sold the reversion in fee to Mrs. Russell. On the part of the plaintiffs it is contended that the reversion so purchased is also subject to the trusts of the testator's will. But the bill does not state to which of those trusts it is conceived to be subject, or for whom this estate is claimed. The testator has given his freehold and his leasehold property in different ways. The eldest son is sole devisee of the freehold estates; all the children are entitled to the leasehold and personal property. To the eldest son, separately, no interest whatever is given in this moiety of the estate. Such interest as the testator had in it, he divided between the wife and all the children. The eldest son, surely, cannot say that any further interest acquired in that estate is to belong exclusively to him. The widow has purchased no interest in any estate that was limited to him by the will, and therefore cannot be a trustee for him. I presume then, it is for all the children that the fee is claimed, as coming in the place of the leasehold interest of which they had the remainder. F
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No case was mentioned in which this sort of equity had been carried to such a length. The ground commonly stated on which the renewed lease becomes subject to the trusts of a will disposing of the original lease is that the one is merely an extension or continuation of the other. But the fee is a totally different subject, which the testator had it not in his contemplation to acquire or dispose of. Yet if Mrs. Russell had purchased from the college, it might be said that she thereby intercepted and cut off the chance of future renewals, and consequently made use of her situation to prejudice the interests of those who stood behind her; and there might be some sort of equity in their claim to have the reversion considered as a substitution for those interests; although, as I have already said, I am not aware of any decision to that effect. But here the situation of the parties was altered by the act of the landlord, without any intervention of the tenant for life. I

- A** The college had alienated the property to an individual. The benefit attending the tenant-right of renewal with a public body was gone. A lease at a rack rent was all that was to be expected from the private proprietor. Mrs. Russell's purchase from the first vendee wrought no change whatever in the situation of those who had had interests in the lease as a college lease. Before she bought, it had become a lease that must expire at the end of fourteen years. Whether Mr.
- B** Hull sold or kept the reversion was a matter of indifference to them. It is not enough to say that Mrs. Russell's situation as tenant for life gave her the opportunity of making the purchase. They must go on and show what right or interest of theirs she acquired or defeated by making the purchase. There never was a stronger case for turning the purchaser of a reversion into a trustee for those who had the antecedent interests in the estate than that of *Norris v. Le Neve* (7).
- C** Norris was the executor of the testator's will: he was also trustee of a term for payment of debts. He had had the management of the testator's affairs and was in possession of all his deeds. The testator had made different limitations of his estate, for life and in tail, with an ultimate remainder to his own right heirs. Norris found out the right heir, and obtained from him the reversion for a small sum of money. The persons who had the limited interests in the property contended
- D** that this purchase by Norris under such circumstances ought to be considered as a trust for them or some of them, and they likened it to the case of a trustee obtaining the renewal of a lease for his own benefit. LORD HARDWICKE, though highly disapproving of Norris's conduct and expressing a strong desire to turn him into a trustee, yet could not find a ground for declaring the purchase to be
- E** a trust for those who had nothing at all to do with the reversion. In the present case, the plaintiffs stood wholly unconnected with Hull's reversionary interest. Whether he sold it to Mrs. Russell or to any other person was a matter of indifference to them. All they allege is that inasmuch as her situation gave her an opportunity to make the purchase, she ought to be turned into a trustee for them. But the case to which I have referred furnishes a sufficient answer to that argument. I think there is even less ground for turning her into a trustee for them, than there would have been for considering Norris as a trustee for the parties interested in the estate. This part of the bill must, therefore, be dismissed.
- F**

Bill dismissed.

CRAVEN AND ANOTHER v. RYDER

[COURT OF COMMON PLEAS (Gibbs, C.J., Dallas and Park, JJ.), January 24, 1816]

[Reported 6 Taunt. 433; 2 Marsh. 127; 128 E.R. 1103]

Shipping—Bill of lading—Right to bill—Mate's receipt for goods—Right of vendor in possession of receipt to stop goods in transitu.

A. sold goods to B., to be delivered free on board, and loaded them on board C.'s vessel taking a receipt from the mate. B. sold the goods to D., who, without the consent of A., obtained a bill of lading from C. B. became bankrupt.

Held: A., being in possession of the receipt, was entitled to stop the goods in transitu, and consequently C. was answerable to A. in trover.

Notes. As to the effect of re-sale by the buyer, see now s. 47 of the Sale of Goods Act, 1893 (22 HALSBURY'S STATUTES (2nd Edn.) 1012).

Distinguished: *Cowas-Jee v. Thompson* (1845), 5 Moo. P.C. 165. Referred to: *Dixon v. Yates*, [1824-34] All E.R. Rep. 744; *Schuster v. McKellar and Young* (1857), 3 Jur. N.S. 1320; *Re Cock, Ex parte Rosevear China Clay Co.* (1879), 11 Ch.D. 560.

As to the effect of disposition by buyer on seller's right of lien and stoppage in transitu, see 34 HALSBURY'S LAWS (3rd Edn.) 137 et seq.; and for cases see 39 DIGEST (Repl.) 768 et seq. As to delivery of bill of lading, see 35 HALSBURY'S LAWS (3rd Edn.) 337 et seq.; and for cases see 41 DIGEST (Repl.) 243 et seq.

Case referred to in argument:

Lickbarrow v. Mason (1787), 2 Term Rep. 63; 100 E.R. 35; on appeal sub nom.

Mason v. Lickbarrow (1790), 1 Hy. Bl. 357, Ex. Ch.; on appeal sub nom.

Lickbarrow v. Mason (1793), 4 Bro. Parl. Cas. 57; 6 East, 22, n., H.L.; 39 Digest (Repl.) 750, 2279.

Motion by the defendant for a rule nisi to set aside the verdict and enter a non-suit, in an action of trover to recover the value of twenty-four hogsheads of sugar.

At the trial before DALLAS, J., at Guildhall, at the sittings after Michaelmas Term, 1815, it appeared that the plaintiffs on May 5, 1815, contracted to sell to B. French & Co. twenty-four hogsheads of sugar denominated Hamburg loaves, at 108s., free on board a British ship, two months being the usual credit on such sales. The plaintiffs on May 13, 1815, sent the sugars by their lighterman alongside a vessel bound for Hamburg, of which the defendant was master, to be put on board, with an order addressed "to the commanding officer on board, to receive them for and on account of the plaintiffs;" and when the loading was complete, on May 16, 1815, took in exchange from the mate, who happened to have the command, an acknowledgment that the goods were "received on board the *George* for Hamburg, for and on account of the plaintiffs." The lighterman proved that he had for the last year adopted this more precise form in his receipts, for the express purpose of giving the shipper a command over the goods till the lighterman's note was, according to the usual course of trade, given up in exchange for the bill of lading. B. French & Co. contracted for the re-sale of the sugars to Caldas and received the price of them; and the defendant, without the plaintiff's privity, on May 15, 1815, signed and delivered to Caldas, who had engaged the defendant's vessel for the voyage, a bill of lading for the sugars, as being shipped by him, deliverable to Carlo Bene or his order, at Hamburg. B. French & Co. having on May 19, 1815, stopped payment, the plaintiffs, not having been paid for the sugars, reclaimed them, which the defendant refused to re-deliver on the ground that he had signed a bill of lading in favour of Caldas deliverable to Carlo Bene to whom Caldas had re-sold and consigned them to Hamburg, and had obtained Bene's acceptances on the credit of this consignment. The jury found that the receipt given to the plaintiffs was restrictive, and that nothing had been

done by them to alter the right of possession of the goods, and gave their verdict for the plaintiffs.

Serjeant Lens for the defendant.

GIBBS, C.J.—Exclusively of the particular form of the receipt for the goods, I take it the practice is that the person who is in possession of the lighterman's receipt is the person entitled to the bill of lading, which ought to be given only to the holder of that receipt. Consequently, the holder of that receipt retains a control over the goods at least until he has exchanged the receipt for the bill of lading. DALLAS, J., who tried this cause, had no doubt on the propriety of the verdict, and the jury were still more clear, and thought it was a right which ought not to be questioned. We should not, therefore, disturb the verdict unless we could be convinced of the propriety of so doing. French & Co. might sell their right again, but the plaintiffs might refrain from delivering the goods unless under such circumstances as would enable them to recall the goods if they saw occasion. The plaintiffs refuse to deliver them except in exchange for this receipt: they know a bill of lading will be executed before the ship sails, and they know that the bill of lading ought regularly to be executed to themselves. French & Co. sell to Caldas. Caldas goes to the defendant and obtains the bill of lading of these goods, but the defendant signs that bill of lading to Caldas in his own wrong, for he ought not to have given the bill of lading but in exchange for the lighterman's note. In this state of things French & Co. became insolvent, and we do not think the right of stoppage in transitu is gone. Nor do we mainly rely on the form of the receipt, though it is a circumstance to be considered, but if the receipt had been in the old form, the principle is the same, namely, that the vendors had never yet parted with the control over the goods in that event.

DALLAS, J.—I think the jury determined properly. They said it was contrary to the course of business, and to the defendant's duty, to give up the bill of lading without the receipt; and that the plaintiffs had never parted with the property as long as they kept possession of the receipt.

PARK, J.—If this verdict disturbed any rule of law the court would be very desirous that it should go to a further inquiry, but it went on a question of fact as to the custom, i.e., that the bill of lading is never delivered except to the party who is in a condition to give the receipt in exchange.

Rule refused.

STEPHENS AND OTHERS v. ELWALL

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., and Le Blanc, J.), June 5, 1815]

[Reported 4 M. & S. 259; 105 E.R. 830]

Master and Servant—Conversion by servant for benefit of master—Liability of servant.

A servant may be charged in trover although the act of conversion be done by him for the benefit of his master.

Per LORD ELLENBOROUGH, C.J.: A person is guilty of a conversion who intermeddles with my property and disposes of it and it is no answer that he acted under authority from another who had himself no authority to dispose of it.

Notes. Applied: *Stephenson v. Hart* (1828), 1 Moo. & P. 357. Considered: *Hutton v. Balme* (1832), 2 Tyr. 620; *Balme v. Hutton* (1833), 9 Bing. 471; *Cranch v. White* (1835), 1 Bing. N.C. 414. Approved: *Hollins v. Fowler*, [1874-80] All E.R. Rep. 118. Considered: *Delaney v. Wallis* (1884), 15 Cox, C.C. 525; *McEntire v. Potter* (1889), 22 Q.B.D. 438; *Gordon v. London, City and Midland Bank*, *Gordon v. Capital and Counties Bank* (1900), 83 L.T. 762. Applied: *Winter v. Bancks* (1901), 84 L.T. 504; *William Leitch & Co. v. Leydon*, [1930] All E.R. Rep. 754. Referred to: *Alexander v. Southey* (1821), 5 B. & Ald. 247; *Price v. Helyar* (1828), 1 Moo. & P. 541; *Garland v. Carlisle* (1837), 4 Scott, 587; *Kynaston v. Crouch* (1845), 14 M. & W. 266; *Sharland v. Mildon*, *Sharland v. Loosemore* (1846), 5 Hare, 469; *Symonds v. Atkinson* (1856), 1 H. & N. 146; *Barker v. Furlong*, [1891] 2 Ch. 172; *Jones v. Manchester Corpn.*, [1952] 2 All E.R. 125.

As to liability of agent for conversion, see 1 HALSBURY'S LAWS (3rd Edn.) 235; and as to removal and misdelivery in relation to conversion, see 38 HALSBURY'S LAWS (3rd Edn.) 777; and for cases see 1 DIGEST (Repl.) 786 et seq. As to liability of servant in tort to third party, see 25 HALSBURY'S LAWS (3rd Edn.) 546 et seq.; and for cases see 34 DIGEST (Repl.) 231.

Case referred to:

(1) *Perkins v. Smith* (1752), 1 Wils. 328; Say. 40; 95 E.R. 644; 1 Digest (Repl.) 786. 3145.

Also referred to in argument:

McCombie v. Davies (1805), 6 East, 538; 2 Smith, K.B. 557; 102 E.R. 1393; 1 Digest (Repl.) 396, 570.

Potter v. Starkie (1807), cited in 4 M. & S. at p. 260.

Cooper v. Chitty (1756), 1 Burr. 20; 1 Keny. 395; 1 Wm. Bl. 65; 97 E.R. 166; 46 Digest (Repl.) 454, 1.

Rule Nisi obtained by the plaintiffs, assignees of Spencer and another, bankrupts, for a new trial in an action of trover for goods. The defendant denied liability.

At the trial before LE BLANC, J., at the last Lancaster assizes it appeared that the bankrupts being possessed of the goods sold them after their bankruptcy to Deane, to be paid for by bills on Heathcote who had a house of trade in London, and for whom Deane bought the goods. Heathcote was in America, and the defendant was his clerk, and conducted the business of the house. Deane communicated to the defendant information of the purchase on the day it was made, and the goods were afterwards delivered to the defendant, and he disposed of them by sending them to America to Heathcote. No demand was made upon the defendant until nearly two years after the purchase. The judge inclined to think, and so stated to the jury, that if the defendant was acting merely as the clerk of Heathcote he was not liable; but if he was transacting business for himself, though in the name of another, then he would be liable. The jury found a verdict

for the defendant. A rule nisi being obtained in the last term for a new trial, in order to question the accuracy of the judge's direction in point of law, *Perkins v. Smith* (1) was cited, and the plaintiffs contended that the defendant being a tortfeasor, no authority that he could derive from his master would excuse him from being liable in this action.

Park, for the defendant, showed cause against the rule.

Topping and *Richardson*, for the plaintiffs, supported the rule.

LORD ELLENBOROUGH, C.J.—The only question is whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. The court is governed by the principle of law and not by the hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and what is still more, that he shall not recover contribution?

LE BLANC, J.—I think the rule of law is very different from what I considered it at the trial. The great struggle made at the trial was whether the goods were for Heathcote or not, but that makes no difference if the defendant converted them. And here was a conversion by him long before the demand.

Rule absolute.

ATTORNEY-GENERAL v. FULLERTON

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), November 13, 1813]

[Reported 2 Ves. & B. 263; 35 E.R. 319]

Landlord and Tenant—Boundary—Tenant's duty to maintain—Liability if boundary destroyed.

There is an obligation on a tenant to preserve boundaries, and, if he permits them to be destroyed so that the landlord's land cannot be distinguished from his and restored specifically, to substitute land of equal value.

Notes. Considered: *Spike v. Harding* (1878), 7 Ch.D. 871.

As to powers of court to give relief concerning disputed boundaries, see 3 HALSBURY'S LAWS (3rd Edn.) 360 et seq., and as to obligation of tenant to preserve boundaries, see 23 HALSBURY'S LAWS (3rd Edn.) 564; and for cases see 7 DIGEST (Repl.) 267 et seq. As to boundaries of charity lands, see 4 HALSBURY'S LAWS (3rd Edn.) 329; and for cases see 8 DIGEST (Repl.) 470.

Motion by the defendant to dissolve an injunction made on answer to an information.

The information stated the title, under an Act of Parliament and a decree of Lord Keeper WRIGHT, of the Free School of Pocklington in the county of York to several parcels of land, which, lying dispersed and intermixed with other lands in Thryburgh, were let for twenty-one years; and the leases, being renewed, were in 1756 vested in Elizabeth Finch as lessee. To all those leases a terrier or schedule was annexed; being the return of commissioners antecedent to Lord Keeper WRIGHT's decree; and which that decree confirmed.

In 1756 Elizabeth Finch, being lessee of the charity lands and owner of all the other lands in the parish (except a small part of the glebe), caused the parish to be surveyed; and all the pieces of land lying in the open and unenclosed fields of the parish (except the glebe) were then laid together for the convenience of measuring; and she allotted a certain portion in lieu of the charity pieces, so dispersed. The tenants of the allotted estate having attorned to the master of the school, an ejectment was brought by the representative of Judith Finch, the lessee under the last renewal in 1806; upon which the information was filed praying a commission for setting out the charity lands as described in the terrier or schedule. An injunction was made against cutting trees on the allotted estate, and to restrain proceedings in the ejectment.

Sir Samuel Romilly, Bell and Barber for the information, showed cause against dissolving the injunction.

Hart and Daniel for the defendant.

LORD ELDON, L.C.—It has been long settled, and that law is not now to be unhinged, that a tenant contracts among other obligations resulting from that relation, to keep distinct from his own property during his tenancy, and to leave clearly distinct at the end of it, his landlord's property, not in any way confounded with his own. This is, therefore, a common equity that a tenant, having put his landlord's property and his own together for his own convenience in order to make the most of it during his tenancy, is bound at the end of the term to render up specifically the landlord's land; and, if he cannot, that a commission shall issue from a court of equity to inquire what were the lands of the landlord: the court taking care to the intent that the tenant may discharge his obligation to do what is right as to the possession in the meantime; and if the tenant has so confounded the boundaries, subdividing the land by hedges and stones, and destroying the metes and bounds, so that the landlord's land cannot be ascertained, the court will inquire what was the value of the landlord's estate, valued fairly, but to the utmost, as against that tenant, who has himself destroyed the possibility of the landlord's having his own.

In this instance I am satisfied that no fraud was intended: on the contrary the occupation of the family estate with that of the charity was probably for accommodation both to the family and the schoolmaster and usher. This is not a case, of which we have had too many, where the charity has not had what is its own: but the property of the family and the school appears in singular circumstances upon this map: a great number of stripes of common-field land which could only be enjoyed by leaving natural soil not ploughed, or by metes and bounds; and that was intended. But the defendant, and those under whom he claims, have permitted their tenants to destroy those boundaries; and it is now contended that upon this plan enough has been done to enable the schoolmaster to take possession of his own estate. That cannot be; unless it can be ascertained in what identical part of the field these stripes of land are, and he can go to some land which he can demonstrate as his own. Upon this plan and admission it is impossible for him to go to any part of the land and say that is his land; and whose fault is that? It is admitted that he has got land belonging to this family; but that mere fact, unless they can restore to him that which is unquestionably his, does not amount to an equity to put an end to this injunction; as the equity is, that unless the tenant can ascertain the land of the landlord, the latter shall have an equal quantity of the tenant's land. Both parties are wrong in this case. If the schoolmaster has got possession by means to which he had no right to resort, no application was made to prevent him: but that observation is made by the defendant, in possession by wrong of land, belonging to the charity; and, if he cannot point out that land, and it cannot be ascertained amicably, a commission must go to ascertain what land belongs to the charity, and what does not; and if that cannot be ascertained, the value of the land that did belong to the charity must be ascertained.

Injunction continued.

SOLLY AND ANOTHER v. FORBES AND ANOTHER

[COURT OF COMMON PLEAS (Dallas, C.J., Burrough and Richardson, JJ.), May 15, 1820]

[Reported 2 Brod. & Bing. 38; 4 Moore, C.P. 448; 129 E.R. 871]

Document—Construction—Intent of parties to prevail so far as by law it may—Ambiguous words—Construction to give effect to intent.

In construing a deed the intent of the parties shall prevail as far as by law it may, and the court will be anxious so to construe the law as to give effect to that intent, provided it does not contravene any fundamental rules of the policy of the law. If the deed operates two ways, one consistent with the intent of the parties and the other repugnant to it, the court will be astute so to construe it as to give effect to the intent. The construction must be made on the whole deed.

Notes. Considered: *Twopenny v. Young*, [1824–34] All E.R. Rep. 273. Applied: *Upton v. Upton* (1832), 1 Dowl. 400. Explained and distinguished: *Warwick v. Richardson* (1844), 14 Sim. 281. Followed: *Thompson v. Lack* (1846), 3 C.B. 540. Applied: *Ford v. Beech* (1848), 11 Q.B. 852. Considered: *Owen v. Homan* (1851), 3 Mac. & G. 378. Applied: *Squire v. Ford* (1851), 9 Hare, 47. Considered: *Pomfret v. Perring* (1854), 18 Beav. 618. Applied: *Price v. Barker* (1855), 4 E. & B. 760; *Willis v. De Castro* (1858), 4 C.B.N.S. 216; *Currey v. Armitage* (1858), 6 W.R. 516; *Green v. Wynn* (1868), L.R. 7 Eq. 28. Considered: *Bateson v. Gosling* (1871), L.R. 7 C.P. 9. Referred to: *Morley v. Frear* (1830), 4 Moo. & P. 305; *Walters v. Smith* (1831), 2 B. & Ad. 889; *Cocks v. Nash* (1832), 9 Bing. 341; *Re Barrow and Geddes, Ex parte Christy* (1832), 2 Deac. & Ch. 155; *Simons v. Johnson* (1832), 3 B. & Ad. 175; *Kearsley v. Cole* (1846), 16 M. & W. 128; *Ansell v. Baker* (1850), 15 Q.B. 20; *Hooper v. Marshall* (1869), 39 L.J.C.P. 14; *Re E.W. A.* (1901), 85 L.T. 31.

As to release of one joint debtor, see 8 HALSBURY'S LAWS (3rd Edn.) 219; and for cases see 12 DIGEST (Repl.) 575. As to general rules for interpretation of deeds (instrument to be construed as a whole), see 11 HALSBURY'S LAWS (3rd Edn.) 289; and for cases see 17 DIGEST (Repl.) 269 et seq. As to where co-sureties not released, see 18 HALSBURY'S LAWS (3rd Edn.) 523; and for cases see 26 DIGEST (Repl.) 211.

Cases referred to :

- (1) *Earl of Clanrickard's Case* (1615), Hob. 273.
- (2) *Crossing v. Scudamore* (1674), 2 Lev. 9; 1 Vent. 137; 83 E.R. 428; sub nom. *Scudamore v. Crossing*, 1 Mod. Rep. 175; 17 Digest (Repl.) 296, 1003.
- (3) *Roe d. Wilkinson v. Tranmarr* (1757), Willes, 682; 2 Wils. 75; 2 Keny. 289; 125 E.R. 1383; 17 Digest (Repl.) 296, 1000.
- (4) *Morris v. Wilford* (1676), 2 Lev. 214; 3 Keb. 814, 840; 2 Show. 46; T. Jo. 104; 83 E.R. 525; 12 Digest (Repl.) 567, 4317.
- (5) *Payler v. Homersham* (1815), 4 M. & S. 423; 105 E.R. 890; 12 Digest (Repl.) 570, 4340.
- (6) *Knight v. Cole* (1690), Carth. 118; 3 Lev. 273; 1 Show. 150; 90 E.R. 673; sub nom. *Cole v. Knight*, Holt, K.B. 620; 3 Mod. Rep. 277; 17 Digest (Repl.) 392, 1957.

Also referred to in argument :

- Bradley v. Peixoto* (1797), 3 Ves. 324; 30 E.R. 1034; 44 Digest 452, 2739.
Moore and Savil's Case (1585), 2 Leon. 132; 74 E.R. 419; 17 Digest (Repl.) 358, 1649.
Stukeley v. Butler (1614), Hob. 168; 80 E.R. 316; sub nom. *Stewkley v. Butler*, Moore, K.B. 880; 17 Digest (Repl.) 306, 1130.

Goodtitle d. Edwards v. Bailey (1777), 2 Cowp. 597; 98 E.R. 1260; 17 Digest (Repl.) 261, 649.

Hutton v. Eyre (1815), 6 Taunt. 289; 1 Marsh. 603; 128 E.R. 1046; 12 Digest (Repl.) 575, 4412.

Action for money paid by the plaintiffs to the use of defendants, money lent, money had and received by the defendants to the use of the plaintiffs, work done and labour performed by the plaintiffs as agents to defendants, interest upon moneys lent by the plaintiffs to the defendants, and on an account stated between the defendants and the plaintiffs. The defendant Forbes pleaded the general issue on which issue was joined; the defendant Ellerman pleaded the general issue, a release, and a set-off.

The plaintiffs cravedoyer of the release which was set forth verbatim, and which was in substance a deed dated May 20, 1819, between the plaintiffs, both in the city of London, merchants and co-partners in trade of the one part, and Abraham Frederick Daniel Ellerman late of Hamburg, merchant, but then residing and carrying on trade in Heligoland, of the other part. The deed recited that up to the year 1806, Ellerman carried on the trade or business of a merchant at Hamburg and also at Toningen, in partnership with John Murray Forbes under the firm, at each of the last-mentioned places, of Forbes and Ellerman, and that there were various transactions of business between them and the plaintiffs. In about March, 1806, both the defendants having become embarrassed in their affairs, stopped payment, and on the balance of accounts between them and the plaintiffs, they stood justly indebted to the plaintiffs as co-partners in trade in a considerable sum of money, the whole of which debt still remained unpaid and was then due and owing from the defendants to the plaintiffs. The defendant Ellerman had lately offered and proposed to the plaintiffs to pay to them in the manner thereafter mentioned £3,000 if the plaintiffs would give and execute unto Ellerman such release or discharge for or in respect of their aforesaid debt or demand on the defendants as thereafter was contained.

The deed witnessed, that in consideration of £600 paid by Ellerman to the plaintiffs immediately before the execution of the deed, the receipt whereof the plaintiffs did thereby jointly and severally acknowledge, and also in consideration of twenty-four promissory notes of Ellerman, each for £100 and each bearing date April 1, 1809, and which twenty-four promissory notes were made payable to the plaintiffs or their order successively at monthly dates, the number of each note corresponding with the number of months it had to run, the receipt of which twenty-four promissory notes amounting together with the £600 to the before-mentioned sum of £3,000 so agreed to be paid to and accepted by the plaintiffs, the plaintiffs did also thereby acknowledge; and pursuant to and in execution of the agreement thereinbefore recited on the part of the plaintiffs, the plaintiffs had, and each of them had, remised, released, and for ever discharged, and by that deed did, and each of them did, remise, release, and for ever discharge Ellerman, his executors, administrators, and assigns, of, from, and against all and all manner of actions and suits, cause and causes of action or suit, debt, sum and sums of money, accounts, bonds, bills, notes, contracts, agreements, promises, damages, claims and demands whatever, in law and in equity, which the plaintiffs then had, or which they, or either of them, their, or either of their executors, administrators, or assigns, thereafter could, should, or might have against Ellerman, his executors, administrators, or assigns, for or by reason of any matter, cause, or thing whatsoever, relating to the premises, from the beginning of the world, to the day of the date of the deed, except, and subject nevertheless to the provisoes declarations or agreements thereafter contained.

It was provided that the said deed or any matter or thing therein contained should not release, or be construed and taken to release, or in any manner to prejudice and affect any claims or demands which the plaintiffs, or either of them,

ever had, or then had, or which they, or either of them, or either of their executors, or administrators, thereafter could, should, or might have upon or against Forbes, either separately, or as a partner with Ellerman, or the executors, administrators, or assigns of Forbes, or upon or against the joint estate or effects of Forbes and Ellerman, in respect of the debt so due from Forbes and Ellerman to the plaintiffs, or any part of such joint estate, or effects, whether the same should be in the hands of or recoverable from Forbes and Ellerman, or either of them, or any other person or persons whomsoever.

Secondly, it was provided that it should and might be lawful to and for the plaintiffs, their executors, administrators or assigns, from time to time, when and as they, the plaintiffs, their executors, administrators, or assigns, should be thereto advised, to commence and prosecute any actions, suits, or other proceedings, either at law or in equity, against Ellerman jointly with Forbes, or against Ellerman, his executors, administrators, and assigns, separately, for the purpose of recovering, or compelling, or of enabling the plaintiffs, their executors, administrators or assigns, to recover or compel payment, or satisfaction of the debt, so due and owing from Forbes and Ellerman, to the plaintiffs as aforesaid, either by or out of any the joint estate or effects of Forbes and Ellerman, or by or from Forbes, his executors, administrators, or assigns, or his separate estate or effects.

Lastly, it was provided that in case default should be made in the due payment of any two of the before-mentioned promissory notes, successively to fall due, in such manner as that any two of the promissory notes should be due and unpaid at the same time, then and in such case the deed, and every matter and thing therein contained, should, from and immediately after such default, be absolutely void and of no effect, and the sum of £600 and all or any other sums or sum of money, which might at that time have been paid, and also all or any other sums or sum of money which might at any time or times from and after such default, be paid, in discharge of any of the aforesaid promissory notes, should be carried to the credit of both the defendants with the plaintiffs, and all the rights, claims and demands of the plaintiffs, their executors, administrators or assigns, by reason or in respect of the debt thereinbefore mentioned to be due to them from the defendants, either upon or against them jointly or separately, their or either of their executors, administrators, or assigns, or any other persons or parties whomsoever, should from and immediately after such default be in full force and virtue (as to so much of the debt so due to the plaintiffs as aforesaid, as should remain unpaid) in like manner, to all intents, effects, constructions, and purposes, as if those presents had never been made, anything therein contained to the contrary thereof in anywise, notwithstanding. The deed was duly executed and a memorandum of which the following is the substance was then added:

"This deed is deposited by S. Solly and H. Solly (the plaintiffs) and by G.B. on the part of Ellerman, with E.L., who is to deliver it to Ellerman, his executors or administrators, or his or their order, after due payment of the within mentioned twenty-four promissory notes, according to the tenor and meaning of the within deed, but in case of any default in payment of the promissory notes, or any of them, according to the tenor and meaning of the within deed E.L. is to deliver up the deed to S. Solly and H. Solly, their executors or administrators, to be cancelled, and in the meantime the indenture is to remain in the hands of E.L. for the purposes aforesaid."

The plaintiffs then contended that by reason of anything by the defendant Ellerman in his plea alleged they ought not to be barred from having their aforesaid action thereof against him because Forbes, with whom the defendant Ellerman was jointly sued in this action, and Forbes in the deed of release mentioned, were one and the same person, and not different persons, and that Forbes was so sued as aforesaid, as a partner with Ellerman in respect of a certain part of the moneys in the deed of release mentioned to be due and owing from

Forbes and Ellerman to the plaintiffs. The plaintiffs further stated that this action was prosecuted against Ellerman jointly with Forbes for the purpose of recovering or compelling, or of enabling the plaintiffs to recover or compel payment or satisfaction of the moneys so due and owing from Forbes and Ellerman to the plaintiffs as aforesaid, either by or out of the joint estate or effects of Forbes and Ellerman, or by or from Forbes, or his separate estate or effects. As to the set-off the plaintiffs replied that they were not indebted to the defendant Ellerman in manner and form alleged, and on which issue was joined. Demurrer, and joinder in demurrer.

Serjeant Blosset for the defendants, in support of the demurrer.

Serjeant Bosanquet for the plaintiffs.

Cur. adv. vult.

DALLAS, C.J., delivered the following judgment of the court.—The circumstances under which this case comes before the court will appear by referring to the pleadings at large. The general question which arises is whether the release as set forth constituted a bar to the action. Of the intention of the parties no doubt can be entertained. It was meant to release Ellerman as to person and effects, but not Forbes, and to retain against Ellerman every right and remedy necessary to enforce payment from Forbes. But so to construe the release as to make it a release of both, which it would be if no action could be brought against Forbes because Ellerman could not be joined, would make it operate not to effectuate but to defeat the intent of the parties. As little doubt can exist upon the words made use of to effectuate the intent, as upon the intent itself. It is not an absolute and unqualified release, but in terms conditional and provisional, being made subject to an exception forming part of the same sentence with the words of release, immediately connecting with and attaching upon them, and introductory to and followed up by a proviso by which it is expressly declared that nothing contained in the deed of release shall be taken to release or in any way prejudice or affect any demands of the plaintiffs, either against John Murray Forbes separately, or as a partner with Ellerman.

It would be to release and in every way affect the demand against Forbes as partner with Ellerman to give such operation to the release as in effect to make it a release to both by making it a bar to an action in which, for the recovery of a joint debt, both must be jointly sued. Nor does this even rest on negative, though necessary, construction, for in a subsequent part of the deed it is expressly provided and declared to be the true intent and meaning of the release that it shall be lawful for the plaintiffs to commence and prosecute any action against Ellerman jointly with Forbes for the recovery of the joint debt due from them and this is a joint action for the recovery of such debt, being, therefore, an action expressly and in direct terms authorised by the deed of release.

Against this, objections of a technical and artificial nature have been raised, and we have been referred to many cases in which it has been held that a saving or condition repugnant to the nature of the grant is void, and that the grant remains absolute and unqualified, the condition no way operating in restraint of the grant. It is not necessary to pursue these cases into their detail; they are all cases of notoriety, the law of which is not to be disputed, and the only question is upon their application. With respect to them all I would observe that in one of the cases cited at the Bar it was correctly stated that the rule of construction in modern times has been more equitable than formerly, courts looking rather to the intention of the parties than to the strict letter, not suffering the latter to defeat the former, except in certain cases to which it is not now necessary to refer. Taking these cases, however, such as they are, the application sought to be established is altogether fallacious. It is assumed that wherever the word "release" is made use of, it must operate absolutely and unconditionally, though immediately and in the same sentence followed by words which show it to be

A partial and particular only and the general words being in no respect repugnant to the special words, but the latter a qualification merely of the former, leaving the release to operate to every purpose except to the exclusion of the particular purpose, which the parties have declared it to be their intention it shall not exclude.

This being apparent both in terms and meaning, what are the rules of law which apply, narrowing them to the particular point? I pass over the general and leading principle that the intent of the parties shall prevail as far as by law it may, and, further, that courts will be anxious so to construe the law as to give effect to that intent, provided it do not contravene any fundamental rules of the policy of the law. If a deed can, therefore, operate two ways, one consistent with the intent and the other repugnant to it, courts will be ever astute so to construe it as to give effect to the intent, and the construction, I need not add, must be made on the entire deed. The passage cited at the Bar from *Earl of Clanrickard's Case* (1) is to the effect material. HOBART, C.J., there said (Hob. at p. 277):

"I exceedingly commend the judges that are curious and almost subtle to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act,"

and it has been correctly added, that in *Crossing v. Scudamore* (2), SIR MATTHEW HALE, C.J., cites and approves of the passage of HOBART, C.J., which is again referred to by WILLES, C.J., in *Roe d. Wilkinson v. Tranmarr* (3), and is cited to be approved of and to be governed by in many other cases. Not to go through all the authorities which are to be found, it will be sufficient to select one or two only, and these will refer to the rest.

In *Morris v. Wilford* (4), it was expressly decided "that a release shall be construed according to the particular purpose for which it was made." It appears from a note to that case that "JONES, WYLD [WILDE] and TWISDEN, JJ., were of opinion on the first argument, that the release is no bar notwithstanding the general words, for being made for particular purposes the general words are to be guided by the particular purposes. RAINSFORD, C.J., contra. The case was argued a third time, when by the whole court judgment was given for the plaintiff." In *Payler v. Homersham* (5), LORD ELLENBOROUGH, C.J., adopts the proposition that the general words of a release may be restrained by the particular recital. He said (4 M. & S. at p. 426):

"Common sense requires that it should be so, and in order to construe any instrument truly you must have regard to all parts, and especially to the particular words of it." [The case in 2 Roll. Abr. 409, to this effect, though said to have been denied by HOLT, C.J., to be law (in *Knight v. Cole* (6) (1 Show. at p. 155)] seems to me as sound a case as can be stated."

BAYLEY, J., added: "There is no doubt but a particular recital in a deed will restrain the general words."

On all these grounds, therefore, the apparent intent of the parties, sufficient words to effectuate that intent, the special nature of the release as formed by the very language in which the release itself is created, the matter upon which it is to operate, and the known and established rules of construction to be collected from the authorities referred to, we are of opinion that this demurrer ought to be overruled. In conclusion I will only say that it is not intended to interfere with any received principles or established cases, but to decide only on this particular case with reference to its special nature, calling in aid former authorities only in the manner in which it has been endeavoured to apply them. But, for further caution, I will add, the decision of the court only is that the demurrer be overruled. It is not necessary now to say anything as to any ulterior remedy the defendant may have or suppose himself to have. In this respect he will act as he may be advised, and as circumstances may seem to require.

Demurrer overruled.

STORER v. GORDON AND OTHERS

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Bayley and Le Blanc, JJ.)
November 28, 1814]

[Reported 3 M. & S. 308; 105 E.R. 627]

Shipping—Charterparty—Construction—Condition—Delivery of outward cargo condition precedent to provision of return cargo.

Deed—Parties—Stranger to deed not entitled to benefit of release in deed.

By a charterparty between the plaintiff shipowner and the defendant freighters the shipowner covenanted to proceed from London to Naples and there deliver the outward cargo, and, having so done, receive on board a return cargo, restraint of princes, etc., excepted. The freighters covenanted in consideration of the premises that at Naples they would find and provide "as they did warrant and assure to the shipowner" a full and complete return cargo, and that £1,750 should be paid on delivery of the outward cargo, which should be considered as earned for outward freight. The outward cargo was seized by the government at Naples and the ship detained through the defendants' failure to provide a return cargo. The £1,750 was not paid. The plaintiff sued for the £1,750 and damages for loss of use of the ship. In a subsequent charterparty between the plaintiff and other freighters the plaintiff agreed to release the defendants (who were not parties) from all claims under the first charterparty.

Held: (i) the freighters could not plead in excuse of performance that the outward cargo was seized by the government at Naples and never delivered to them, for the delivery of the outward cargo was not a condition precedent to the providing a return cargo; (ii) the delivery of the outward cargo was a condition precedent to the payment of the £1,750, and, therefore, that sum was not recoverable; (iii) the release to the defendants contained in a later deed to which the defendants were not themselves made parties could not be relied on as a defence to a claim under the charterparty between the plaintiff and the defendants.

Notes. By s. 56 (1) of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES) (2nd Edn.) 554), a person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

Applied: *Fothergill v. Walton* (1818), 8 Taunt. 576. Referred to: *Barford v. Stuckey* (1820), 2 Brod. & Bing. 333.

As to rights and liabilities under a deed inter partes, see 8 HALSBURY'S LAWS (3rd Edn.) 57; and for cases see 17 DIGEST (Repl.) 238 et seq. As to test of conditions precedent in charterparties, see 35 HALSBURY'S LAWS (3rd Edn.) 260. 261; and for cases see 41 DIGEST (Repl.) 539, 560.

Cases referred to:

- (1) *Ritchie v. Atkinson* (1808), 10 East, 295; 103 E.R. 787; 41 Digest (Repl.) 569, 3473.
- (2) *Atkinson v. Ritchie* (1809), 10 East, 530; 103 E.R. 877; 41 Digest (Repl.) 352, 1456.
- (3) *Blight v. Page* (1801), 3 Bos. & P. 295, n.; 127 E.R. 163, N.P.; 41 Digest (Repl.) 340, 1347.
- (4) *Touteng v. Hubbard* (1802), 3 Bos. & P. 291; 127 E.R. 161; 41 Digest (Repl.) 565, 3435.
- (5) *Sjoerds v. Luscombe* (1812), 16 East, 201; 104 E.R. 1065; 41 Digest (Repl.) 340, 1348.

- A (6) *Scudamore v. Vanderstene* (1587), 2 Co. Inst. 673; 41 Digest (Repl.) 170, 138.
- (7) *Gilby v. Copley* (1683), 3 Lev. 138; 83 E.R. 618; 12 Digest (Repl.) 47, 252.
- (8) *Frontin v. Small* (1726), 2 Ld. Raym. 1418; 2 Stra. 705; 92 E.R. 423; 17 Digest (Repl.) 228, 284.
- (9) *Pigott v. Thompson* (1802), 3 Bos. & P. 149.
- B (10) *Boone v. Eyre* (1779), 1 Hy. Bl. 273, n.; 1 Wms. Saund. 320 c.; 2 Wm. Bl. 1812; 126 E.R. 160; 12 Digest (Repl.) 472, 3526.
- (11) *Cooker v. Child* (1673), 2 Lev. 74; 83 E.R. 456; sub nom. *Coker v. Child*, 3 Keb. 115; 41 Digest (Repl.) 170, 139.
- (12) *Dicker v. Noland*, Co. Litt. 52 b, n. 4; 2 Roll. Abr. 8, pl. 12.
- C (13) *Moyle v. Ewer* (1602), Cro. Eliz. 905; Noy. 49; 78 E.R. 1127; 17 Digest (Repl.) 210, 86.

Action for breach of covenants in a charterparty.

By a charterparty dated Dec. 19, 1811, the plaintiff, Seth Storer, the owner of the ship *Concord*, agreed to carry such cargo as the defendants should provide from London via Cagliari to Naples and there unload the cargo at the direction of the defendants' agents, and that "having so done" the ship should receive on board such return cargo as the defendants' agents should provide at Naples, and being fully laden should depart from Naples to London, via Gallipoli if required, perils and dangers of seas, rivers, navigation, capture, restraint, and detention of or by enemies, princes, rulers and others, and all other inevitable accidents excepted. The defendants covenanted within the stipulated number of lay days to find and send alongside at London the outward cargo and receive it at Naples and there find and provide "as [the defendants] did warrant and assure to the [plaintiff]" a full and complete return cargo of wine, etc., to be sent alongside, and that they would pay for the freight at the rate of £15 per ton of 252 gallons of wine, and a proportionate freight per ton of any other goods £1,750 of the freight was to be paid on the delivery of the ship's outward cargo (to be considered as due for outward freight) by a bill of exchange, and the remainder in equal amounts by two bills payable within a certain time after the ship should be reported inward at the Custom House in London. Eighty-five running days were allowed for the whole voyage and twenty days more on the defendants paying demurrage at the rate of £15 per day. When the ship arrived at Naples it was seized and unloaded by the government, and the plaintiff having then regained possession of the ship notified the defendants' agents at Naples of his readiness to load the return cargo in accordance with the charterparty. While the ship lay at Naples the eighty-five running days and the twenty days demurrage expired and the ship was detained there a further 430 days, not being allowed to leave without the cargo provided for by the charterparty, which was a permitted export under the laws there in force.

The plaintiff sued on the covenants in the charterparty for damage for loss of use of the ship by reason of the defendants' failure to provide a return cargo and for £1,750 due on account of freight not paid. In defence to the first part of the claim the defendants alleged (in the second plea) that they were discharged from providing or sending alongside any return cargo by reason of the seizure of the outward cargo without any fault on their part, namely, because delivery of the outward cargo was a condition precedent to the provision of the return cargo. To the second part of the claim the defendants pleaded first (the fourth plea) that the outward cargo never was delivered, and secondly (the fifth plea), that they were at all times ready to receive the outward cargo and pleaded the seizure as discharging the defendants from their obligations. To the first of these pleas the plaintiff replied that the ship arrived at Naples and the plaintiff gave notice to the defendants' agents of his readiness to unload and thereafter the ship and its cargo was detained under the authority of the government at Naples (an excepted peril under the charterparty). In the defence to the whole claim (the

fifteenth and sixteenth pleas) the defendants alleged first, a release dated May 21, 1813, whereby the plaintiff released to the defendants all claims under the covenants contained in the charterparty and all claims and demands thereunder in respect of any damages sustained by him by reason of all breaches thereof committed by the defendants; and secondly, that by the release the plaintiff released to the defendants all damages sustained by reason of the breaches of covenant alleged in the plaintiff's claim. It appeared that the release in question was an indenture between the plaintiff of the one part and Vallin Routh & Co. by the order of W. Eppes Routh of London, for account of Schneider & Co., merchants of London, and Harford and Visgers, merchants of Bristol, of the other part; the defendants not being parties to it. The plaintiff contended that this was ineffective to discharge the defendants from their liability under the charterparty.

Puller for the plaintiff: It is admitted that by the terms of the covenant the delivery of the outward cargo was a condition precedent to the payment of the £1,750, so that the breach of non-payment thereof cannot be supported. On the rest of the claim, first, the delivery of the outward cargo was not a condition precedent to the providing a return cargo, the covenant being absolute to provide a return cargo, "as the defendants did warrant and assure to the plaintiff," and not like the covenant for the payment of the £1,750 depending "on the delivery of the outward cargo." This difference in the language of the two covenants shows that the parties did not intend the same thing in both, and that when they did intend to make a condition precedent they knew how to express it so as to leave no doubt. Whether a thing be a condition precedent on the reason and sense of the thing, as it is to be collected from the whole contract: *Ritchie v. Atkinson* (1); *Atkinson v. Ritchie* (2). The plaintiff has covenanted to deliver the outward cargo, with an express exception of the restraint of princes, etc.; but if he cannot insist upon the covenant to provide a return cargo, by reason that he was prevented by the Neapolitan government from delivering the outward cargo, what is that but saying that though he has in express terms excepted a particular event, he shall nevertheless by construction be liable in that event? This exception has always been considered as an exception for the benefit of the shipowner: *Blight v. Page* (3); *Touteng v. Hubbard* (4), 3 Bos. & P. at p. 298, per LORD ALVANLEY, C.J.; *Sjoerds v. Luscombe* (5), and the general covenant by him to make a true delivery has never been held to bind him to become an insurer for the delivery. Secondly, the subsequent charterparty did not operate as a release of the former. A deed inter partes is confined in its operation to those who were parties to it: *Scudamore v. Vanderstene* (6); BROOKE'S ABRIDGMENT, Estranger, al-fait, pl. 21; BACON'S ABRIDGMENT, Release, 266; *Gilby v. Copley* (7); *Frontin v. Small* (8); and several other cases which are collected in a note to *Pigott v. Thompson* (9). It is true that for avoiding circuitry of action covenants between the same parties have been construed to operate as a release, but if that were so where the parties are different there would be no mutuality.

Richardson for the defendants: The delivery of the outward cargo was a condition precedent to the providing a homeward cargo because the plaintiff has covenanted to make a right and true delivery, and "having so done," the ship should receive on board the return cargo; so that the plaintiff's receiving on board a return cargo was to depend on his having made a right and true delivery.

Further, the provision of return cargo must also depend upon the same condition; otherwise the defendants would be obliged to provide a return cargo although the plaintiff would not be obliged to receive it. Yet the defendants only covenant in consideration of the premises. Therefore these covenants are reciprocal, that the one shall deliver the outward cargo, and upon such delivery the other shall provide the homeward cargo; consequently whatever operates in excuse of the delivery of the outward cargo shall equally operate in excuse of the providing a homeward cargo. The non-delivery of the outward cargo goes

A to the whole consideration, and, therefore, falls within the rule in *Boone v. Eyre* (10); for the produce of the outward cargo was to be the fund and means of obtaining the return cargo. The rule of law that if a charterparty be expressed to be made between A. of the one part and B. of the other it cannot work a release to C., is of a very technical and refined nature. A slight distinction will vary the rule: *Cooker v. Child* (1); and none of the cases cited contra are applicable to a release like the present. *Scudamore v. Vanderstene* (6) only decided that one who was in effect no party to the indenture, though his name was introduced into the covenants, could not release another who was a party to it. In *Gilby v. Copley* (7) there was no decision, three of the judges differing in opinion with LEVINS, J., who upheld the rule. The principle is not universally true that no one who is not a party to a deed can be affected by it, if the deed be expressed to be made between parties; for a feoffment made between A. and B. with a letter of attorney to C. to make livery, though C. be not a party to the deed, is good, and the estate shall pass by his livery: *Dicker v. Noland* (12); *Moyle v. Erwer* (13). If so, why may he not be released? Here the charterparty uses apt words of release, for the defendants are "thereby acquitted": COMYNS' DIGEST, Release, A. 1.

Cur. adv. vult.

LORD ELLENBOROUGH, C.J., delivered the following judgment of the court: This was an action of covenant upon a charterparty between the plaintiff, as owner of the ship *Concord*, and the defendants the freighters. By the charterparty the ship was to proceed by Cagliari to Naples and there make a delivery of her outward cargo, and, having so done, she was to take on board a homeward cargo and proceed therewith to London. There was an eventual stipulation for her going to Gallipoli, but that became immaterial. The defendants covenanted that they would find and provide, as they did warrant and assure to the plaintiff, a full and complete homeward cargo, and they stipulated to pay freight by the ton, and that £1,750, part thereof, should be paid on the delivery of the outward cargo, which was to be considered as earned and due for outward freight. The declaration assigned several breaches, the first of which was that the defendants did not find and provide a homeward cargo, and another, that they did not pay the £1,750 freight. The other breaches did not come in question.

To the first of these breaches the defendants pleaded that after the ship's arrival the outward cargo was, without any default of the defendants, forcibly seized and landed and kept by the persons exercising the powers of government at Naples, and never was returned to the plaintiff or defendants, and the plaintiff never did or could make a right or true delivery of any part thereof. To the plea stating these facts, viz., the second, there is a general demurrer. To the third plea there was a demurrer upon which the plaintiff has had leave to amend. The fourth and fifth pleas, with the pleadings thereon, insist upon the same facts in answer to the second breach, and the plaintiff's counsel was satisfied upon the argument, and we think rightly, that he could not support that breach. The defendants also pleaded in their fifteenth plea a release of the covenants in the charterparty and of all claims and demands thereon, and in their sixteenth plea, a release of all damages sustained by the plaintiff by the breaches of covenant assigned in the declaration.

The plaintiff craved oyer of these deeds of release, and the defendants have set forth, as and for the deed containing this release, a charterparty of May 21, 1813, indented and made between the plaintiff of the one part, and Vallin Routh & Co., for account of Messrs. Schneider & Co. of London, of the other part, whereby the plaintiff let the ship to go to Gallipoli, Malta and London, and in consideration thereof, and more particularly in consideration of the charterparty mentioned in the declaration, which charterparty, in consideration of the freight and moneys Vallin Routh & Co. were to pay, was thereby declared to be rendered

null and void, the plaintiff agreeing to cancel that first charterparty for and in consideration of the second, and the defendants were thereby (said to be) acquitted of all claims which the plaintiff might have against them in virtue of that first charterparty, and the plaintiff pledged himself to deliver the same to W. Eppes Routh within a convenient time not exceeding sixty days after the ship's arrival in England, and for those considerations Vallin Routh & Co. covenanted to give the plaintiff a cargo and pay him certain freight. Upon the setting out of this deed, as and for the release pleaded by the defendants, the plaintiff has replied that the deed is made between the plaintiff of the one part and Vallin Routh & Co. of the other, to which the defendants are strangers, and that the charterparty mentioned in the declaration is still in force; and thereto the defendants have demurred.

There are, therefore, two questions: one, whether the seizure of the outward cargo by the Neapolitan government discharged the defendants from the obligation which their covenant otherwise would throw upon them to find and provide a homeward cargo; the other, whether the charterparty of May 21, 1813, is by operation of law a release to these defendants. Upon the former of these questions the defendants contend that the right and true delivery of the outward cargo was a condition precedent, and that till the performance thereof by the plaintiff they were under no obligation to provide a homeward cargo, and unless they can establish this proposition the question upon the second plea must be determined against them. The covenant from them contains no words which import to make the delivery of the outward cargo a condition precedent; they covenant generally and without qualification that the outward cargo shall be found and provided, sent alongside the ship, received from on board at Naples or Gallipoli and that at one of those places they would find and provide, as they did thereby warrant and assure to the plaintiff, a full and complete cargo. It is contended, however, that from the wording of the plaintiff's covenant this condition precedent is to be implied. That covenant, as far as is material to this question, is that the ship should go to Naples and there make a right and true delivery of her outward cargo, and that having so done she should take and receive a homeward cargo. The argument is that the words "having so done" would have excused the plaintiff from taking on board a homeward cargo if he had not first delivered his outward cargo; and that whatever would have excused the plaintiff from receiving would also excuse the defendants from loading.

It does not appear to us, however, that these words would have been any excuse to the plaintiff, and admitting that they would, it by no means follows that they afford one to the defendants. The words seem rather intended to mark the time when the plaintiff's obligation to receive a homeward cargo should attach, viz., when his ship from being clear of one cargo should be in a condition to receive another, and they are unaccompanied with those express words of condition which would naturally have been used, had there been any intention of giving the plaintiff an option of terminating the contract and refusing a homeward cargo, if he should have been prevented by any accident from delivering the outward cargo. Admitting that the plaintiff might have been discharged from his obligation to receive, does it follow that, if the plaintiff is willing to receive, the defendants are discharged from their obligation to deliver? The plaintiff might wish to reserve an option to himself and might, therefore, qualify his covenant; but he might not choose to give any option to the defendants and might insist from them upon an unconditional and unqualified covenant. The plaintiff has in terms introduced as an exception into his covenant the perils of the seas and capture, restraint, or detention, by enemies, princes or rulers, but he has suffered no such exception to be in the covenant of the defendants. He did not, therefore, mean that whatever would be an excuse to him should also be an excuse to the defendants; and we cannot, therefore, by implication from the wording of the plaintiff's covenant introduce an exception into that of the defendants. Nor is there any ground from

A the nature of the thing to imply such an exception. The outward cargo may be intended as the fund to procure the homeward cargo, but it by no means follows that it must be so, and in very many instances the homeward cargo is procured and in readiness to ship before the outward cargo arrives. We cannot, therefore, consider the right and true delivery of the outward cargo as a condition precedent, and the demurrer, therefore, to the second plea must be allowed.

B As to the release, the objection is this, that where there is such a deed as is technically called a deed inter partes, that is, a deed importing to be between the persons who are named in it as executing the same, and not as some deeds are, general to "all people," the immediate operation of the deed is to be confined to those persons who are parties to it; no stranger to it can take under it except by way of remainder, nor can any stranger sue upon any of the covenants it contains.

C For this proposition *Scudamore v. Vanderstene* (6) and several other authorities to which we have referred were cited, and the same doctrine occurs in *Co. Litt.* 231, a. The defendants' counsel did not deny these cases, but he denied their application to a release, and he brought under our notice *Moyle v. Ewer* (13), where in an indenture of feoffment between A. of the one part and B. of the other, a letter of attorney to a stranger to the indenture to deliver seisin was adjudged good. A letter of attorney, however, passes no interest but merely gives an authority, and such authority is essential to effectuate the conveyance from A. to B. But the release in this case, if it is to operate as a release, takes something out of the plaintiff, viz., his right to sue, and passes to the defendants an indemnity and bar against the plaintiff's claim. This case, therefore, appears to us within the general rule and not within the excepted case; and we are, therefore, of

D opinion that the demurrer to the replications to these pleas cannot be allowed. The consequence upon the whole record is that there must be judgment for the plaintiff upon the second plea and upon the replications to the fifteenth and sixteenth pleas, and for the defendants on the replication to the fourth and upon the fifth pleas.

E

Judgment accordingly.

ATTORNEY-GENERAL *v.* LORD HOTHAM

[ROLLS COURT (Sir Thomas Plumer, M.R.), June 9, 10, 12, 1823] -

[Reported Turn. & R. 209; 37 E.R. 1077]

[LORD CHANCELLOR'S COURT (Lord Lyndhurst, L.C.), May 23, July 1827]

[Reported 3 Russ. 415; 35 E.R. 631]

Landlord and Tenant—Lease—Estoppel—Lessor's title—Estoppel of lessee from disputing—Capacity of lessee to give evidence in dispute.

A tenant is estopped from disputing his lessor's title while he is in possession, and he cannot while he remains in possession give evidence in support of any dispute relating to the landlord's title.

Evidence—Document—Document of record—Court rolls.

Court rolls, taken by themselves, are evidence only against the tenants of the manor and the lord of the manor.

Court—Jurisdiction—Tribunal exercising jurisdiction not possessed—Nullity.

Where a tribunal takes upon itself to exercise a jurisdiction which it does not possess, its decision is a nullity and does not create any necessity for an appeal.

Notes. Referred to: *A.-G. v. Hungerford* (1834), 8 Bli. N.S. 437; *Re Smith, Public Trustee v. Smith*, [1931] All E.R. Rep. 617.

As to estoppel between landlord and tenant, see 15 HALSBURY'S LAWS (3rd Edn.) 247; and for cases see 30 DIGEST (Repl.) 367 et seq. As to admissibility of court rolls, see 15 HALSBURY'S LAWS (3rd Edn.) 391, 392; and for cases see 13 DIGEST (Repl.) 38, 39. As to the meaning of jurisdiction, see 9 HALSBURY'S LAWS (3rd Edn. 350, 351; and for cases see 16 DIGEST (Repl.) 117 et seq.

Case referred to :

(1) *R. v. Bedford Level Corpn.* (1805), 3 East, 356; 2 Smith, K.B. 535; 102 E.R. 1323; 38 Digest (Repl.) 879, 910.

Information filed at the relation of the churchwardens and overseers and some of the inhabitants of the parish of East Moulsey, to set aside a lease for ninety-nine years of charity lands.

The information stated that there had been from time immemorial situate within the said parish certain enclosed lands, called the Hale and Hale Platts, which were many years since conveyed by the then owners thereof for the use and benefit of the parish, and that the lands, although the conveyance thereof had been lost, had from time to time been let by the inhabitants of the parish assembled in vestry, and that the rents and profits of the lands had from time immemorial been received by the churchwardens and overseers of the parish, and applied in the repairs of the church, in the maintenance of the poor, and in other parochial purposes in aid of the rates. In 1767 the lands in question were demised by the then churchwardens of the parish, with the consent of the overseers and other inhabitants of the parish in vestry assembled, to Thomas Sutton and Susannah Norman, the owners of the adjoining lands, for the term of twenty-one years, at the yearly rent of £31 10s., subject to a covenant that they would not dig, plough up, or convert into tillage, or sow with any kind of grain, the demised premises, or any part thereof, or lop or top any of the trees thereon; Upon the expiration of the above-mentioned lease in 1788, the lands were (at a vestry of the parishioners) again demised to Thomas Sutton, for the benefit of himself and Sir Beaumont Hotham (who had become entitled to the interest of Susannah Norman in the adjoining lands) for the further term of twenty-one years, at the like rent of £31 10s., and subject to the like covenants as were contained in the first-mentioned lease. Thomas Sutton died shortly after the date of the last-mentioned lease, and on his death the benefit of such lease became vested in Sir Thomas Sutton his son, and at a meeting of the inhabitants of the parish in their vestry, held on July 30, 1789.

A it was agreed that the lease of the Hale lands granted to Thomas Sutton in 1788 should be cancelled, and a new lease thereof granted to Sir Thomas Sutton for the term of ninety-nine years, at the like rent and subject to the like covenants as were contained in the former lease. Such new lease was accordingly executed by the then churchwardens of the parish to Sir Thomas Sutton.

B Sir Thomas Sutton died in 1813, and by virtue of his will the defendants claimed to be entitled to the beneficial interest in the Hale lands for the residue of the said term of ninety-nine years. The information then set forth an Act of Parliament, passed in 1815, by which commissioners were appointed for dividing and enclosing the commons and waste lands in the parishes of East and West Moulsey, and were empowered to hear and determine any dispute, which might arise between any parties interested in the division and enclosure concerning the respective shares and proportions which any of them should claim in or to the lands and grounds thereby directed to be divided and enclosed: but it was provided by the Act that nothing therein contained should extend to enable the commissioners to determine the title to any messuages lands tenements or hereditaments whatsoever, or to determine any right between any parties contrary to the possession of any such parties, except in cases of encroachment made within the period of twenty years, but that in case the commissioners should be of opinion against the right of the person or persons so in possession, they should forbear to make any determination thereupon, until the possession should be given up by or recovered from such person or persons, by ejectment or other due course of law. The Act of Parliament contained a clause, by which parties aggrieved were enabled to appeal to the general quarter sessions which should be holden for the county, within two calendar months next after the cause of complaint should have arisen, on giving notice of such appeal to the commissioners and the parties concerned.

E From 1779 the lessees of the Hale lands had been also lessees under the Crown of the manor of East Moulsey, and the manor had been recently purchased from the Crown by the defendants. The information stated that the Hale lands were F treated by the commissioners under the Act of Parliament as common lands, and as such were allotted to the defendants, and it charged that shortly before the expiration of the lease granted to Thomas Sutton and Susannah Norman in 1767, Thomas Sutton set up a claim to the said lands, insisting that they were part of the waste lands and commons of the manor of East Moulsey, and that in consequence of such claim it was deemed advisable to take the opinion of counsel, and G a Case was accordingly stated, and the facts in such Case approved of and agreed to by Thomas Sutton and his solicitor, and laid before Mr. SERJEANT HILL for his opinion who gave an opinion in favour of the title of the parish to the lands.

After further charging, that in case the Hale lands were formerly part of the waste lands of the manor of East Moulsey, they were not enclosed therefrom within the space of twenty years previous to the passing of the Act, and that the commissioners had no authority to allot the same to the defendants, the information H submitted that the defendants could not derive any title to the lands under the enclosure, or any allotments of the same made by the commissioners, and it prayed that the lease granted in pursuance of the agreement of July 30, 1789, might be declared to have been improvidently and improperly granted by the then churchwardens, and overseers of the parish of East Moulsey, and that the I same might be declared to be null and void, and might be delivered up to be cancelled; and that the defendants might be decreed to deliver up the possession of the lands to the churchwardens of the parish, and to account with them for the rents which had accrued due for the same subsequently to Dec. 25, 1816 (to which time it was admitted by the information that the rents had been paid) and that the defendants might also be decreed to deliver up all deeds papers and writings relating to the lands, or any part thereof.

The defendants by their answers denied that the Hale lands had ever been conveyed for the use of the parish, and insisted that the freehold thereof, as parcel of

the manor of East Moulsey, until the allotment under the Act of Parliament mentioned in the information, was vested in the Crown. After setting forth an extract from the Parliamentary Survey of the Crown lands taken in 1649, containing a description of a piece of land called the Hale as part of the common and waste lands belonging to the manor of East Moulsey, and also setting forth an extract from the court rolls of the said manor in 1661, purporting to be an order of the Court Baron regulating the mode in which the commoners were to enjoy rights of common on the Hale, the defendants stated that shortly previous to 1710 the practice began of some person solely occupying the Hale, and paying for the benefit of the parish a yearly sum of money by way of compensation for the right of common thereon to which the parishioners were entitled, and that by degrees the parishioners in vestry assembled assumed the right of letting the said lands. The answers admitted that a lease of the Hale lands had been executed to Sir Thomas Sutton, and that upon his death the beneficial interest in such lease became vested in the defendants, and that they and those under whom they claimed had for fifty years held the lands under the parish, and had during the same period been the lessees of the manor, and that the defendants had lately purchased the manor.

The answers further admitted that the Act of Parliament was passed as stated in the information, and after further stating that the commissioners appointed under the said Act had determined the Hale lands to be part of the common and waste lands which they were authorised to allot, and had allotted the same to the defendants, and also stating, that to the belief of the defendants the lands were not enclosed from the commons and waste lands within the period of twenty years, or any other period of time previous to the passing of the Act of Parliament, but continued parcel thereof up to the time of their being allotted in manner aforesaid, the defendants submitted that the commissioners had authority to divide and allot the said lands, and that their allotment was final and conclusive, inasmuch as no person had appealed therefrom in the manner prescribed by the Act of Parliament, and they insisted that the allotment could not be impeached by the court, and claimed the same benefit of the objection as if they had made it by plea or demurrer.

The evidence on the part of the informants consisted principally of a series of entries in the parish books, which were made evidence by being in every instance authenticated by the parties interested in the manor, and which proved that the Hale lands had from the year 1710 been uniformly dealt with as the separate property of the parish. The Case laid before SERJEANT HILL stated many of these entries, and also stated that Thomas Sutton, the lessee of the Hale lands, being also lessee of the manor, permitted the timber on the Hale to be cut and applied for the use of the parish.

The facts stated in this Case were admitted to be evidence in support of the information under the following circumstances. It was proved that in 1787, when the Case was laid before SERJEANT HILL, Thomas Sutton was lessee of the manor, and Henry Swann deposed that, in the above-mentioned year, he had frequent communications with Thomas Sutton for the purpose of settling the then existing disputes as to the title of the parish of East Moulsey to the Hale and Hale Platts, that it was at first proposed to submit the matter to arbitration, that various communications were had on the subject, that at length when the necessary facts relating to the matters in dispute were ascertained, it was concluded that instead of proceeding to arbitration the opinion of SERJEANT HILL should be obtained, that every means were used, by making searches and otherwise, to ascertain the facts to be stated in the Case prepared for the opinion of SERJEANT HILL and that the statement of facts in the Case was known to and approved of by Thomas Sutton and his solicitors. The witness then deposed that a Case after much altercation and dispute was prepared for the opinion of SERJEANT HILL, and that his opinion being taken thereon, it was communicated to Thomas Sutton. The witness further deposed

A that he did himself, shortly after the opinion was procured, communicate the purport thereof to Thomas Sutton, and on several occasions he discussed the opinion with Thomas Sutton who submitted to and acquiesced in the opinion by consenting to the calling of a vestry of the parish of East Moulsey for the purpose of re-letting the lands, and agreeing at such vestry to take the lands upon lease for twenty-one years.

B The lease of the Hale lands to Sir Thomas Sutton for ninety-nine years, dated Nov. 18, 1789, was also produced on the part of the informants.

The defendants gave in evidence the Parliamentary survey, and the court rolls of the manor, but they did not show any act of ownership or enjoyment following up these documents. They also proved the Enclosure Act and the award.

C *Horne and Pepys* for the relators.

Shadwell and Temple for the defendants.

D **SIR THOMAS PLUMER, M.R.**—In giving my judgment upon this case I shall consider it in three points of view: first, as it presents the case on the part of the relators, considered as distinct from the case made by the defendants; and secondly, with reference to the case on the part of the defendants, branching out into two distinct grounds of defence. With respect to the first view of the subject it is unnecessary to make any observations upon it, because the relief sought by this information is quite according to the ordinary practice of the court with respect to charity lands. It is too clear to admit of any doubt that a husbandry lease of lands belonging to a charity for ninety-nine years at an uniform rent, cannot stand, **E** unless some satisfactory reason can be given to support it; and in the present case, the fact of the lease for ninety-nine years having been substituted for one of twenty-one years, without any agreement being made for an increase of the rent according to the change of circumstances, or any obligation being imposed upon the tenant to lay out any money upon the estate, is quite conclusive against the lease.

F The difficulties, therefore, which belong to this subject arise out of the case made by the defendants. Admitting that they were lessees for ninety-nine years, they contend that the property is changed, and that they are no longer bound by the terms of the contract. To support that proposition two grounds are taken. First, it is said that if the Act of Parliament had never passed, the lands in question would not now have been the separate property of the parish, but common waste lands belonging to the manor of East Moulsey. It is attempted to make that out by **G** adducing the Parliamentary survey and the court rolls of the manor, and it is contended that those documents furnish strong evidence to show that in the years 1649 and 1661 these lands belonged to the manor.

Both the documents adduced are undoubtedly deserving of great consideration—the Parliamentary survey in particular is entitled to considerable weight, from the accuracy with which it is known to have been taken—but it is to be observed that **H** the evidence is documentary; we do not know that on the survey being taken it was attended by the persons claiming these lands as their property; the Parliamentary surveyors may have been mistaken, and with respect to the court rolls of the manor, taken by themselves they are evidence only against the tenants of the manor and the lord of the manor. It is competent to the Court Baron to enter upon their records, my land to be their common, and I have no means to dispute it; **I** their record, therefore, is of itself but *ex parte* evidence, and does not of necessity bind third persons. The first thing the court looks at as the criterion of property is usage and enjoyment. Ancient deeds are exceedingly material if followed up by possession, but if not followed up by possession, and if there has been a long enjoyment and uninterrupted possession in opposition to them, they lose that importance to which they would otherwise be entitled. Very high judges have said they would presume anything in favour of a long enjoyment and uninterrupted possession. Suppose this case was now submitted to the consideration of a jury, and the Parliamentary survey and the court rolls of the manor were produced to

show that these lands belonged to the Crown, and no other evidence was produced to prove that fact; and on the part of the parish the parish books were produced, containing these different entries, and it was proved that the parish had been in the quiet enjoyment and uninterrupted possession of this property for one hundred and ten years—would not that be conclusive? Is not sixty years possession a title against the Crown? Is not one hundred and ten years possession sufficient to put an end to any claim as to this property?

We must suppose that persons who have a right to property will assert that right, and if they lay by for one hundred and ten years, and suffer the property to be enjoyed by other persons, that enjoyment must constitute right. I cannot have the least hesitation in saying that, whatever may have been the origin of the possession of these lands by the parish, that possession, coupled with the circumstance that the party who it is said is entitled has been standing by and making no objection to the property being enjoyed as the separate property of the parish, must decide the question; and that we must consider these lands as having been originally granted to trustees for the benefit of the parish, and to be enjoyed by them as their separate exclusive property.

The second part of the case made by the defendants is that the Act of Parliament gave the commissioners jurisdiction to decide the question with respect to these lands, but I am clearly and decidedly of opinion that they had no jurisdiction at all, and that they were expressly prohibited from interfering or meddling in any manner with this subject. It follows as a matter of course, if they had no jurisdiction, that their decision is a nullity. It does not create any necessity for an appeal where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it; if it decides upon matters with respect to which it has no authority, its decision amounts to nothing, and no party can in the least be bound by it.

There is, therefore, no ground of defence upon which the right of the relators to the property in question can be resisted; but there is a feature in this case which courts of justice have always considered it their duty to mark with the strongest censure; that the tenant, instead of endeavouring to protect and support the title of his landlord, has done all in his power to impeach it. If there is one principle more established than another with respect to the relation between landlord and tenant, it is this, that if a tenant receives the possession of an estate from a landlord, he never can dispute the title of that landlord. There are instances where under peculiar circumstances courts of justice, when third persons have been interested, have let the tenant in to show that the person to whom he has paid rent was not entitled to receive it; but even in such cases it has always been done with the very greatest caution. With respect to the principle, it is the first maxim for every tenant to understand, that so long as he retains possession, he cannot dispute the title of the person who gave him that possession. There have been cases in which it has been evident that the landlord had no title, and yet the court would not hear the tenant say so, as for instance in *R. v. Bedford Level Corpn.* (1) where they wanted to show that the lease was good for nothing because it was not registered, when the tenant came to state that, his evidence was not allowed to be received.

It has been decided a hundred times over, that the tenant cannot plead the plea of *nil habuit in tenementis*, and that the plaintiff in cognisance or in avowry is not called upon to show his title. It would be contrary to the principle upon which the relation between landlord and tenant exists, to allow the tenant to dispute his landlord's title; for there is an implied covenant that the landlord shall protect the tenant's enjoyment, and the tenant shall guard the landlord's title. If the merits of this case had been otherwise the defendants were estopped; if they wished to dispute the title of their landlord they ought to have given up the possession. I almost doubt whether they ought to have been permitted to enter into evidence at all, upon the principle that the plea of *nil habuit in tenementis* could not have been

A pleaded at law; but for the purpose of meeting the justice of the case, I was unwilling to exclude the evidence. Upon the whole view of this case, I have not the least doubt but that the relators are entitled to the relief they pray. The consequence is that the lease must be declared null and void, that possession must be delivered up, and that there must be an account of the rents according to the true value; and the defendants must pay all costs.

B The following decree was made.

C His Honour doth declare that the lease, dated Nov. 18, 1789, of the charity lands and premises in the pleadings mentioned, called the Hale and Hale Platts, for the term of ninety-nine years, granted in pursuance of the agreement of July 30, 1789, in the pleadings mentioned, is void, and doth decree the same accordingly; and his Honour doth order and decree that the defendants do deliver up the lease to the relators William Greening Martin and William Annison, the churchwardens of the parish of East Moulsey, to be cancelled, and that the defendants do deliver up possession of the charity lands with the appurtenances, and all other the premises comprised in the lease, to William Greening Martin and William Annison as such churchwardens as aforesaid; and that it be referred to the Master to take an account of the rents of the lands and premises, which have accrued due since Dec. 25, 1816, and which have been received by the defendants, or by any other person or persons by their or either of their order or for their or either of their use. In case it shall appear upon taking the account, that the defendants or any or either of them have been in the occupation of any part of the lands and premises since Dec. 25, 1816, or if the Master shall not be able to ascertain what rents have been received in respect of such lands, the defendants are to be charged in taking the aforesaid account according to a valuation to be set thereon by the Master. And it is ordered that the Master do consider what is a reasonable rent to be paid by the defendants during such time, and that the defendants be charged therewith accordingly; and that what shall be found due on taking the account be paid by the defendants to William Greening Martin and William Annison as such churchwardens as aforesaid. And it is ordered that the Master do inquire and state whether the defendants, or any of them, have in their or any of their possession custody or power, any and what deeds documents books accounts evidences or writings belong to the lands, and that the defendants do deliver the same to William Greening Martin and William Annison as such churchwardens as aforesaid. And it is ordered that the defendants do pay unto the relators their costs of this suit to be taxed by the Master.

G July, 1827. On an appeal by the defendants **LORD LYNTHURST, L.C.**, expressed his assent to the judgment of the Master of the Rolls, and affirmed the decree principally on the ground that the long possession of the lands by persons holding as lessees of the charity was conclusive evidence of the title of the charity to the property, and that, the commissioners under the Enclosure Act having no jurisdiction to determine with respect to the title of the lands in question, their decision was a nullity.

Appeal dismissed.

MEREST v. HARVEY

[COURT OF COMMON PLEAS (Gibbs, C.J., and Heath, J.), April 30, 1814]

[Reported 5 Taunt. 442; 1 Marsh. 139; 128 E.R. 761]

Trespass — Damages — Exemplary damages — Trespass on land — Offensive behaviour.

Damages for trespassing on another's land and shooting on it in defiance of notice, accompanied by indecent and offensive behaviour, may be exemplary.

Notes. Considered: *Fielden v. Cox* (1906), 22 T.L.R. 411. Applied: *Loudon v. Ryder*, [1953] 1 All E.R. 741. Referred to: *Price v. Severne* (1831), 5 Moo. & P. 125; *Whitwham v. Westminster Brymbo Coal and Coke Co.*, [1896] 1 Ch. 894; *Mason v. Clarke*, [1955] 1 All E.R. 914; *Rookes v. Barnard*, [1964] 1 All E.R. 367.

As to exemplary damages, see 11 HALSBURY'S LAWS (3rd Edn.) 223-225; and for cases see 17 DIGEST (Repl.) 105 et seq.

Motion by the defendant for a rule to set aside a verdict for the plaintiff on the ground of excessive damages in an action for trespass by forcibly breaking and entering the plaintiff's close and with walking and with dogs treading down and spoiling the plaintiff's grass, and with dogs and guns searching, hunting and beating for game there and doing other wrongs.

At the trial before HEATH, J., at Norfolk Assizes, 1814, the evidence was that in September the plaintiff, a gentleman of fortune, was shooting on his own manor and estate in a common field contiguous to the highway when the defendant, a banker, a magistrate, and a Member of Parliament, who had dined and drunk freely after taking the same diversion of shooting, passed along the road in his carriage, and, quitting it, went up to the plaintiff and told him he would join his party. The plaintiff positively declined, inquired his name, and gave him notice not to sport on the plaintiff's land; but the defendant declared with an oath that he would shoot and, accordingly, fired several times on the plaintiff's land at the birds which the plaintiff found, proposed to borrow some shot of the plaintiff when he had exhausted his own, and used very intemperate language, threatening, in his capacity of a magistrate, to commit the plaintiff and defying him to bring any action.

The witnesses described his conduct as being that of a drunken or insane person. The plaintiff conducted himself with the utmost coolness and propriety. A special jury found a verdict for the plaintiff for the whole damages in the declaration, £500.

Serjeant Blosset for the defendant: The defendant's conduct must have proceeded from intoxication or insanity, as it was described by the witnesses. The jury seemed to have considered, not what they ought to give as a compensation for the injury sustained, but what they, as lords of manors in a sporting county, where the jealousy of preserving the game was carried to an excess, should like to receive in similar circumstances.

GIBBS, C.J.—I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation of life who should behave himself in this manner? I do not know on what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain.

Suppose a gentleman has a paved walk in his paddock before his window, and that a man intrudes and walks up and down before the window of his house

A and looks in while the owner is at dinner, is the trespasser to be permitted to say: "Here is a halfpenny for you, which is the full extent of all the mischief I have done?" Would that be a compensation? I cannot say that it would be.

B **HEATH, J.**—I remember a case where a jury gave £500 damages for merely knocking a man's hat off; and the court refused a new trial. There is not one country gentleman in a hundred who would have behaved with the laudable and dignified coolness which this plaintiff did. It goes to prevent the practice of duelling if juries are permitted to punish insult by exemplary damages.

Rule refused.

C

D STEIGLITZ AND ANOTHER v. EGGINTON AND OTHERS

[COURT OF COMMON PLEAS (Gibbs, C.J.), Michaelmas Term, 1815]

[Reported Holt, N.P. 141]

Power of attorney—Execution of deed—Need to be under seal.

Partnership—Authority by one partner to another to execute deed—Presumption that authority under seal.

E An authority to execute a deed must be by deed. If one partner acknowledges that he gave another partner authority to execute a deed for him, the presumption is that it was a legal authority which must be under seal and produced. An acknowledgment is not sufficient.

F **Notes.** Followed: *Re Milsted, Ex parte Jory* (1868), 18 L.T. 156. Referred to: *Re Burnsel and Wootton, Ex parte Burnsel and Wootton* (1867), 16 L.T. 538.

As to appointment of agents by deed, see I HALSBURY'S LAWS (3rd Edn.) 153-156; and for cases see 1 DIGEST (Repl.) 328.

Action of debt on an award.

G A dispute between the plaintiffs, merchants trading at St. Petersburg, and the defendants was referred to arbitration, the submission to arbitration being contained in a deed which was executed by one of the defendants "for self and partner." It was executed on behalf of the plaintiffs by an agent named Jonn in his own name, without adding that it was by procuration or that it was for the plaintiff. They had given Jonn a power of attorney to sign any instruments or documents relating to commercial affairs in their names, either jointly or severally, or in his own name. Following the arbitration the plaintiffs sued on the award and alternatively on the subject-matter of the original dispute. The defendants challenged the execution of the deed.

H *Vaughan* and *Parke* for the defendants: An attorney should execute in the name of his principal. The power of attorney is not sufficient: it should appear from the deed itself that he is an attorney and not by an extraneous document.

I **GIBBS, C.J.**, doubted whether the execution by Jonn would be sufficient, but called on the plaintiffs to support the execution by one of the defendants "for self and partner."

Serjeant Lens and *Gaselee* for the plaintiffs: One of the defendants gave authority to the other to execute the deed for him. The partner who did not execute had subsequently acknowledged the deed. This amounted to substantial execution.

GIBBS, C.J.—The authority to execute must be by deed. If one partner, who does not execute, acknowledge that he gave an authority, I must presume

that it was a legal authority, and that must be under seal and produced. One man cannot authorise another to execute a deed for him but by deed. No subsequent acknowledgment will do. The defendants have pleaded that it is not their deed. A

The plaintiffs afterwards recovered a verdict on the alternative grounds pleaded. B

R. v. HUNT AND OTHERS C

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), May 8, 1820]

[Reported 3 B. & Ald. 566; 1 State Tr. N.S. 171; 106 E.R. 768]

Criminal Law—Evidence—Unlawful assembly—Intention—Evidence of resolutions proposed and banners and flags proposed at another meeting. D

A.B. and others were indicted for unlawfully meeting together with persons unknown for the purpose of exciting discontent and disaffection. A.B. had presided at the meeting. At the trial evidence of certain resolutions passed at another meeting held one month previously in a distant place at which A.B. had also presided, the avowed object of which meeting being the same as that of the meeting mentioned in the indictment, was sought to be put in by the prosecution. The evidence was in the form of a copy of the original resolutions delivered by A.B. to a witness at the former meeting as the resolutions then intended to be proposed which corresponded with those which the witness had heard read by counsel from a written paper. The defendant objected to the evidence on the ground that the original paper from which the resolutions were read should have been produced. E

Held: (i) the resolutions were admissible in evidence to show the intention of A.B. in assembling and attending the meeting mentioned in the indictment, and the copy of the resolution offered in evidence by the prosecution was admissible without producing the original; F

(ii) parol evidence of inscriptions and devices as banners and flags displayed at the meeting was admissible without producing the originals. G

Notes. Considered: *R. v. Hinley* (1843), 2 L.T.O.S. 287. Referred to: *R. v. Fursey* (1833), 6 C. & P. 81; *Jones v. Tarleton* (1842), 9 M. & W. 675; *R. v. O'Connell* (1844), 5 State Tr. N.S. 1; *R. v. Cuffey* (1848), 7 State Tr. N.S. 467; *Boosey v. Davidson* (1849), 13 Q.B. 257; *R. v. Petcherini* (1855), 7 Cox, C.C. 79; *Hockin v. Ahlquist Bros., Ltd.*, [1943] 2 All E.R. 722. H

As to evidence in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 436 et seq.; as to unlawful assembly, see *ibid.*, 585-587. For cases see 14 DIGEST (Repl.) 401 et seq.; 15 DIGEST (Repl.) 787-791.

Motion by five defendants for a rule nisi for the new trial of an indictment tried by BAYLEY, J., in which the defendants were charged with unlawful assembly and on which they were found Guilty. I

The first count of the indictment stated, that the defendants, Hunt, Knight, Johnson, Saxton, Moorhouse, Healy, Bamford, Jones, Swift and Wild, being malicious, seditious and ill-disposed persons, and intending to disturb the peace and common tranquillity of the realm and to excite discontent and disaffection, and to excite the subjects of our lord the King, to hatred of the government and constitution, on July 1, 1819, and on divers other days and times, at Manchester, did conspire together with divers other persons unknown, unlawfully to meet

A together and to cause a great number of other persons to meet with them at a certain place in the said county, for the purpose of disturbing the peace, exciting discontent, and exciting the subjects to hatred, etc.; and that the defendants, and other conspirators, in pursuance of the conspiracy, on Aug. 16, at Manchester, unlawfully did meet together and did cause, aid and assist in causing
B divers subjects, to wit, sixty thousand and more, unlawfully to meet together for the purposes aforesaid in a formidable and menacing manner and in military array, with clubs, sticks and other offensive weapons, and with divers seditious ensigns, and with flags, banners and placards, bearing divers seditious inscriptions and devices; to the great terror of the subjects, to the evil example, etc., and against the peace, etc. The second and third counts were also for a conspiracy.

C The fourth count stated that the defendants unlawfully did meet together with sixty thousand other persons unknown, for the purpose of exciting discontent and disaffection, and for the purpose of exciting the subjects to hatred of the government and constitution, in contempt, etc. There was also a count for a riot. The defendants pleaded Not Guilty.

D At the trial before BAYLEY, J., at Yorkshire Assizes, it appeared that on July 21, 1819, the defendant Hunt had presided at a meeting in Smithfield, one of the chief objects of which was to consider the means of obtaining a reform in Parliament. At that meeting, resolutions of a seditious tendency were passed, Hunt having put the resolutions from the chair. On July 31 a notice of a meeting, dated July 23, and purporting to be signed by eleven persons, inhabitants of Manchester, appeared in a newspaper at Manchester, by which the public were
E informed that a meeting would be held on Aug. 9 on the area near St. Peter's Church, to take into consideration the most speedy and effectual mode of obtaining "a radical reform in the House of Commons, and also to consider the propriety of the unrepresented inhabitants of Manchester electing a person to represent them in Parliament." The notice announced that H. Hunt, Esq., was to be in the chair.

F The magistrates having given notice that this meeting was illegal, another notice purporting to be signed by the same persons appeared in the same paper, stating that they had been advised that a meeting for the purpose of electing a person to represent the inhabitants of Manchester in Parliament was illegal and that such meeting would not, therefore, be held. In the same paper, however, a notice
G appeared dated Aug. 6, "that a public meeting would be held on the area, near St. Peter's Church, on Monday, Aug. 16, to consider the propriety of adopting the most legal and effectual means of obtaining a reform in the House of Commons, the chair to be taken by Hunt, at 12 o'clock." In pursuance of this last notice, the meeting assembled on Aug. 16, and Hunt appeared on the hustings, but before any resolutions were proposed, the meeting was dispersed and Hunt and others were taken into custody.

H For the prosecution, the resolutions passed at Smithfield were given in evidence and their truth was proved by a copy produced by a witness to whom that copy had been delivered by Hunt at the time of the Smithfield meeting, as the resolutions intended to be there proposed. The witness also swore that the resolutions he heard read, corresponded with the copy so delivered to him. The defendants objected that this was not sufficient evidence of the tenor of the resolution, inas-
I much as the original paper from which they were read ought to have been produced, or the defendants ought to have had notice, at least, to produce it in order to let in the secondary evidence. Secondly, that the resolutions themselves were not admissible at all, inasmuch as there was no evidence to show that it was intended to propose the same resolutions at the meeting at Manchester. The judge overruled the objections and received the evidence.

It appeared also that large bodies of persons who attended the meeting at Manchester, on Aug. 16, came from a distance, organised and with a regularity of step and movement resembling that of a military march, and that one of these

bodies came from the neighbourhood of a place called White Moss. Evidence was given that, on Aug. 14, a witness had seen at White Moss before daybreak, a number of persons assembled, practising the marching step, and that these persons, on seeing the witnesses, had ill-treated them and called them spies, and extorted from one of them an oath never to be a King's man again, or to name the name of a King. It was proved that some of the parties who entered Manchester on Aug. 16, in military order, on passing the house of the witness who had been so ill-treated, expressed their disapprobation of him by hissing.

The defendants objected that this was not admissible evidence against them, inasmuch as it did not appear that the meeting at White Moss took place with the knowledge or concurrence of any of them. The judge overruled the objection and received the evidence.

It appeared also, that at the meeting of Aug. 16, there were various flags and banners containing inscriptions and devices of a seditious and inflammatory tendency, and that these were seized by the police officers on the dispersion of the mob. These inscriptions and devices were described by the several witnesses from memory. The defendants objected that the flags or banners ought to have been produced or that, in order to entitle the prosecutors to give secondary evidence, the defendant ought to have had notice to produce the originals. The defendants also tendered evidence to prove that various acts of outrage were committed on the people assembled by the military on the dispersion of the meeting. The judge refused to receive this evidence.

The trial occupied ten days at York, and the defendants, Hunt, Knight, Bamford, Healy, and Johnson were found Guilty on the fourth count of the indictment. The other defendants were acquitted. The defendant, Hunt, on behalf of himself and the others, contended that there ought to be a new trial on the ground that improper evidence had been received against him, and that evidence tendered on the part of the defendants at the trial had been refused, and he renewed the objections made at the trial. He further urged that the judge had misdirected the jury as to the effect of the evidence.

The defendant Hunt appeared in person in support of the motion.

Cur. adv. vult.

ABBOTT, C.J.—Although this matter has occupied a considerable portion of that time and attention which is dedicated to the administration of justice, it has not presented to my mind any doubt whatever, and I will deliver my opinion on the several points with as much brevity as possible.

The first objection taken by the defendants was as to the rejection of the proposed evidence of the misconduct of the military. This supposed misconduct took place at the dispersion of the assembly and was, in my opinion, irrelevant to the matters in issue. The matters in issue were the intention and object of the assembly and, on the count for a riot [the fifth count] the conduct of the persons assembled prior to their dispersion. The conduct of those who dispersed the assembly could have no bearing on the intention and object of the assembly, because those must have existed before the dispersion and were, in their nature, perfectly distinct from the conduct of those who afterwards dispersed the assembly. Neither was the conduct of the dispersers relevant to the demeanour of those who had previously assembled, and nothing that was properly applicable to show the demeanour of the persons assembled was rejected. On the contrary, witness after witness was called and heard to speak to the propriety of their demeanour up to and at the time of the arrival of the military among them; and up to and at the period spoken to by one of the prosecution witnesses, who gave his opinion and reasons for sending in first the yeomanry and afterwards the regular cavalry. No witness

was rejected who was offered to speak to facts contradictory to the matters deposed to by that person, or by any other witness examined for the prosecution.

It appears to me, therefore, that the proposed evidence relating to the conduct of other persons in a matter subsequent was properly rejected. But if this were more doubtful than it appears to me to be with reference to the whole charge originally preferred against the defendants, that doubt would be altogether removed by the verdict which, having narrowed the offence of the defendants to the fourth count which charges an unlawful assembly for the purpose of exciting discontent and disaffection, and does not charge any actual or intended violence, has, in my opinion, unquestionably rendered the proposed evidence irrelevant, as having no bearing on that charge.

The second point of objection is to the admission of the resolutions of the Smithfield meeting. The objection here is two-fold: first, that the best evidence was not produced; and secondly, that no evidence of them was admissible. The paper produced was proved to have been received from the hands of one of the present defendants, at the time and place of passing the resolutions, as containing the very resolutions then actually in progress, and then in the act of being passed by or proposed to the persons assembled. As against the party to whom this proof applied, the paper produced was as good, if not better evidence than any other could have been. On the second part of the objection, it is to be observed that these resolutions were proposed at a large assembly very recently held for some alleged purpose of Parliamentary reform, which was the avowed purpose of the meeting at Manchester. At the previous assembly, one of the defendants had presided and put the question (if, indeed, any question can be deemed to be effectively propounded on such an occasion). That defendant, a stranger in point of residence or other than political connection with Manchester or its vicinity, was announced as the invited chairman and actually became the chairman at the meeting in question. In such circumstances, on the question of intention, I have no doubt that it was competent to show, as against that individual, that at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. I have no doubt of the competency of such evidence; its effect was for the consideration of the jury and was properly left to them. It was, in its nature, a declaration by that defendant of his own sentiments and views, with reference to what is called Parliamentary reform, and to the assembling of large numbers of persons to hear speeches and resolutions under that pretext.

The third objection was to the reception of that evidence which regarded the training at White Moss and the assault there committed. The case submitted to the jury by the present indictment presented two questions: first, the general character of the assembly, as in all cases of conspiracy or other unlawful acts in which many persons are concerned; secondly, the particular case of each individual charged, as connected with the general character, supposing the general character to be such as that its criminality might in the result be a fit matter for the consideration of the jury.

It was shown that a very considerable part of the persons assembled, or at least a very considerable part of those who came from a distance, went to the place of meeting in bodies to a certain extent arranged and organised, and with a regularity of step and movement resembling those of a military march, though less perfect. The effect of such an appearance and the conclusion to be drawn from it, were points for the consideration of the jury, and no reasonable person can say that they were left to the consideration of the jury in a manner less favourable to the defendants than the evidence warranted. If this appearance were in itself proper for the consideration of the jury, it must have been proper to show to them that at the very place from which one of these bodies came, a number of persons had assembled before daybreak and had been formed and instructed to march as soon as there was light enough for such an operation; and [also to show] that some

of the persons thus assembled had grossly ill-treated two others (whom they called spies) and had extorted from one of them, at the peril of his life, an oath never to be a King's man again or to name the name of a King: and [to show further] that another of the bodies that went to the place of meeting, expressed their hatred towards this person by hissing as they passed his door. These matters were, in my opinion, unquestionably competent evidence on the general character and intention of the meeting. Their effect as to each particular defendant was, as I have already observed, a distinct matter for the consideration of the jury. A

As to the last point, the reception of the evidence as to the inscriptions on the flags or banners, I think it was not necessary either to produce the flags or to give notice to the defendants to produce them. The cases requiring the production of a writing itself will be found to apply to writings of a very different character. There is no authority to show that, in a criminal case, ensigns, banners or other things exhibited to public view and of which the effect depends on such public exhibition, must be produced or accounted for on the part either of the prosecutor or of the defendants. And in many instances the proof of such matters from eye-witnesses, speaking to what they saw on the occasion, has been received and its competency was never, to my knowledge, called in question until the present time. Inscriptions used on such occasions are the public expression of the sentiments of those who bear and adopt them, and have rather the character of speeches than of writings. If we were to hold that words inscribed on a banner so exhibited could not be proved without the production of the banner, I know not on what reason a witness should be allowed to mention the colour of the banner, or even to say that he saw a banner displayed, for the banner itself may be said to be the best possible evidence of its existence and its colour. B C D

If such parol proof may be received generally, the proof at this trial was properly received, notwithstanding the allegation that the things themselves, or some of them, were in the hands of a constable then at York: for, in the first place, this fact did not appear (if indeed it appeared at any time distinctly) until after the evidence was received; and, in the second place, if it had appeared distinctly at the time when the parol evidence was offered, that particular fact would still not affect the competency of the other proof, such other proof being competent on general principles. Its proper effect would only be to furnish matter of observation to the jury on the part of the defendants, that the prosecutor chose to offer only the fallible testimony of witnesses where he had it in his power to produce the infallible testimony of the things themselves. Although, however, for the purpose of the present objection, it is assumed that some of the banners actually displayed in St. Peter's Fields were in the hands of a constable at York, yet if, instead of offering the parol evidence, that person had been called as a witness to produce them, the prosecutor might have been further required to prove that the things produced were the things displayed, and might have been required to deduce them from hand to hand; and if there had been a failure in any one step, the thing must have been rejected, supposing its production to be the only proof. E F G H

The difficulty of such a deduction, and the impossibility that must occur in many cases of either producing the things themselves or of showing what has become of them, shows the unreasonableness of requiring the proof of the things themselves, and of rejecting the testimony of eyewitnesses in a matter of public exhibition on an occasion like the present. The evidence of these banners and inscriptions was properly admissible to show the general character and intention of the assembly. Their application to the particular defendants was matter for the consideration of the jury and was left to the jury in that way. I

Having disposed of these objections as matters of law, I shall take no further notice of the observations addressed to us on what has been called misdirection in the effect given to this or that particular point, either of proof adduced or of proof supposed to be deficient, than to say generally, that it appears to me that no observation was made to the jury unsuitable to the matter to which it was

applied; that the whole effect of the evidence was most properly left to them and that they were not desired or directed to draw, nor have in fact drawn, any presumption or conclusion against the defendants which was not well warranted by the evidence adduced against them.

BAYLEY, HOLROYD, and BEST, JJ., concurred.

Rule refused.

FOSTER v. STEWART

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Le Blanc and Bayley, JJ.), November 15, 1814]

[Reported 3 M. & S. 191; 105 E.R. 582]

Master and Servant—Apprentice—Wrongful inducement of another's apprentice to work—Right of master to recover value of apprentice's services.

The plaintiff's apprentice deserted from the plaintiff's ship and went on board the defendant's where he secreted himself until the defendant's ship sailed. He then surrendered himself to the defendant who carried him to H., to which place he worked his passage, receiving only his food. During their passage to H. the plaintiff's and the defendant's ships were within hail, but the defendant did not make known to the plaintiff that he had the apprentice on board. On the arrival of the defendant's ship at H. the apprentice wished to leave her, but the defendant persuaded him to remain, promising him either wages or clothes and pocket-money. Under this persuasion the apprentice sailed with him to E. doing duty as one of the crew, but received no wages, clothes or pocket-money. In an action by the plaintiff for compensation in respect of the apprentice's services to the defendant on the voyage from H. to E.,

Held: the plaintiff was entitled to waive the tort and bring assumpsit against the defendant for the work and labour of his apprentice, and to recover a reasonable compensation for the services of the apprentice from H. to E.

Per Curiam: If a man wrongfully induces another's apprentice to work for him, the master may sue for the value of the services in an action for work and labour.

Notes. Applied: *Cornish v. Abington* (1859), 7 W.R. 504. Referred to: *Chamberlain v. Hazelwood* (1839), 9 L.J.Ex. 87; *Phillips v. Homfray* (1883), 24 Ch.D. 439.

As to services obtained by fraud or wrong, see 8 HALSBURY'S LAWS (3rd Edn.) 226, 227; as to election in the case of tort, see *ibid.*, 247 et seq.; and for cases see 34 DIGEST (Repl.) 334, 335.

Cases referred to:

- (1) *Hambly v. Trott* (1776), 1 Cowp. 371; 98 E.R. 1136; 24 Digest (Repl.) 669, 6576.
- (2) *Curteis v. Bridges* (1697), Comb. 450.
- (3) *Hill v. Allen* (1748), 1 Ves. Sen. 83; 1 Dick. 130; 27 E.R. 906; 34 Digest (Repl.) 332, 2540.
- (4) *Eades v. Vandeput* (1784), 4 Doug. K.B. 1; 5 East, 38, n.; 99 E.R. 736; 34 Digest (Repl.) 332, 2541.
- (5) *Lightly v. Clouston* (1808), 1 Taunt. 112; 127 E.R. 774; 34 Digest (Repl.) 334, 2570.

- (6) *Arris and Arris v. Stukely* (1677), 2 Mod. Rep. 260; 86 E.R. 1060; 12 Digest (Repl.) 635, 4910. **A**
- (7) *Smith v. Hodson* (1791), 4 Term Rep. 211; 100 E.R. 979; 4 Digest (Repl.) 439, 3875.
- (8) *Kitchen v. Campbell* (1772), 3 Wils. 304; 95 E.R. 1069; sub nom. *Hitchin v. Campbell*, 2 Wm. Bl. 827; 12 Digest (Repl.) 633, 4887.
- (9) *Birch v. Wright* (1786), 1 Term Rep. 378; 99 E.R. 1148; 45 Digest (Repl.) 315, 257. **B**
- (10) *Barber v. Dennis* (1703), 1 Salk. 68; 6 Mod. Rep. 69; 91 E.R. 63; 34 Digest (Repl.) 332, 2535.

Case directed to be stated on a rule nisi being obtained to set aside a nonsuit and enter a verdict for the plaintiff in an action of assumpsit for work and labour by the plaintiff and his servants. The defendant pleaded non assumpsit. **C**

At the trial before LORD ELLENBOROUGH, C.J., the plaintiff was nonsuited, with leave to move to enter a verdict in his favour, with £12 damages, if the court should think the action maintainable in that form. On a rule nisi obtained for that purpose, the court, on showing cause, directed a Case to be stated, the material facts of which are as follows. **D**

The plaintiff, a shipowner in London, by indenture of Dec. 2, 1811, took one Plumpton to be his apprentice for six years and sent him on board his (the plaintiff's) ship on a foreign voyage. The defendant was master of the ship *Guildford* of Shields and, in August, 1812, while his and the plaintiff's ships were lying at St. John's, New Brunswick, Plumpton having, as he said been ill-treated by the master of the plaintiff's ship, absconded and went on board the defendant's ship, where he secreted himself without the defendant's knowledge for two days and until after the defendant had weighed anchor to sail from that place. **E**

When they had got about a mile from the land Plumpton surrendered himself to the defendant and told him who he was, and from what ship he had deserted. After this, the two ships in the course of their passage to Halifax were once or twice within hail of each other but the defendant did not communicate to the master of the plaintiff's ship that he had Plumpton on board. The defendant carried him in his ship to Halifax to which he worked his passage and for which he received his food. On the arrival of the defendant's ship at Halifax, Plumpton wished to leave her but the defendant persuaded him to continue on board and told him he would either give him wages or supply him with clothes and pocket-money. At this time the defendant's ship was but thinly manned, and by this persuasion, Plumpton sailed in her to England and arrived at Grimsby and from thence sailed to Shields where he was discharged. He immediately returned to London and surrendered himself to the plaintiff. **F**

During the whole of this period Plumpton did duty as one of the crew of the defendant's ship and the defendant had not paid him any wages, or given him any clothes or pocket-money, and £12 was a fair compensation for his services from Halifax to Shields. **G**

The question for the opinion of the court was whether the plaintiff was entitled to recover. **H**

Gaselee for the plaintiff: The plaintiff is entitled to recover, inasmuch as he might waive the tort and sue in assumpsit. The sum of £12 was found to be a fair compensation for the services of the apprentice from Halifax to Shields and it can hardly be denied but that an action of some kind will lie against the defendant for the services of the apprentice after his arrival at Halifax. Neither can it be doubted that in many cases where tort lies, assumpsit may be brought. **I**

In *Humbly v. Trott* (1), which was trover against an executor for a conversion by his testator, LORD MANSFIELD, in showing how an executor might be liable for torts committed by his testator, though not in an action in the form of tort.

went much into the principle of waiving the tort and bringing assumpsit. He said (1 Cowp. at p. 375):

"In most, if not in all the cases, where trover lies against the testator, another action might be brought against the executor which would answer the purpose. An action on the custom of the realm against a common carrier is for a tort and supposed crime; the plea is not guilty; therefore, it will not lie against an executor. But assumpsit, which is another action for the same cause, will lie. So if a man take a horse from another, and bring him back, an action of trespass will not lie against his executor, though it will against him; but an action for the use and hire of the horse will lie against the executor."

And again (ibid. at p. 376):

"But where, beside the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall."

So here on the same principle, the defendant having, besides the tort committed in taking the plaintiff's apprentice, acquired to himself the service of the apprentice which benefited him, an action for the value of such service will lie against him in the same manner as it would survive against his executor. That the service of the apprentice which was acquired by a tortious act belonged to the plaintiff is clear from *Curteis v. Bridges* (2), where it was held (Comb. 450):

"If the master of one ship takes a servant that belongs to the master of another ship, whatsoever wages he receives from the King upon his account, shall be to the use of the first master, being acquired by the labour and industry of his servant."

Also in *Hill v. Allen* (3), which was a bill brought by an apprentice who had run away from his master and gone on board a ship that had taken a prize, his share of which was claimed by his master, LORD HARDWICKE said (1 Ves. Sen. 83):

"In general the master is entitled to all that the apprentice shall earn, consequently if he run away and go to a different business, the master is entitled at law to all his earnings."

These authorities establish the principle; but *Eades v. Vandeput* (4) and *Lightly v. Clouston* (5) decide the question. In the latter, SIR JAMES MANSFIELD, C.J., has set the matter on the true ground where he says (1 Taunt. at p. 114):

"The defendant wrongfully acquires the labour of the apprentice, and the master may bring his action for the seduction. But he may also waive his right to damages for the tort, and may say that he is entitled to the labour of his apprentice; that he is consequently entitled to an equivalent for that labour, which has been bestowed in the service of the defendant."

Scarlett for the defendant: Independently of the decision last cited which was founded on *Eades v. Vandeput* (4), and was a misapplication of the principle laid down in *Hambly v. Trott* (1), it would be difficult to show that the plaintiff in this case could maintain assumpsit. *Eades v. Vandeput* (4) cannot be correctly reported, for it is stated to have been an action for wages, but if so, how could it be material to charge the defendant with knowledge? Knowledge could not be material if the action was on an implied contract and, therefore, it would rather seem that the action must have been for the seduction. The record of that case has been searched for in vain.

Then, as to the principle on which a man may waive tort and bring assumpsit; wherever money is in the hands of one man which he ought, in equity and good conscience, to pay over to another, the law will imply a promise on his part to do

what in equity and conscience he ought to do. Therefore, if a man receive the fees of an office which office belongs to another, he to whom the office belongs shall have money had and received against him: see *Arris and Arris v. Stukely* (6). So if a man take the goods of another and sell them, the owner of the goods may waive the trespass and sue him for money had and received, affirming the sale because he, being in equity and conscience bound to pay over the proceeds to the owner of the goods, the law will imply a promise by him so to do.

What the plaintiff contends for is very different for he says, that if a man seduce the apprentice of another, the law will presume that he contracts to pay the master for the service of the apprentice, and, therefore, the master may have an action against him for work and labour. It might as well be said that if a man take the goods of another, the owner of the goods may have assumpsit against him for goods sold. No such principle is to be found in *Hambly v. Trott* (1) or in any other case, and it would be confounding the distinction between actions if any such principle could prevail.

As to the case put by LORD MANSFIELD of a man's taking another's horse, he only meant to show that trespass would not lie against his executor, though it would against him. He never meant that he who took the horse would be liable to an action for the use and hire; at least if he so meant, it may be answered that he has cited no authority for it and it is not founded in principle. As to *Lightly v. Clouston* (5), SIR JAMES MANSFIELD, C.J., seems not to have been quite satisfied with it, or with *Smith v. Hodson* (7), which he thought difficult to distinguish from it. The distinction, however, is this, that there the assignees only affirmed the contract which the bankrupt had made.

Gaselee replied: By the same rule that the assignees in *Smith v. Hodson* (7) were at liberty to affirm the contract of the bankrupt, the plaintiff here was at liberty to affirm the contract of his apprentice; both were in fraud of the parties really interested. If a party may waive the tort and bring money had and received on the principle that the money, in point of moral right, belongs to him (*Kitchen v. Campbell* (8)), why may he not on the same principle waive the tort and bring assumpsit for work and labour, where he is entitled to the work and labour? Both remedies are open to him. So trespass lies against a man who is in wrongful possession of another's land, yet the owner of the land may choose whether he will treat him as a trespasser, or have assumpsit for use and occupation; though he cannot have assumpsit after he has treated him as a trespasser: *Birch v. Wright* (9).

LORD ELLENBOROUGH, C.J.—When this case was before me at nisi prius, the plaintiff's right to recover was rested on *Eades v. Vandeput* (4). It occurred to me at that time and afterwards still more strongly, on looking into that case, that it is but a very loose note. For as to the defendant, Vandeput, who was in the King's service, supposing an action for work and labour could have been maintained, yet it was work and labour for the King and not for Vandeput; and, therefore, in his character of captain of a ship of war he could not have been the object of such an action. It does not appear, however, by the note of that case what the form of the action was; if the captain had enticed away the apprentice, perhaps he might have been liable to tort. But under the uncertainty both of fact and form which attends that case very material argument is to be derived from it.

However, there are two other cases which do afford an argument more pregnant and important for the court to consider. I allude to *Hambly v. Trott* (1), and *Lightly v. Clouston* (5). I should be more inclined, for the better preserving the simplicity of actions, to hold that where the seduction is the cause of action, the action ought to be in tort for the seduction. Still, I should go the length of holding with the case in SALKELD [*Barber v. Dennis* (10)], that where the apprentice in the course of his service had acquired a chattel, trover would lie for it; or if

that chattel had been converted into money, that the master might follow it in all its representative forms. But when it comes to substituting the apprentice as an agent of the master for forming a specific contract, it seems to be going somewhat further than the necessity of the case requires or the authorities prior to *Hambly v. Trott* (1) appear to warrant.

What LORD MANSFIELD said in *Hambly v. Trott* (1): "that if a man take a horse from another, and bring him back, trespass will not lie against his executor, though it will against him, but an action for the use and hire of the horse will lie against the executor," I can only conceive to be founded on an assumption that the action for the use and hire of the horse would also have lain against the testator, because an executor is liable on a supposition that his testator would also have been liable to the same species of action; for an executor is liable in the representative character which he bears to his testator. The difficulty, therefore, is in taking the first step and saying that the tort may be waived for an action for use and hire on the contract. That is somewhat different from an action for money had and received for the produce of goods sold by the sheriff, or from *Smith v. Hodson* (7), where assumpsit was held to lie by the assignees on a contract made with the bankrupt.

In this case, on the authority of *Hambly v. Trott* (1), in which the power to waive the tort and take to the contract is put by LORD MANSFIELD and illustrated by the case of cutting down trees, it is argued that an action for the work and labour of the apprentice, that is for the benefit acquired by the defendant from the service of the apprentice, is maintainable. In *Lightly v. Clouston* (5) the same case was before the court, and it seems as if SIR JAMES MANSFIELD, C.J., on that occasion, entertained nearly the same doubts as I do now. He appears, however, to have yielded to the authorities and to have considered that the master might waive the tort and adopt the contract. I think, therefore, that these cases, to the authority of which I bend, go the length of the present case, though I must confess that I do not accede to them with the same conviction that I do to many others.

LE BLANC, J.—I think it has been decided in many cases that tort may be waived and an action on contract substituted. I think also that, by the help of a few principles, the court will be warranted in determining this case in favour of the plaintiff. It is clearly established by all the cases that the master is entitled to the labour and earnings of his apprentice during the whole term of his apprenticeship. It is likewise established by the cases that if those earnings have got into the apprentice's hands, the master may claim and recover them. That was clearly determined in *Hill v. Allen* (3), where the apprentice having left his master and gone on board a privateer, became entitled to a share of a prize. The case was afterwards compromised but the opinion of LORD HARDWICKE was that the master was entitled to all that the apprentice earned, and although the share had not got into the apprentice's hands, yet it was to be considered as earnings, though in the shape of a share of prize, because it was in the nature of a compensation for the labour and industry of the apprentice.

Also in several cases it has been determined with respect to the sheriff who sells goods, or with respect to a person who is in possession, by wrong, where the party might bring tort if he pleased, yet he may maintain an action founded on contract. In the cases which have decided that money had and received may be maintained without any privity between the parties, though it has been truly said that those decisions are founded on the principle that the money belongs in justice and equity to the plaintiff, yet in order to attain that justice, the law raises a promise to the plaintiff as if the money were received to his use, which in reality was received by a tortious act.

These instances are independent of those put by LORD MANSFIELD in *Hambly v. Trott* (1), which he puts as clear law though he does not cite authorities for them.

As in the instance of the executor being chargeable for the trees cut by his testator; that imports that the owner of the trees might waive the tort and bring an action as for trees sold and delivered. In the same manner the case of a man take another's horse, imports that the trespass may be waived and an action for the use and hire of the horse substituted. These cases are independent of *Lightly v. Clouston* (5), which is a determination on this particular point.

As to *Eades v. Vandeput* (4), it would hardly be a sufficient authority, as it stands on the report alone without further inquiring into the form of action, for the court to found their decision on, except so far as it supports the general proposition that I set out with, that the master is entitled to the earnings of his apprentice and that the court will follow those earnings wherever it can.

Here undoubtedly, the plaintiff might have maintained tort for the wrongful detaining of his apprentice but, inasmuch as the defendant has had a beneficial service of the apprentice, the plaintiff may waive the tort, and require of him the value of the benefit. I should also be inclined to consider that as there was a contract, the master might avail himself of it, as the apprentice was under an incapacity of making any contract except for the benefit of his master. I should consider it in the same light as where a party purchases under the sheriff and has not paid, the party interested may avail himself of the contract made with the sheriff. On these grounds I think this action is maintainable.

BAYLEY, J.—To decide that this plaintiff is not entitled to recover would be to overrule the decision of *Lightly v. Clouston* (5), and also to impeach the doctrine in *Hambly v. Trott* (1). Both cases appear to have been well considered, no contrary authorities have been produced, and I am not aware that they contain principles inconsistent with others. It has often been laid down that you may waive the tort and bring assumpsit and in no instance that I can foresee, will that be prejudicial to the defendant because, in assumpsit, the party cannot recover more than in an action of tort. In many instances he will recover less. Oftentimes there would be a defect of justice if this could not be done. After the death of the tortfeasor the action as far as it respected the tort would not be maintainable [but see now s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1934: 9 HALSBURY'S STATUTES (2nd Edn.) 792], and, therefore, there could be no remedy by way of action at all unless the tort could be waived. Thus in the case of taking goods, unless the tort could be waived, no action at all would lie after the party's death.

Founding myself, therefore, on the principles laid down in *Hambly v. Trott* (1), and on the decision of *Lightly v. Clouston* (5), I think this plaintiff is entitled to recover.

Rule absolute.

NEWCASTLE FIRE INSURANCE CO. v. MACMORRAN & CO.

[HOUSE OF LORDS (Lord Eldon, L.C.), February 15, July 8, 10, 1815]

[Reported 3 Dow. 255; 3 E.R. 1057]

Insurance—Warranty—Breach—Avoidance of policy—Irrelevance of questions of misrepresentation or degrees of risk.

It is a first principle of the law of insurance that, when a thing is warranted to be of a particular nature or description, it must be exactly such as it is represented to be. Otherwise the policy is void, and there is no contract.

Therefore, where a cotton and woollen mill was insured as being of one class and turned out to have been of another class at the relevant time.

Held: an action on such a policy could not be sustained.

Per LORD ELDON, L.C.: Whether the misrepresentation was in a material point or not, or whether the risk was equally great in the one class as in the other, were questions which had nothing to do with the case, the only question being whether the building damaged was in fact the building insured?

Notes. Considered: *Re Universal Non-Tariff Fire Insurance Co., Forbes' Claim* (1875), L.R. 19 Eq. 485. Applied: *Hambrough v. Mutual Life Insurance Co. of New York* (1895), 72 L.T. 140; *Condogianis v. Guardian Association*, [1921] 2 A.C. 125. Referred to: *Wells, Fargo & Co. v. Pacific Insurance* (1872), 2 Asp. M.L.C. 111; *Thomson v. Weems* (1884), 9 App. Cas. 671; *Ellinger v. Mutual Life Insurance Co. of New York*, [1905] 1 K.B. 31; *Rozanes v. Bowen* (1928), 32 Ll. L. Rep. 98.

As to warranty and the conditions of a policy, see 22 HALSBURY'S LAWS (3rd Edn.) 217-229, and for cases see 29 Digest (Repl.) 60, 61.

Appeal from a decision of the Court of Session in Scotland in an action by the assured against insurers on a policy of insurance.

Macmorran & Co., cotton and wool spinners, at Garschew, insured their premises with the Newcastle-upon-Tyne Insurance Co. The policy was dated April 16, 1805, and contained a receipt for the premium which was accounted for to the company by Hamilton, their agent at Glasgow, through whom the insurance had been effected. The policy was retained by Hamilton till Sept. 5, 1805, when it was delivered to the insured upon their paying the premium. The policy referred to certain printed proposals, a copy of which was, according to the practice of the office, always delivered to the person transacting the insurance, in which proposals it was stated that, where the persons insuring gave a description of the subject in order to its being insured at a lower premium, and that where there should be fraud or false swearing in stating the amount of the loss, the policy was to be of no force. Certain classes of buildings were likewise specified, according to the particulars of which the premium was to be lower or higher, and the premises in question were warranted to be of the first class, for which the lower premium only was charged.

On Dec. 7, 1805, the mill was burnt, and, the insurers refusing to pay the sum claimed for the loss, the insured brought an action before the Court of Session, concluding for payment of £1,647, and interest from Dec. 7, 1805. A condescendence having been ordered, the insurers stated two charges as the ground of their refusal to pay: first, that there was fraud and false swearing as to the amount of the loss; secondly, that the fire was intentional. Upon proof it appeared that there was no foundation for this latter charge, but it also appeared that, at the time of the date of the policy, the premises were of the second class contrary to the warranty. In answer to this it was alleged that Hamilton, the agent of the Newcastle company, had taken it for granted that the premises were of the first class and made out the policy accordingly, without any representation on the part of the insured, and that before the policy was delivered, and the loss happened, the premises had been altered so as to bring them within

the first class. It did not appear very distinctly in proof, how the demand of £1,647 was made up. The court below decreed against the insurers in terms of the libel, and from this decision the Newcastle company appealed. A

Romily and Richardson for the appellants.

Park and Brougham for the respondents.

July 8, 1815. **LORD ELDON, L.C.**—This is an appeal by the Newcastle-upon-Tyne Fire Insurance Co. from a judgment of the Court of Session by which they were held liable in the payment of a sum of £1,647 upon a policy of insurance, and the question is whether this judgment was right or not. The summons stated that the Newcastle company were indebted to the pursuers in a sum of £1,647, in terms of a policy dated April 16, 1805 (your Lordships will note the date), and concluded for payment accordingly. B

The policy itself was in these terms :

“Whereas Mr. Hugh M'Morran & Co., etc., have paid the sum of £21 5s. 8d. to the society of the Newcastle-upon-Tyne Fire Office and do agree to pay or cause to be paid to the said society at their office in Newcastle-upon-Tyne, the sum of £17 17s. on June 24, 1806, and the like sum of £17 17s. yearly on June 24 during the continuance of this policy, as a premium for the insurance from loss or damage by fire, of £50 on millwright's work, including all the standing and going gear in their mill, which is used as a cotton and woollen mill, situated at Garschew as aforesaid, being in their own occupation only, and stone built and slated; £550 on clockmakers' work, carding and breaking engines, and all movable utensils in the second floor, occupied as a cotton mill; £160 on stock of cotton in the same; £600 on clockmakers' work, carding and breaking engines, and all movable utensils in the first floor, occupied as a woollen mill; and £350 on stock of wool in the same.” C

Then followed this very material passage :

“warranted that the above mill is conformable to the first class of cotton and woollen rates delivered herewith.” D

The materiality of that consisted in this (though in one view whether it was material or not did not signify, i.e., if it was a condition precedent), that if it was of the second class and not of the first a larger premium ought to have been given. The policy goes on :

“Now know all men by these presents that from the day of the date hereof until the said June 24, 1806, and so from year to year so long as the said Hugh M'Morran & Co. shall duly pay, etc., the sum of £17 17s., etc., and the same shall be accepted by the trustees or acting members of the said society for the time being, the stock and fund of the said society shall be subject and liable to pay, etc., all such damage and loss as the said Hugh M'Morran & Co. shall suffer by fire, not exceeding the sum of £1,700, etc.” E

There followed at the bottom an entry of the receipt of the government duty of £2 from April 16, 1805, up to June 24, 1806. This instrument could never have been produced in court if it were only on account of the revenue, save as a policy of April 16, 1805, on which as a policy so dated the demand could have been made. But whether that was so or not the demand was made on this policy. On June 24, 1806, the premium must again be paid and the duty to government. and whether the demand was on the policy originally entered into or on the renewed policy it must be on a policy liable to such a duty and of this date. F

In the appellant's Case it is stated that the printed proposals formed part of the contract, and that besides being referred to a copy is always delivered to the party insuring; and that it is there set out, among other things, that if any G

“person or persons shall insure his, her, or their houses, mills, etc., and shall cause the same to be described in the policy otherwise than as they really are. H

so as the same shall be insured at a lower premium than proposed in the table, such insurance shall be of no force."

As to their so setting it out in their printed proposals, in the case of a warranty it is unnecessary to consider that, for, if there is a warranty, the person warranting undertakes that the matter is such as he represents it, and, unless it be so, whether it arises from fraud, mistake, negligence of an agent, or otherwise, then the contract is not entered into. There is in reality no contract.

They further state that by another article of these proposals, it is provided :

"All persons insured by this society sustaining any loss or damage by fire, are forthwith to give notice thereof at their office in Newcastle, and as soon as possible after to deliver in as particular an account of their loss or damage as the nature of the case will admit, and make proof of the same, by their oath or affirmation, according to the form practised in the said office, and by their books of accounts, or other proper vouchers, as shall be reasonably required . . . and until such affidavit and certificate shall be made and produced, the loss-money shall not be payable; and if there appear any fraud or false-swearing, such sufferers shall be excluded from all benefit by their policies."

They further represent that in the second set of proposals for the insurance of cotton mills, etc., certain classes of buildings were specified, according to the particulars of which the premium is at a lower or higher rate. Thus, class 1 comprehends

"buildings of brick or stone, and covered with slate, tile, or metal, having stoves fixed in arches of brick or stone on the lower floors, with upright metal pipes carried to the whole height of the building, through brick flues or chimneys, or having common grates, or close or open metal stoves or coakles, standing at a distance of not more than one foot from the wall, on brick or stone hearths, surrounded with fixed fenders, and not having more than two feet of pipe leading therefrom into the chimney, and in which, or in any building adjoining thereto, although not communicating therewith, no drying stove or singeing frame shall be placed."

I request your Lordship's particular attention to the words "not having more than two feet of pipe leading therefrom into the chimney." Class 2 comprehends

"buildings of brick or stone, and covered with slate, tile, or metal, which contain any singeing frame, or any stove or stoves, having metal pipes or flues, more than two feet in length, and in which, or in any building adjoining thereto, although not communicating therewith, no drying stove shall be placed."

As I understand this the reason for requiring a higher premium for mills of the second class is that the greater length of the pipe increases the danger. If the pipe of the stove is a yard in length, for instance, the danger is increased beyond what belongs to pipes of two feet. It is immaterial whether I misunderstand this or not, for, if the mill was warranted as being of the first class, it must be such as it is warranted to be, unless there is something to oust the warranty, otherwise there is no contract.

This mill was burnt, and, as generally happens in these cases, the insured were very anxious to get their money and the insurers were not very ready to pay. An action was then brought to compel payment, to which defences were given in. As to that defence which was the most unwelcome to hear, viz., that the premises has been wilfully set on fire, it appeared that there was no ground for it, and the Court of Session seem to have thought that there was no ground for the imputation of fraud and overvalue. It is not likely at any rate that the articles were undercharged, and it was extremely difficult to make out a case of overvalue where the books and papers were all destroyed, and when the amount of

these improvements and the value of spinning-jennies and such articles were to be calculated. But though one cannot help believing that enough was charged, it might be dangerous to say under the circumstances that that defence ought to be sustained. A

But there was another very material point of defence stated, that this mill, which was warranted as being of the first class with a pipe of two feet, was in reality of the second class, and that, being of the second class, whether there was fraud or not, whether the misstatement on the part of the insured arose from fraud or from mere error, inattention, or the mistake of an agent (unless they were misled by the agent of the Newcastle company) or from whatever other cause, the contract never had effect. B

Evidence was gone into as to whether the mill was of the first or second class. The Court of Session seems to have thought it immaterial whether it was or not. But if the mill was warranted as of the first class, and was really of the second class, the judgment of the court below was clearly erroneous, for it is a first principle in the law of insurance, on all occasions, that where a representation is material it must be complied with—if immaterial, that immateriality may be inquired into and shown; but that if there is a warranty it is part of the contract that the matter is such as it is represented to be. Therefore, the materiality or immateriality signifies nothing. The only question is as to the mere fact. It is proposed then that the matter should stand over for a day or two in order to examine the case again for the purpose of further inquiry as to that fact, but my present impression is that the mill was not such as it was warranted to be, and that, therefore, all consideration of fraud or overvalue is out of the question unless it can be effectually answered that the insured were misled by the insurers or their agent. Then they say that the misrepresentation was owing to the agent of the Newcastle Fire Co. I cannot say, however, that they have made out that point, and it is denied on the other side, and may, therefore, be laid out of the question. C D E

They say further that there was no effectual policy till the premium was paid, and refer to the terms of art. 4 of the printed proposals which declares that F

“no insurance is considered by this office to take place till the premium be actually paid by the insured, his, her, or their agent, or agents.”

The premium, they say, was not paid till a considerable time after the date of the policy. G

The respondents say that the alteration was made which brought this mill within the description of the first class of mills before the premium was paid, and that the alteration had been communicated to the agent of the company. The company deny that any such communication was made, and, even if it had been made, it would have been still necessary to consider how far that circumstance could alter the law as applicable to the case. As the fact was denied and there was no proof of it, that point may be considered as out of the question. With respect to the effect of the article referred to, the appellants contend that it did not relate to the first policy, but to the renewals of policies. In the present case it is not necessary to consider whether it related to the first policy or any renewal of it as they say that as between the respondents and them the premium had in point of fact been paid before the alteration took place, as the Scottish agent had accounted for it to his constituents the Newcastle company before the period of the alteration, and it had, therefore, become a personal debt due to him from the Scottish company. That may be considered as an answer to the argument raised upon that ground. But suppose that were entirely out of the question, we must in this case as in all others proceed *secundum allegata et probata*, according to what is alleged and proved. If they could succeed at all on this summons it must be on a policy or contract dated April 16, 1805, and when they have founded upon that only they cannot afterwards in that action turn round and say: “Though we H I

cannot succeed on that policy, we are entitled to recover on a subsequent contract." See how the contract would be varied. This was a bilateral contract of the date of April 16, 1805, from which period to June 24, 1806, the premium was acknowledged to have been paid, and it was agreed that a certain premium should continue to be paid on June 24, de anno in annum. Can your Lordships convert that into a transaction commencing not in April, but in September, 1805?

Suppose the fire, after being smothered for some time in the mill, had burst out the day before the money was paid to the agent of the Newcastle company, could that company say: "Though the premium has been paid us by our agent, and we own the receipt of the money, yet as you did not pay the agent we are not bound." Acquitting M'Morran & Co., then, of all fraud in the business, the question is reduced to this: "Are you M'Morran & Co. looking to the facts and evidence as applicable only to the policy of April, 1805, entitled to recover under this contract?"

I have said so much because I consider it as of the greatest importance that the mercantile law should be uniform all over the country, and because it is dangerous, therefore, to decide these questions of insurance without being sure what may be the effect of the decision and the nature of the doctrine which may result from it. If this is to be taken as a contract of April, 1805, and the premises were not of the class of which they were warranted to be, it appears to me quite clear that the respondents ought not to recover. If the Court of Session was of opinion that the danger and risk was not greater in mills of the second class than in those of the first class, though that were sworn to by five hundred witnesses, it would signify nothing. The only question is: What is the building *de facto* that I have insured?

July 10, 1815. **LORD ELDON, L.C.**—Since I had the honour of addressing your Lordships the other day on this case, I have looked again at all the papers. I repeat what I before said and what indeed the appellants themselves have authorised me to say, that there is no ground whatever for the imputation that the mill had been wilfully set on fire. As to the question of fraud and false swearing, on the best consideration I have been able to apply to the case, though there appears a tendency to state the loss as high as it can be fairly carried, I cannot say that there is anything which amounts to fraud and falsehood. Another ground was that this summons proceeded on a policy, dated April 16, 1805, and that it contained a warranty that the building belonged to the first class described as having the stoves not more than one foot from the wall, with pipes or flues not more than two feet in length. I stated the doctrine of warranty, and on the best consideration I have been able to give the case, I do not think that the warranty was made good. The remaining question then was whether, attending to the nature of the summons the respondents could be considered as having insured of a date posterior to April, 1805, and after the alteration had taken place in the description of the building. I stated my opinion that they could not on this summons. It appears to me then that the appellants ought to be assoilized in this action, and if the respondents have other special circumstances to allege, they may take advice whether they ought to proceed upon another summons. But I think they cannot succeed on this, and I am, therefore, of opinion that the judgment of the court below ought to be reversed.

Appeal allowed.

RUDING v. SMITH (FALSELY CALLED RUDING)

[CONSISTORY COURT OF LONDON (Lord Stowell), July 18, 28, August 1, 1821]

[Reported 2 Hag. Con. 371; 1 State Tr. N.S. 1054; 161 E.R. 774]

Conflict of Laws — Marriage — Validity — Solemnisation abroad — Recently conquered territory—Non-compliance with law of territory.

It is no part of the law of England or of the law of nations that on the conquest of a territory by an invading nation the subjects of that nation, in the absence of special terms in the agreement of capitulation, will be bound by the law previously existing in the territory.

Accordingly, where a marriage took place at the Cape of Good Hope in 1796, a year after the Dutch in that colony had surrendered to the British, between British subjects who were not permanently resident in the colony, and, while the marriage did not comply with the Dutch law which had prevailed in the colony before its acquisition by the British, it was celebrated according to English law by an English chaplain with the permission of the commander of the British forces in the colony,

Held: a libel in which it was alleged that the marriage was invalid as not being in compliance with Dutch law and should be declared null and void should not be admitted.

Notes. Considered: *Kent v. Burgess* (1840), 11 Sim. 361; *Taczanowska (orse. Roth) v. Taczanowski* (*Krystek cited*), [1957] 2 All E.R. 563. Applied: *Preston (orse. Putynski) v. Preston (orse. Putynska (orse. Basinska)*, [1963] 2 All E.R. 405. Referred to: *R. v. Millis* (1844), 10 Cl. & Fin. 534; *Ward v. Day* (1846), 5 Notes of Cases, 66; *Connelly v. Connelly* (1851), 2 Rob. Eccl. 201; *Brook v. Brook* (1858), 3 Sm. & G. 481; *Armitage v. Armitage* (1866), L.R. 3 Eq. 343; *Bater v. Bater*, [1906] P. 209; *Berthiaume v. Dastous*, [1929] All E.R. Rep. 111.

As to the legality of marriages solemnised abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 88 et seq.; and for cases see 11 DIGEST (Repl.) 455 et seq.

Cases referred to:

- (1) *Robinson v. Bland* (1760), 1 Wm. Bl. 256; 2 Burr. 1077; 96 E.R. 141; 6 Digest (Repl.) 402, 2866.
- (2) *Calvin's Case* (1608), 7 Co. Rep. 1 a; Jenk. 306; 2 State Tr. 559; 77 E.R. 377; sub nom. *Union of Scotland and England Case*, Moore, K.B. 790; 11 Digest (Repl.) 560, 2.
- (3) *Campbell v. Hall* (1774), 20 State Tr. 239; 1 Cowp. 204; Lofft. 655; 98 E.R. 1045; 2 Digest (Repl.) 196, 167.
- (4) *Dalrymple v. Dalrymple* (1811), 2 Hag. Con. 54; 161 E.R. 665; on appeal (1814), 2 Hag. Con. 137, n.
- (5) *Compton v. Bearcroft* (1769), Bull. N.P. 113; 2 Hag. Con. 444, n.; 161 E.R. 799; 11 Digest (Repl.) 463, 967.
- (6) *Ilderton v. Ilderton* (1793), 2 Hy. Bl. 145; 126 E.R. 476; 11 Digest (Repl.) 498, 1182.
- (7) *Burn v. Farrar* (1819), 2 Hag. Con. 369; 161 E.R. 773; 11 Digest (Repl.) 466, 955.
- (8) *Middleton v. Janverin* (1802), 2 Hag. Con. 437; 161 E.R. 797; 11 Digest (Repl.) 462; 957.
- (9) *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395; 161 E.R. 782; 11 Digest (Repl.) 462, 955.

Petition by the husband for nullity of a marriage celebrated in a room in a private house between the parties, being British subjects, at the Cape of Good Hope, on Oct. 22, 1796, by the chaplain of the English forces, by virtue of a licence or permission from General Sir James Craig, the commander of the British forces in the colony.

The libel pleaded the surrender of the Cape to the British forces in 1795, and the terms of capitulation

"that the inhabitants of the Cape should preserve their prerogatives, and the exercise of public worship, which they at present enjoy"

and that the laws of the United Provinces, which were in force at that time, had never been repealed or altered. It then set forth the law of Holland respecting marriage, and alleged that between persons both, or either of them, dissenting from the religion established by law, marriage must be solemnised or contracted before a magistrate, or otherwise the same would be null and of no effect, and that no exception was allowed for persons being strangers or foreigners. It then pleaded the principal circumstances in the situation of these parties

"that the wife was born at Fort Saint George, in India, in November, 1777, and Mr. Ruding in 1774, in England, and that they were resident at the Cape in September and October, 1796."

It was prayed that the marriage, being had in a private house and not in the parochial church, without banns or licence, and without consent of parents as required by the law of Holland, might be pronounced to be null and invalid.

Dr. Jenner and *Dr. Phillimore*, opposing the admission of the libel, submitted that, though the principle of *lex loci*, which was assumed in the libel, might be very just as an affirmative position, it would not follow that the converse of that proposition was true, namely, that no marriage contracted in a foreign country could be good unless it was solemnised according to the law of the place. The general principle could not apply to persons being at the Cape, as British subjects under the protection of the British forces then in possession of the settlement by virtue of the recent surrender; such persons must be supposed to contract with reference to the law of their own country, according to the distinction maintained even by *HUBER* [*PRÆLECTIONES JURIS CIVILIS*; *DE CONFLICTU LEGUM*, lib. 1, tit. 3, s. 10], and admitted by *LORD MANSFIELD* in *Robinson v. Bland* (1), that marriage is to be considered not so much with respect to the *locus contractus* as of the place where it is to be exercised. The terms of the capitulation might preserve to the inhabitants the enjoyment of their former laws, but it would be unreasonable to impose them as paramount authority on all English subjects, who might be with the British army in the condition of conquerors. In Gibraltar, in the East Indies, and in other places, the exercise of particular religions is reserved to inhabitants, yet the marriages of English subjects in those places, under the English laws, had never been disputed.

Dr. Lushington and *Dr. Dodson*, supporting the libel, contended that it had been established by the highest authority that in conquered countries the laws remained in force until altered by competent authority: *Calvin's Case* (2), 7 Co. Rep. at p. 17 b. The authority of the laws, so continued, was binding on all persons, and there was no distinction as to contracts between natives and strangers except as to property situated in another country: *Campbell v. Hall* (3), 1 Cowp. at p. 208. It had been laid down in this court in *Dalrymple v. Dalrymple* (4) that all persons contracting marriage are bound to celebrate such marriage according to the *lex loci*. It had been so held in older cases—in *Compton v. Bearcroft* (5), and in *Ilderton v. Ilderton* (6), and the distinction now contended for as to persons in the character of conquerors could not be maintained. In *Burn v. Farrar* (7), which was a case of British subjects married in France by licence and the permission of the Duke of Wellington, the court admitted the libel, but intimated that it was a question of moment in which it was not disposed to proceed further in the absence of the husband who was said to be gone to South America. If that marriage could be held good, it must be owing to the particular situation of the British armies in France. There was no conquest, and no natural communication with the civil authorities, nor opportunity of resorting to the

tribunals of the country. In this instance such a plea could not be advanced as the laws had been recognised, and there was a special provision in those laws for the case of strangers and dissenters from the religion of the place by which the celebration of this marriage might have been had as easily as by the mode which had been adopted. The principle of resorting to English law would carry with it a great inconvenience, as the law so imported, would be, not the present law of England, but such as had been in force seventy years ago. The case of British subjects in India was peculiar and *sui generis* as they were exempted from the law of the country and lived as persons in factories [trading settlements] under the faith of treaties and the provisions of sundry charters and Acts of Parliament. In *Middleton v. Janverin* (8), a marriage solemnised in Flanders, but not according to the *lex loci*, had been set aside. On those authorities this marriage, being had without publication of banns and without a licence from any competent authority, or according to the laws of Holland, was null and void.

Aug. 1, 1821. **LORD STOWELL.**—This is a suit brought by Walter Ruding, against Jemima Claudia Smith for the purpose of praying this court to pronounce null and void his marriage had with that lady under the following circumstances. She was born at Fort St. George, in the East Indies, in November, 1777. His birth took place at Kineton, in the county of Warwick, on May 13, 1774. In September, 1796, she was at the Cape of Good Hope; the Cape had surrendered a year before. For what purpose she came thither, or how long she meant to remain, does not appear. At the same time Mr. Ruding came thither also, on his way to the East Indies, being at that time a captain in the 12th Regiment of Foot. On Oct. 22, 1796, they were married by the chaplain of the British garrison under the authority of a licence granted by General Craig, the commander in chief of the British forces in that country. When the marriage was performed, Mr. Ruding was of full age, but the lady was under the age of nineteen. The consent of parents or guardians, required by the Dutch law then generally prevailing at the Cape, was not obtained, as regarded either of the contracting parties. Her father had died some years before, her mother had married a second husband, and no appointment of guardians had taken place. It is contended by the husband, that by the Dutch law at that time in force at the Cape, this marriage was null and void, and on that ground he seeks the aid of this court, to pronounce a sentence declaratory of its nullity.

The facts which I have stated, and the Dutch law under which, if applied to these facts, the marriage is to be invalidated, are pleaded in the libel, and I think that there is little doubt, that the Dutch law with respect to persons to whom it really applies, is fairly represented, and would be so proved, if the libel was admitted. Little doubt is there that the facts of the case would be established by clear proof, but the real question is whether the Dutch law, so pleaded, ought to govern entirely and exclusively this case of fact applying to these individuals. For, if it ought not, the libel, which rests the case upon it, ought not to be admitted.

In order to maintain that the Dutch law ought to govern the case, the party pleads, first, an article in the capitulation under which the Dutch colony was surrendered to the British arms. That stipulation covenants that the inhabitants shall preserve the prerogatives which they enjoy at present. The meaning of this article, be it what it may, for the term used "prerogatives" is sufficiently indefinite and obscure, can never be extended to the British conquerors, *ex vi terminorum*. They are the grantors, not the grantees. They were not in the enjoyment of any prerogatives whatever under the Dutch law; they had nothing under it which they could wish to preserve. It is impossible that the Dutch could intend to stipulate for them. It has, therefore, I think been nearly admitted that as to the British conquerors this article has no intelligible application. Consequently, if the Dutch law binds them, it must be by some other obligation.

A by which, independent of this article of capitulation, the Dutch law imposes itself upon them.

In order to bring it a little nearer, after pleading in the following articles what the Dutch law of marriage is, it is stated also

B "that that law binds all persons whatever within the colony, foreigners as well as natives, for that their laws say so, and that their learned lawyers will support that doctrine, and that their courts will enforce it."

C If that be true, that the law binds the British conqueror immediately upon the capitulation (there being no express covenant to that effect), it must be either from some known rule of the law of nations which subjects the conquerors to the laws of the conquered, or from some peculiar principle of the law of England which imposes such an obligation upon the British conquerors of the possessions of the enemy, for clearly the Dutch law, taken by itself, cannot directly, and by its own force, bind them. Dutch authority could not impose it, for Dutch authority had ceased, and a Dutch court, taking upon itself to force this law upon British parties only, and in transactions purely British, might be thought to put forward no very just or moderate pretension unless some authority, superior to it, had imparted to it a force, which it did not itself directly possess. Such an authority, if it exists at all, must be found either in the law of nations, or in the British law, for no other authority could give it. I am not aware that any such principle or practice exists in the general law of nations. It sometimes happens that the conquered are left in possession of their own laws—more frequently the laws of the conquerors are imposed upon them; and sometimes the conquerors, if they settle in the country, are content to adopt for their own use such part of the laws, prevailing before the conquest, as they may find convenient, under the change of authority, to retain. I presume that there is no legal difference between a conquered country and a conquered colony in this respect, as far as general law is concerned, and I am yet to seek for any principle, derivable from that law, which bows the conquerors of a country to the legal institutions of the conquered. Such a principle may be attended with most severe inconvenience in its operation. The laws may be harsh and oppressive in the extreme, and may contain institutions abhorrent to all the feelings, opinions, and habits of the conquerors. At any rate they can be but imperfectly understood, and that they should all of them instantaneously attach, and continue obligatory upon them, until their own government had time to learn them, and select and correct them, is a proposition which, I think, a professor of general law would be inclined to consider cautiously, before it could be unreservedly admitted.

I It is argued to be the doctrine of the law of England; if so, it is not the less hard, as the municipal code of our country is generally admitted to be more liberal and more indulgent, than the codes of most other countries. It would be a most bitter fruit of the victories of its subjects if they were bound to adopt the jealous and oppressive systems of all the countries, which they subdued, and to groan under all the tyranny, civil and ecclesiastical, of those systems until their own government, occupied by the pressure of existing hostilities, had time to look about, to collect information, and to prescribe rules of conduct more congenial to their original habits. To learn what the laws of a country are is not the work of a day, or even in pacific times and to persons accustomed to legal inquiries, and to construct a code fit for such a new and mixed situation of persons and things, demands, not without reason, a very serious *tempus deliberandi*, and conquerors are, certainly, not the last men who are entitled to the protection of their country under new grievances.

I am perfectly aware, that it is laid down generally, in *Calvin's Case* (2) and *Campbell v. Hall* (3)

"that the laws of a conquered country remain, till altered by the new authority." A

I have to observe, first, that the word "remain" has, *ex vi termini*, a reference to its obligation upon those in whose usage it already existed, and not to those who are entire strangers to it in the whole of their preceding intercourse with each other. Even with respect to the ancient inhabitants, no small portion of the ancient law is unavoidably superseded by the revolution of government that has taken place. B The allegiance of the subjects and all the law that relates to it—the administration of the law in the Sovereign and appellate jurisdictions—and all the laws connected with the exercise of the sovereign authority—must undergo alterations adapted to the change. This very libel furnishes instances of this sort. In the third article it is stated: C

"Dispensations from the publication of banns must be had from the authority of the States of Holland."

That, I must presume, could not be continued during the existence of the war, and the extinction or suspension of the sovereignty of that nation. But, secondly, though the old laws are to remain, it is surely a sufficient application of such terms "that they shall remain in force," if they continue to govern (so far as they do continue) the transactions of the ancient settlers with each other and with the newcomers. To allow that they shall intrude into all the separate transactions of these British conquerors is to give them a validity, which they would otherwise want in all cases whatever. D

It is certainly true, that in *Campbell v. Hall* (3), that most eminent judge, Lord Mansfield, a person never to be named but with accompanying expressions of reverence, has laid down the following proposition (1 Cowp. at p. 208): E

"The law and legislative government of every dominion equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives." F

HUBER (*DE CONFLICTU LEGUM*, lib. 1, tit. 3, s. 2) too, speaking upon general principles, had before promulgated the same doctrine:

"Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorantur." G

But to such a proposition, expressed in very general terms, only general truth can be ascribed, for it is, undoubtedly, subject to exceptions.

It is not to be said that Ambassadors and public ministers are subject to the whole body of the municipal law of the country where they reside. They belong, in great part, to the country which they represent. Even the native and resident inhabitants are not all brought strictly within the pale of the general law. It is observed by the learned Dr. Hyde that there is in every country a body of inhabitants, formerly much more numerous than at present (and now generally allowed to be of foreign extraction) having a language and usages of their own, leading an erratic life, and distinguished by the different names of Egyptians, Bohemians, Zingarians, and other names, in the countries where they live. Upon such persons the general law of the country operates very slightly, except to restrain them from injurious crimes, and the matrimonial law hardly. I presume, in fact, anywhere at all. In our own country and in many others, there is another body, much more numerous and respectable, distinguished by a still greater singularity of usages, who, though native subjects, under the protection of the general law, are, in many respects, governed by institutions of their own, and, particularly, in their marriages, for it being the practice of mankind to consecrate their marriages by religious ceremonies, the differences of religion in all countries that admit residents professing religions essentially different unavoidably introduce H I

A exceptions in that matter to the universality of that rule which makes mere domicile the constituent of an unlimited subjection to the ordinary law of the country. The true statement of the case results to this, that the exceptions, when admitted, furnish the real law for the excepted cases; the general law steers wide of them. The matrimonial law of England for the Jews is their own matrimonial law, and an English court examining the validity of an English Jewish marriage would examine it by that law, and by that law only, as has been done in the cases that were determined in this court on those very principles. If a rule of that law be that the fact of a witness to the marriage having eaten prohibited viands or profaning the Sabbath day would vitiate that marriage itself, an English court would give it that effect, when duly proved, though a total stranger to any such effect upon an English marriage generally. I presume that a Dutch tribunal would treat the marriage of a Dutch Jew in a similar way, not by referring to the general law of the Dutch Protestant Consistory, but to the ritual of the Dutch Jews established in Holland.

C What is the law of marriages in all foreign establishments settled in countries professing a religion essentially different? In the English factories [trading settlements] at Lisbon, Leghorn, Oporto, Cadiz and in the factories in the East —Smyrna, Aleppo, and others—(some of these establishments existing by authority under treaties, and others under indulgence and toleration) marriages are regulated by the law of the original country to which they are still considered to belong. An English resident at St. Petersburg does not look to the ritual of the Greek Church, but the rubric of the Church of England, when he contracts a marriage with an English woman. Nobody can suppose that while the Mogul empire existed, an Englishman was bound to consult the Koran for the celebration of his marriage. Even where no foreign connection can be ascribed, a respect is shown to the opinions and practice of a distinct people. The validity of a Greek marriage in the extensive dominions of Turkey is left to depend, I presume, upon their own canons without any reference to Mohammedan ceremonies. There is a *jus gentium* upon this matter—a comity which treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in this transaction of marriage. It may be difficult to say, *a priori*, how far the general law should circumscribe its own authority in this matter, but practice has established the principle in several instances, and where the practice is admitted it is entitled to acceptance and respect. It has sanctioned the marriages of foreign subjects in the houses of the Ambassadors of the foreign country, to which they belong. I am not aware of any judicial recognition upon the point, but the reputation which the validity of such marriages has acquired makes such a recognition by no means improbable if such a question was brought to judgment.

G In the case which has now occurred, the case of a conquering force stationed in a conquered country or colony for the purpose of enforcing the reluctant obedience of the natives and composing for the present a distinct and immiscible body, can it be maintained that the success of their arms and the service of vigilant control in which they are employed lays them at the feet of the civil jurisdiction of the country without any exception whatever? In *Burn v. Farrar* (7) the court intimated its opinion (for the case never reached a decision) that the law of France would not apply to an officer of the English Army of Occupation, marrying an English lady, on the ground that at that time and under such circumstances the parties were not French subjects, under the dominion of French law, and surely the condition of a garrison of a subdued country is not more capable of impressing the domestic character and all the obligations it carries with it than the situation of the army of occupation at that time in France.

I Much of the order of a society, so peculiarly placed, depends upon a discreet application of general principles to particular institutions. This can hardly be specified beforehand. But that the whole mass of law, formed for another state of things and for a status personarum widely different, is to be immediately forced

down upon these foreign guardians, in their own separate transactions and without any reserve or limitation is a proposition much too inconvenient in its consequences, to be perfectly just in its principle. A

The time of this transaction is to be considered. The marriage took place at no great distance of time from the compelled surrender. This case, therefore, has no resemblance to the case of Ireland, the Isle of Man, the plantations, or even Minorca, where recognised civil governments had been established, and a permanent system introduced, of which all must be supposed cognisant. The Cape was conquered, but not ceded, and it remained for a treaty of peace to decide to whom it was to belong. The ancient civil sovereignty was suspended, and no other fully established in its place. The character of the individuals is likewise to be considered. The husband goes there, not as a volunteer or a settler, by intention of his own, or there to remain, but in the character of a British soldier in the prosecution of a further voyage directed by British authority. He does not put himself under the law of the place; he goes there neither to purchase, sue, nor live. What the legal case of persons engaging in such concerns would be, I am not called upon to inquire, much less am I disposed to determine. The party principal is a military servant of the British government, sent upon a public errand elsewhere, and, though in itinere, is not so upon any movement of his own. Whatever a Dutch court might determine upon the general case of a foreigner, or even of a passing traveller, however just in such cases, has no pertinent application to the present. B C D

Suppose the Dutch law had thought fit to fix the age of majority at a still more advanced period than thirty, at which it then stood—at forty—it might surely be a question in an English court, whether a Dutch marriage of two British subjects, not absolutely domiciled in Holland, should be invalidated in England upon that account, or, in other words, whether a protection, intended for the rights of Dutch parents, given to them by the Dutch law, should operate to the annulling a marriage of British subjects, upon the ground of protecting rights which do not belong in any such extent to parents living in England, and of which the law of England could take no notice, but for the severe purpose of this disqualification. The Dutch jurists, as represented in this libel, would have no doubt whatever that this law would clearly govern a British court, but a British court might think that a question, not unworthy of further consideration before it adopted such a rule, for the subjects of this country. In the article of the libel which follows, it is alleged that such a marriage would be declared by Dutch tribunals and Dutch jurists not only null and void in Holland and the colonies, but likewise in this kingdom and in every other country. I should presume that this is a claim of universal jurisdiction which Dutch jurists and Dutch tribunals would not make for themselves. In deciding for Great Britain upon the marriages of British subjects, they are certainly the best and only authority upon the question whether the marriage is conformable to the general Dutch law of Holland. and they can decide that question, definitively, for themselves and for other countries. But questions of wider extent may lie beyond this—whether the marriage be not good in England, although not conformable to the general Dutch law, and whether there are not principles leading to such a conclusion. Of this question, and of those principles, they are not the authorised judges, for this question and those principles belong either to the law of England, of which they are not authorised expositors at all or to the *jus gentium*, upon which the courts of this country may be supposed as competent as themselves, and, certainly, in the cases of British subjects much more appropriate judges. E F G H I

It is true, indeed, that English decisions have established the rule that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere else, but they have not *e converso* established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England. It is, therefore, certainly, to be advised, that the safest course is always to be married according to the law of the country, for then no question can be

A stirred, but if this cannot be done on account of legal or religious difficulties, the law of this country does not say that its subjects shall not marry abroad. Even in cases where no difficulties of that insuperable magnitude exist, yet, if a contrary practice has been sanctioned by long acquiescence and acceptance of the one country, that has silently permitted such marriages, and of the other that has silently
B accepted them, the courts of this country, I presume, would not incline to shake their validity upon these large and general theories, encountered, as they are, by numerous exceptions in the practice of nations.

The libel here states a case of marriage as nearly entitled to the privileges of strict necessity as can be. The husband was a person entitled, by the laws of his own country, to marry without consent of parents, or guardians, being of the age of twenty-one, but by the Dutch law, he could not marry without such consent till
C he was thirty years of age. I do not mean to say that HUBER [DE CONFLICTU LEGUM, lib. i, tit. 3, s. 12] is correct in laying down as universally true: "that personales qualitates, alicui in certo loco jure impressas, ubique cir cumferri, et personam comitari"—that, being of age in his own country, a man is of age in every other country, be their law of majority what it may, yet it is not to be laid
D out of the case that the Dutch law would impose in this respect a very unfavourable disability upon the British subject, and one which, in the situation of this individual, it was extremely difficult, indeed, almost impossible for him to remove, even supposing that the Dutch law contemplated the protection of parental rights of British subjects living in England. His father lived in England, and he was pursuing his prescribed course to the East Indies for the military service. The
E lady was a little younger, but her father had died in the East Indies, her mother was married again, and no guardian had been appointed. It would puzzle the person most versed in that most difficult chapter of general law, the conflictus legum, to say how a marriage could be effected under such circumstances in a manner satisfactory to the Dutch requisitions. Under such difficulties as regarded the Dutch law, the marriage naturally enough was not solemnised with any
F reference to that law, but under a formal licence from the British governor and by the ministration of an English clergyman, the chaplain of the English garrison. The Crown, it is admitted, has the power of altering all the laws of a conquered country. This is an act passing under the authority of the representative of the British Crown and between British subjects only, in which Dutch subjects have no
G interest whatever, for the parties were no settlers there. It is to be presumed, that the representative was not acting without the knowledge and permission of his government, if that permission was absolutely necessary to legalise that act. It was not so, in my opinion, unless the Dutch law involved such persons in its obligations, for otherwise no Dutch law was invaded by the act, though the sanction of government might be requisite for the purposes of order and notoriety.

It is, therefore, under all these circumstances that I am called upon to dissolve
H a marriage of twenty-five years standing, upon a ground of nullity which is alleged to have existed in its formation, though the vinculum has remained untouched by either party during the whole time. I know that in strict legal consideration I am to examine this marriage in the same way as if it had taken place only yesterday. It is likewise not improbable that the stability of many marriages may depend upon the fate of this, for, doubtless, many have taken place in a way very similar. But
I I know that I must determine it upon principles, and not upon consequences. Authority of former cases, there is none. The decision in *Middleton v. Janverin* (8) turned upon a ground of impeachment that was directly the reverse of what is attempted in the present case, for the ground there was that it was a bad marriage under the lex loci to which it had resorted. So in *Scrimshire v. Scrimshire* (9) where a marriage was celebrated in France according to the French ceremonial by a priest of that country, but was totally null and void, as clandestine, under its law [the priest was unlicensed and the parties, being minors, married without the consent of parents]. The ground here is, that it did not resort at all to the lex loci.

In my opinion, this marriage (for I desire to be understood as not extending this decision beyond cases including nearly the same circumstance) rests upon solid foundations—on the distinct British character of the parties, on their independence of the Dutch law in their own British transactions, on the insuperable difficulties of obtaining any marriage conformable to the Dutch law, on the countenance given by British authority and British ministration to this British transaction, upon the whole country being under British dominion, and upon the other grounds to which I have adverted—and I, therefore, dismiss this libel, as insufficient, if proved, for the conclusion it prays.

Libel dismissed.

ATTORNEY-GENERAL (ON THE RELATION OF CHURCHILL AND ANOTHER) v. DUKE OF MARLBOROUGH

[VICE-CHANCELLOR'S COURT (Sir John Leach, V.-C.), December 18, 19, 21, 24, 1818]

[Reported 3 Madd. 498; 56 E.R. 588]

Settled Land—Tenant in tail—Powers—Power to destroy mansion-house and cut timber—Restraint from alienation.

At common law a limitation to a man and the heirs of his body resulted in his not having the absolute property in the estate until issue was born, but when issue was born, the condition being performed, the estate became absolutely his property and he could dispose of it in the same manner as if he held it in fee-simple. By the second Statute of Westminster and the statute 32 Hen. 8, c. 28 (repealed by Law of Property (Amendment) Act, 1924), the tenant in tail was restrained from alienation except in the case of certain leases. With the exception, therefore, of alienation including leases unless according to the later statute, a tenant in tail came to be considered as much the absolute owner of the estate as a tenant in fee simple, and, as such, might do what he pleased with the buildings and timber on the estate.

Where, however, an estate was granted as a reward for public services and it appeared to the court that it was the intention of the legislature that it should descend and be enjoyed by the family with honours and dignities also granted and not that the successive possessors of those honours and dignities should have rights of property over it,

Held: a tenant in tail had no absolute and unqualified right to cut timber which was essential to the shelter and ornament of the house.

Document—Construction—Ab inconvenienti—Alternative constructions possible—Rejection of construction resulting in inconvenience.

The argument of inconvenience is sometimes of great value on the question of the intention of the maker of a deed or other document. If there be in any deed or instrument equivocal expressions and great inconvenience must follow from one construction, it is strong to show that that construction is not according to the true intention of the grantor. Where there is no equivocal expression in the instrument and the words admit of only one meaning arguments of inconvenience prove only want of foresight in the grantor, but because he wanted foresight courts will not make a new instrument for him. It must act on the instrument as it is made.

Statute—Construction—Implication from statutes in pari materia.

The sense and meaning of an Act of Parliament and the intention of the legislature in passing it is not only to be deduced from direct expression, but

is to be collected by implication from the language of the particular Act and of other Acts which are in *pari materia*.

Notes. Applied: *Turner v. Wright* (1860), 2 De G. F. & J. 234. Referred to: *Dashwood v. Magniac*, [1891] 3 Ch. 306; *Re Marlborough's Parliamentary Estates* (1891), 8 T.L.R. 179; *Re Marlborough's Blenheim Estates and Settled Land Acts* (1892), 8 T.L.R. 582; *Re Bolton Estates, Russell v. Meyrick*, [1903] 2 Ch. 461.

As to tenancy in tail, see 32 HALSBURY'S LAWS (3rd Edn.) 274 et seq.; and for cases see 38 DIGEST (Repl.) 843 et seq.

Cases referred to:

- (1) *Knight v. Mosely* (1753), Amb. 176; 27 E.R. 118; 2 Digest (Repl.) 98, 630.
- (2) *Aston v. Aston* (1750), 1 Ves. Sen. 264, 396; Belt's Supp. 134; 27 E.R. 1021, 1103; 2 Digest (Repl.) 107, 758.
- (3) *Abrahall (Abraham) v. Bubb* (1680), 2 Swan. 172; 2 Show. 69; Freem. Ch. 53; 2 Eq. Cas. Abr. 757; 36 E.R. 581; 2 Digest (Repl.) 114, 841.
- (4) *Williams v. Day* (1680), 2 Cas. in Ch. 32; 22 E.R. 832, L.C.; 40 Digest (Repl.) 698, 1925.
- (5) *Anon.* (1704), Freem. Ch. 278; 22 E.R. 1209; 2 Digest (Repl.) 115, 843.
- (6) *Garth v. Cotton* (1753), 1 Ves. Sen. 524, 546; Dick. 183; 3 Atk. 751; 27 E.R. 1182, 1196; 2 Digest (Repl.) 114, 840.
- (7) *Cooke v. Whaley (Winford)* (1701), 1 Eq. Cas. Abr. 221, pl. 2, 400, pl. 5; 21 E.R. 1004, 1132; 2 Digest (Repl.) 115, 842.
- (8) *Williams v. Williams* (1810), 12 East, 209; 104 E.R. 81; previous proceedings (1808), 15 Ves. 419, L.C.; 38 Digest (Repl.) 848, 635.
- (9) *Countess of Shrewsbury v. Earl of Shrewsbury* (1790), 1 Ves. 227; 3 Bro. C.C. 120; 30 E.R. 314, L.C.; 40 Digest (Repl.) 758, 2439.
- (10) *Robinson v. Litton* (1774), 3 Atk. 209; 6 Cru. Dig. 428, 429; 26 E.R. 922; 2 Digest (Repl.) 96, 609.
- (11) *Bowles' Case* (1615), 11 Co. Rep. 79b; 77 E.R. 1253; sub nom. *Bowles v. Berrie*, 1 Roll. Rep. 177; 2 Digest (Repl.) 114, 838.
- (12) *Davis v. Duke of Marlborough* (1818), 1 Swan. 74; 2 Wils. Ch. 130; 36 E.R. 303; 38 Digest (Repl.) 860, 720.
- (13) *Cresset v. Mitton* (1792), 1 Ves. 449; sub nom. *Cressett v. Mytton*, 3 Bro. C.C. 481.

Demurrer by the Duke of Marlborough to a bill filed by the Attorney-General on the relation of the Hon. George Spencer Churchill, Marquis of Blandford, the duke's son and heir, and the Hon. George James Welbore Ellis Agar.

The prayer of the bill was that an account might be taken by and under the direction and decree of the court of all and singular the trees which had been cut down or felled by the order or with the permission of the defendant at Blenheim Palace, Woodstock, Oxon., and of the moneys which had been received by him or by any person by his order or for his use from the sale thereof; that the defendant might be decreed to answer the amount of such moneys; that such timber as had been cut and still remained in and about the park, woods, plantations or grounds of Blenheim might be sold by and under the direction and decree of the court; and that the amount of such moneys together with the amount of the moneys to arise from the last-mentioned sale might be secured and invested by and under the like direction and decree for the benefit of the persons entitled and to become entitled to the estate. The bill also asked that the defendant, his servants, agents and workmen, and all persons with whom he had contracted for the sale of trees or timber, their respective servants, workmen and agents, might be restrained from cutting down timber and other trees growing in and upon the Blenheim estate, which had been or were planted or growing there for the protection or shelter of the mansion-house or for the ornament of the mansion-house and the estates, and which grew or stood in lines, walks, vistas, clumps or otherwise, for the ornament of the mansion-house or of the gardens, pleasure-grounds, parks, and other grounds

belonging to the estate, and also from cutting down any timber or other trees in and upon the estate, except at reasonable times, and in a husbandlike manner, and from committing any other waste, spoil or destruction in and upon the estate. A

On the filing of the bill and affidavits in support of it an injunction was granted by the Lord Chancellor.

The Solicitor-General (*Sir Robert Gifford*) and *Sidebottom* for the plaintiffs: The question in this case is of great importance, not only to the individuals concerned, but to the public. The question is whether the present, or any future Duke of Marlborough can destroy property which was given as a perpetual monument of British gratitude for the unparalleled services of the first duke. The demurrer must be taken to admit that the duke has cut down and intends to cut down timber planted for shelter and ornament. We do not insist that he ought to be prevented cutting down any timber, but only such as was planted for shelter and ornament. C
The Crown has a right to interfere. The same principle which is to warrant the cutting down of ornamental timber would justify the demolition of the house. The estate emanated from the Crown; it was given for public services and on public grounds, and it is interested in seeing the gift is not abused. If the two Acts, the Act of 3 & 4 Ann, c. 4 [c. 6 in *Ruffhead*], and the Act of 6 Ann, c. 6 [5 Ann., c. 3, in *Ruffhead*] are to be taken together, it must be considered as an estate settled by the Crown, the reversion of which is in the Crown. Even where there is no reversion in the Crown as in the case of a bishopric the Attorney-General, on behalf of the Crown, may interfere to prevent the bishop from committing waste: *Knight v. Mosely* (1). Suppose collusion between all the parties interested in this estate, might not the Crown interfere to protect it? The plaintiff, the Marquis of Blandford, is the next in succession. Mr. Welbore Ellis Agar, it is true, has a more remote interest, but they are entitled to file such a bill as this. D
E

This estate was originally granted to the Duke of Marlborough in fee, but afterwards it was thought proper that the estate should always accompany the title, and for that purpose the statute 6 Ann., c. 6, was passed. It is an estate peculiarly limited by Parliament, and cannot, strictly speaking, be termed an estate tail. F
There is no power to alienate. The Act enables the duke to grant leases for twenty-one years or three lives, which was an unnecessary provision if he was to take an estate tail, for to such an estate such a power is incident by law. When an estate tail is granted, with a reversion in the crown, still the tenant in tail is entitled to make such leases. The legislature could not, therefore, have supposed that they were settling an estate tail on the duke. If it is to be considered as an estate tail with all its legal incidents except that of alienation it will follow as a consequence that the wife of the duke will be dowable and the next duke might only take two-thirds of the estate, for the Act provides only against Acts of the party, but dower is by act of law. So, if the title and estates descended to a daughter, her husband might be tenant by the curtesy, and if the title and estates descended to a daughter, and the daughter left four daughters only, the estate must go to them in coparcenary, although the title would go to the eldest. None of these circumstances can take place under the settlement by these Acts. It is plain, therefore, that Parliament did not mean to settle an estate tail. Parliament may and has here created a new estate. It is a statutory estate of a peculiar nature, not an estate tail; it resembles more a tenancy for life without impeachment of waste. Suppose, however, for the sake of argument, that this estate is properly termed an estate tail, or a qualified estate tail, still, there being an express clause to prevent alienation, it is a case in which, according to the principle upon which other cases have been decided, this court will interfere to prevent the destruction of ornamental timber and of the house. G
H
I

What the common law doctrine is as to waste is scarcely necessary to be considered, since this is an application founded upon the equitable doctrines of this court. By the common law a tenant in tail after possibility of issue extinct might have committed what waste he pleased, but LORD HARDWICKE in *Ashton v. Ashton* (2)

A (1 Ves. Sen. at p. 265), mentions *Abrahall* and *Bubb* (3), and classing it with the case of tenant for life without impeachment of waste, observes that "extravagant and humoursome waste," was in that case restrained. He mentions also *Williams v. Day* (4), where LORD NOTTINGHAM declares he would stop the pulling down of houses in the case of tenant in tail after possibility of issue extinct, which LORD HARDWICKE observes is carrying it a good way. There is a subsequent case, *Anon.* (5), where the

B Master of the Rolls granted such an injunction. In *Garth v. Cotton* (6) also LORD HARDWICKE cites as law the determination in *Abrahall* and *Bubb* (3). A tenant for life without impeachment of waste and a tenant in tail after possibility of issue extinct are both put in the same class with respect to relief in equity against waste, because each has a limited estate. Each is without a power of alienation, and it is unreasonable and against conscience that they should destroy the estate and

C exercise an absolute power as if they were, or could become, owners in fee. In *Cooke v. Winford* (7), on a motion to stay a jointress, tenant in tail after possibility of issue extinct, from committing waste, the court held that, she being a jointress within the statute 11 Hen. 7, c. 20 [repealed with savings by the Fines and Recoveries Act, 1833, s. 17], ought to be restrained, being part of the inheritance, which by the statute, she was restrained from alienating, and, therefore, granted an injunction against wilful waste. In *Williams v. Williams* (8) (15 Ves. at p. 421), it is stated arguendo in support of the demurrer that *Cooke v. Winford* (7) is not to be found in the REGISTRAR'S BOOK, probably because, as it appears on a search since made, the real title of the cause was *Cookes v. Whateley, alias Winford*. The minutes of the order have been found, and it appears that an injunction was

E granted to restrain wilful waste in the houses. *Countess of Shrewsbury v. Earl of Shrewsbury* (9), which was cited when the Lord Chancellor granted the present injunction and which his Lordship thought analogous in principle, has a material bearing upon the present question. It is a rule that, if a tenant in fee or in tail pays off an encumbrance, it is presumed that the estate was meant to be discharged, but, if a tenant for life pays off an encumbrance, the presumption is otherwise,

F and the onus lies upon them who contend that the estate was meant to be discharged to show that it was so meant. In the case alluded to, as Lord Shrewsbury was tenant in tail by grant from the Crown, but expressly restrained from alienation, LORD THURLOW thought he ought to apply the same rule to a tenant in tail so restricted paying off an encumbrance as was applied to a tenant for life. So, in *Robinson v. Litton* (10), an infant tenant in tail was, at the

G instance of contingent remaindermen, enjoined from cutting down timber. The legal restraint there, owing to infancy, was thought to afford a sufficient ground to interpose by injunction on behalf of those in remainder. It has been said that, if timber planted for ornament cannot be cut, it must stand for ever, but what is the consequence if it may be cut? The estate might be laid waste, the house destroyed, and this great national monument of British valour and British

H gratitude annihilated.

SIR JOHN LEACH, V.-C.—This is a case of very considerable importance, not only from the very high degree of interest which must necessarily attach to the case in itself, but because its decision involves some of those principles upon which a very important branch of the jurisdiction of this court depends.

I It is supported by the counsel who support this information that the defendant, the Duke of Marlborough, has, as incident to his estate, a right to cut down all timber other than timber planted for ornament or shelter. It is contended that under the special provisions of the statute 6 Ann., c. 6, the duke has not an estate tail and is for that reason within the principle of those cases in which courts of equity interfere to restrain the cutting of timber planted for ornament or shelter, or, if the Duke of Marlborough can be considered as having an estate tail, yet being restrained by the provisions of the statute from defeating the succession of those to whom the estate is limited after him and the reversion being in the

Crown, he is, therefore, within the same principle of equitable restraint as to the cutting of timber planted for ornament or shelter. A

That an ordinary tenant in tail may, at his pleasure, cut down all timber for whatever purposes planted, admits of no question, and it is hardly necessary to advert to the origin of that particular species of tenure. It grew out of the ancient conveyances to a man, and to the heirs of his body. Under such a conveyance it was held at common law that until issue born he had not the absolute property in the estate, it being limited by the grant, not to his general heir, but to the heirs of his body, but the moment issue was born the condition being performed, the estate became absolutely his property, and he could dispose of it in the same manner as if he had held it in fee-simple. The legislature, however, thought fit to interfere, and by the second Statute of Westminster (commonly called the Statute De Donis, 13 Edw. 1, c. 1) it was declared, that the will of the donor or grantor should be observed and that an estate so granted to a man and the heirs of his body, should descend to the issue and that he should not have power to alienate the estate. In the construction of that Act of Parliament it was held that a tenant in tail remained with the same unqualified and absolute ownership of his estate as he had before that statute, with the single exception of the restraint on alienation. In that restraint of alienation was included alienation by lease, leases being considered, according to the construction of that statute, as partial alienations, but by the subsequent statute of the 32 Hen. 8, c. 28 [repealed by the Law of Property (Amendment) Act, 1924], a tenant in tail is permitted to make certain leases mentioned in that statute. With the exception, therefore, of alienation including leases unless according to the later statute, a tenant in tail is at this day to be considered as much the absolute owner of the estate as a tenant in fee-simple, and, as such, may do what he pleases with the buildings and timber on the estate. B C D E

Such being the law it is to be considered what this Act of Parliament [6 Ann., c. 6] has done in settling this estate upon the issue of the first Duke of Marlborough. Has this statute conferred upon the members of this noble family from time to time as they succeed to the possession of this property that estate which by the law of the country is called an estate tail subject to qualification, or has it given to the successive possessors of this property some peculiar and anomalous estate before unknown to the law? The Act recites the former grant of the estate to the duke in fee, and the quality of his interest in his dignities. It then states the intention of the legislature, on account of his eminent services, to confer upon his family, that is, upon his issue of all descriptions, the same honours. The statute then proceeds to declare the limitation of the peerage. The duke, it seems, had three daughters. The eldest was married to the son and heir of Lord Godolphin, the second to the Earl of Sunderland, and the third to the Earl of Bridgewater. The Act of Parliament takes up the succession according to the seniority. It begins with Lady Godolphin, and settles the honours and dignities upon the heirs male of her body. Failing the heirs male of Lady Godolphin, it settles them upon Lady Sunderland and the heirs male of her body, and on failure of her heirs male the honours and dignities are settled upon Lady Bridgewater and the heirs male of her body, and then upon Lady Mary Montagu, her youngest daughter, and the heirs male of her body. Failing all these heirs male it proceeds to settle the honours and dignities upon Lady Godolphin and her first and other daughters and the heirs male of their bodies and so as to the other daughters, and the Act ultimately provides that the honours and dignities shall remain in the issue of the duke so long as any such issue, male or female, shall continue. F G H I

Having concluded the limitations with respect to the honours and dignities, it proceeds to deal with the estate

“to the intent that the estate so granted shall always go along to be enjoyed

A with the titles, honours and dignities as aforesaid, as thereafter is mentioned:”

B It is enacted that the Duke of Marlborough shall stand and be seised of all the said honour, manor and park of Woodstock, and the manor-house and premises granted by the last-mentioned letters patent, during his life without impeachment of waste, and it is further enacted that from and after his decease the same shall be and remain upon and be held and enjoyed by Sarah Duchess of Marlborough, wife of the duke, for and during the term of her natural life, and from and after her decease the same shall be and remain upon and be held and enjoyed by the heirs male of the body of the Duke of Marlborough begotten. On default of such issue, the same shall be and remain upon and be held and enjoyed by all and every of the daughters the said Duke of Marlborough and the heirs male of their respective bodies issuing, and all others severally and successively, in such manner as the said titles, honours and dignities aforesaid are thereinbefore expressed and limited to be taken and enjoyed.

C The effect of the Act of Parliament is, therefore, the same as if it had proceeded to repeat here, with regard to the estate, those same limitations which had been previously declared with respect to the honours and dignities. The present Duke of Marlborough is now in possession of his property under the limitation to the heirs male of the body of Lady Sunderland who was the second daughter, for Lady Godolphin died without issue in the lifetime of her father. The question is: What is the estate which that limitation, by the law of England and this particular law, confers upon the Duke of Marlborough? The legislature must be held to have intended, where there is no expression to the contrary, to use legal terms in a legal sense. This limitation, simply stated, is a mere estate tail descendible to the heirs male of the body. If the Act of Parliament had stopped here, then this would be the common case of a tenant in tail who has by law the absolute property in the timber and the absolute property in the house and may at his pleasure pull down every brick he finds upon the estate and destroy every sapling that grows upon it. That is the necessary consequence of the estate which would be conferred by these words. The court cannot act upon what was fit to be conferred, but must look at what the legislature has conferred upon the duke. But the Act of Parliament, continues thus:

G “Provided always, and be it further enacted by the authority aforesaid, that neither the said Duke of Marlborough or the heirs male of his body, nor any of his daughters or the heirs male of their body, or any other person to whom the premises shall come or descend by virtue of the limitation aforesaid, shall have any power, by fine or recovery, or any other act, assurance, or conveyance in the law, to hinder, bar or disinherit any the person or persons to or upon whom the said manors, house, land, tenement, hereditaments or premises are hereby vested or limited, from holding or enjoying the same, according to the limitations before in this Act mentioned.”

H In the first place it is to be observed that this is an express admission by the legislature, that the estate conferred upon the issue of the Duke of Marlborough by the previous limitations was an estate capable of being barred by fine or recovery, or in other words, was an estate tail, to which alone the bar by fine or recovery is applicable, and this provision is, therefore, nothing more than a declaration on the part of the legislature, that the estate tail given to the issue of the Duke of Marlborough should, in this respect, lose one of the incidents which belong to it by the principles of law, namely, the power of barring the entail by fine or recovery, and necessarily, therefore, leaving every tenant in tail in possession with every other legal incident which belongs to the nature of his estate, and, consequently, leaving him as much the absolute owner of the timber and buildings on the estate as if he were tenant in fee-simple. It has been argued that this is not to be considered as an estate tail, because, being inseparably annexed to the

honours and dignities which are limited to the eldest daughters, the estate will descend, not as an estate tail does at common law, to all the daughters, but to the elder daughter singly. If this be the effect of the statute, then it must be admitted that another qualification is here introduced to the legal incidents of an estate tail, leaving still to that estate all those legal incidents which are not touched by the statute. The same observation applies to the argument that the wife of a Duke of Marlborough would not, like the wife of an ordinary tenant in tail, be dowable of this estate. My opinion, therefore, is that the issue of the Duke of Marlborough were by the statute successively made tenants in tail of this property, and that they have all the legal rights and incidents which belong to an estate of this character except where such rights and incidents are specially qualified by the provisions of the statute, and that, there being no qualification with respect to the right of cutting timber, they are as much the legal owners of the timber upon this property as if they were tenants in fee-simple.

It remains to be considered whether there is a principle of jurisdiction in a court of equity to restrain the legal incidents of an estate tail, with respect to timber, either because the estate tail cannot be barred or because the reversion is in the Crown. Abstractedly considered, it would seem to be a singular proposition to state that if a tenant in tail without the power of barring the successor has by law a right to deal as he pleases with the building and the timber upon his estate, a court of equity can assume a jurisdiction to alter the law and deprive the tenant in tail of the legal incidents of his estate; that, if the law makes a tenant in tail absolute owner of the timber, a court of equity, which is bound to follow the law, is to make a new law and say that a tenant in tail shall not be the absolute owner of the timber. But whatever objection there might be, abstractedly considered, to such a principle, yet if in a long course of proceeding evinced by precedents and records, and sanctioned, as it were, by common consent such a jurisdiction has, in this particular case, been exercised by successive judges, I agree that it is now too late to inquire into the origin of that jurisdiction.

It is pressed upon the court that there is a course of precedents which necessarily establish a jurisdiction to that extent. It is not, however, alleged that such a jurisdiction has ever been actually exercised in the particular case of a tenant in tail whose estate is not barrable, but that it has been exercised in analogous cases. The great body of authorities relate to the case of tenant for life without impeachment of waste, but it is to be observed that the ownership of the timber is not a legal incident to the estate of tenant for life. He takes his interest in the timber by the provision of the grantor, and courts of equity seem to have interfered upon the construction and intention of the grant—to have considered that the grantor meant to confer a full power of temporary enjoyment without the power of destroying or altering the character of that property which he had limited over in succession to others. In *Robinson v. Litton* (10), LORD HARDWICKE expressly grounded his interference upon the intention of the testator and circumstance that the heir was a trustee for other persons, and the injunction was not confined to equitable waste. The case of a bishop bears no application, for there a court of law will interfere by prohibition. *Knight v. Mosely* (1) was not a case of equitable waste. The case of a tenant in tail, after possibility of issue extinct, is, however, urged as being altogether in point, and there is, certainly, authority that such a tenant in tail has been considered within the principle of equitable waste. The common case of a tenant in tail after possibility of issue is extinct is where the estate is descendible to the issue of the wife alone. Until the death of the wife without issue this estate has all the legal incidents of other estates tail, but upon the death of the wife without issue, the estate has no longer a descendible quality, and the husband's interest is, in effect, limited to his life. His estate becomes ranked in the law among estates for life, and he may make exchange with a mere tenant for life. In *Bowles' Case* (11), however, it was held at law that, as he had before the death of his wife an estate tail and was once owner of

A the timber, notwithstanding the death of his wife and the change in the quality of his estate, he should still continue unimpeachable of waste.

In a court of law, therefore, a tenant in tail after possibility of issue extinct is, in effect, a tenant for life without impeachment of waste, and courts of equity have, in the question of equitable waste, confounded him with other tenants for life without impeachment of waste and have not entered into the distinction that he is unimpeachable of waste, not by the provision of a grantor, but as a legal incident to his estate. If, however, this question as to the tenant in tail after possibility of issue extinct is now to be considered as the settled doctrine of the court, it is not in point to the present case: the Duke of Marlborough is not at law tenant for life without impeachment of waste. The case of tenant in tail without the power of barring his issue is common to every case where the reversion is in the Crown, and no instance can be stated in which a court of equity has ever interfered against such a tenant in tail upon the principle of equitable waste. I cannot feel myself at liberty, therefore, to extend this jurisdiction of a court of equity beyond the limits of all former precedent.

D The argument of inconvenience has been very strongly pressed upon me. It has been said that the necessary consequence of such a determination must be that this monument of national gratitude will be at the mercy of every successive individual who may happen to have the possession of it. There is some inconvenience, however, and something like absurdity, on the other side. If this court is in all time to protect all trees planted here for ornament or shelter, then the taste of the first proprietor with respect to the gardens and the house is for ever to remain impressed upon this property, however little suited it may be to the altered notions of succeeding ages with regard either to beauty or convenience. Arguments of inconvenience are sometimes of great value, upon the question of intention. If there be in any deed or instrument equivocal expressions and great inconvenience must necessarily follow from one construction, it is strong to show that such construction is not according to the true intention of the grantor. But where there is no equivocal expression in the instrument and the words used admit only of one meaning arguments of inconvenience prove only want of foresight in the grantor. Because he wanted foresight courts of justice cannot make a new instrument for him; they must act upon the instrument as it is made. It is said that the duke may demolish the mansion of Blenheim, and reduce this noble possession to a desert. It is true he may, but he enjoys this estate under a grant from the legislature, and we can only look into that grant to see whether or not the legislature meant to leave him at liberty to do so. If we find upon looking into the Act that the legislature meant to repose a confidence in the successive possessors of this property that they would deal with it as became their high rank and situation, a court of equity cannot repeal the law, and recall that confidence which the legislature have given. The legislature have calculated upon that feeling which belongs to all great and good minds. They have considered that the successive possessors of this splendid property would always deal with it according to the sentiments which belong to persons in their exalted stations of life, and that their pride and honour would always lead them to maintain this magnificent monument of national gratitude. It is not to be believed, that any member of this noble family will ever act, with respect to this property, upon other principles.

I Dec. 21, 1818. **SIR JOHN LEACH, V.-C.**—Since we last met an Act of Parliament has occurred to me not mentioned in the pleadings, or insisted upon in the argument. I mean the Act of 6 Ann., c. 7 [5 Ann., c. 4, in Ruffhead: repealed by S.L.R., 1948], by which a pension is settled on the Duke of Marlborough and his posterity out of the revenues of the Post Office. It appears to me, upon reading that Act together with the two other Acts stated in the pleadings, that there is reason for contending on other principles than those of equitable waste that the

public has an interest in the House of Blenheim which every court of justice is bound to protect. The Act 6 Ann., c. 7, is a public Act to which the court is bound to advert. Though the bill is principally framed to prevent the cutting of ornamental timber, yet there is an allegation that the duke means to commit waste generally, and the duke by the demurrer in effect insists that he has a power to commit waste generally, but if the house of Blenheim must be preserved, he must equally preserve the timber which serves as ornament or shelter to it. I wish, therefore, the case to be argued, not upon the point of equitable waste, as to which I am, upon reflection, confirmed in the opinion which I have already expressed upon it, but as to the question whether the legislature have not imposed upon the successive members of this family an obligation to maintain the house of Blenheim.

Dec. 24, 1818. *Bell, Wray, and Hampson*, supporting the demurrer: There are three questions to be considered: (i) whether waste can be committed on the house; (ii) whether waste can be committed, not only as to the house, but also as to ornamental timber; (iii) whether the information and bill are so framed as to entitle the plaintiffs by injunction to prevent waste as to the house. The duke must be considered as tenant in tail, and, if he is restrainable for waste, it must be in respect of some special provisions in the Acts of Parliament taking away the right which a tenant in tail has by the common law of cutting timber, ornamental or otherwise. But there is no such restriction. If there is any such, it can only be inferred; there is nothing expressed. It cannot be supposed that the legislature meant that the house and timber should be preserved in all respects the same though the taste of the age altered or timber was rotting. Suppose the timber had been planted so as to represent the battle of Blenheim, or the twelve signs of the Zodiac, or according to the most grotesque taste, is that to be continued for ever? It was never meant to deprive the posterity of the duke of all the comforts of property or the power of improving the lands according to the taste of the age, and of fashioning the house so as to increase its conveniences. In the restraint upon alienation, in the statute 6 Ann., c. 6, s. 5, no mention is made of the house, nor in any part of that Act are there any express words against the commission of waste. In the Act of 6 Ann., c. 7, settling the pension upon the duke, it is in the preamble recited what had been done, and the Act settles the pension in the same way as the titles and lands had been settled. The pension was at first granted by letters patent of the Queen, and the subsequent Act was merely a substitution of the former grant. In *Davis v. Duke of Marlborough* (12), the Lord Chancellor considers the Act (6 Ann., c. 6) as having converted the duke into a tenant in tail of the estates of which he was then tenant in fee, and at the instance of a creditor, who had obtained, by way of security, an assignment of the estate and of the pension, a receiver was appointed as to the rents and profits of the estate, but refused as to the pension because the duke is, by the Act personally to give a receipt for that. In the present case, the attention of the legislature was not called to the power which the heirs of the first duke would have over the timber and the house, and, if it had, it would probably have left it to the honour of the parties, or would, as in the instance of the Parliamentary settlement on the Duke of Wellington have enabled trustees or the court to decide how and by what rules improvements might be made. The only charge in the bill is that ornamental timber had been cut, some of which were ornamental to the mansion-house and served for shelter, and that the defendant intends to cut down and commit other acts of wanton and improvident waste, but it is not stated that any waste has been committed or threatened as to the mansion-house. If the duke were, by an answer, to deny he had committed or intended to commit the waste charged in the bill, he might do so with correctness although he had committed or intended to commit waste on the mansion-house. It is true that the prayer of the bill is for an injunction against the cutting of ornamental timber, "and from

A committing any other waste or destruction in and upon the said mansion-house, parks, etc.;" but that applies only to the kind of waste before stated in the bill. If, therefore, on the construction of the Acts, waste could not be committed on the house, the demurrer is good, because the bill only applies to the timber and not to the house. Counsel cited *Cressett v. Mytton* (13).

B The plaintiffs' counsel were stopped by

C **SIR JOHN LEACH, V.-C.**—Having reflected much upon this subject before and since I took the liberty to call it a second time to the consideration of the Bar, and having listened with all the attention I am master of, to the several arguments addressed from the Bar, I am confirmed in the opinion which I formed out of court upon reading the two Acts of Parliament stated in the pleadings together with the Act granting the pension not stated in the pleadings nor referred to in the former argument. All these Acts, being in *pari materia*, are to be taken together in order to form a sound conclusion as to the intention of the legislature with respect to every part of the subject. I disclaim any authority to construe an Act of Parliament other than according to the expressed intention. A court of equity, as well as a court of law, must be bound by the expression of an Act of Parliament, and must declare the law as it finds it. But the sense and meaning of an Act of Parliament and the intention of the legislature in it is not only to be deduced from direct expression, but it is to be collected by implication from the whole language of the particular Act of Parliament and of the other Acts of Parliament which are in *pari materia*.

E The first question is whether, if the statute does restrain the Duke of Marlborough from the destruction of the house of Blenheim, that question is material to the consideration of this demurrer according to the present state of this record. The Duke of Marlborough is charged by the information and bill with committing acts of waste and destruction by cutting timber ornamental to the mansion-house, park, and estate or affording shelter to the mansion-house, and trees in lines and avenues as well as timber of an improper growth, and contracting to cut down more timber of the same description, which was marked out to be cut down, and that he has stated that he intends to commit other acts of wanton and improvident waste. I take these latter words to mean waste and destruction upon the estate *ejusdem generis* as that before mentioned, that is, by cutting timber. The duke's demurrer, therefore, admitting, for the purpose of the argument, the statement of the bill, and insisting that he has a right to do all that is alleged, does, in effect, insist upon an unrestrained right to cut timber. I am of opinion that, if the duke is bound to maintain the house of Blenheim, he has not an unrestrained right to cut timber, but must maintain also all timber which is essential to the ornament or shelter of the house, and that the state of this record necessarily involves the question whether the statute does restrain the duke from the destruction of Blenheim House.

I The next consideration is whether there is plain expression or necessary implication that it was the intention of the legislature that the house of Blenheim should be maintained, in all times, as the residence of the family, although, with respect to the estate generally, the legal rights of tenant in tail were given to those who were successively to enjoy the honours and dignities of the family, except where those rights are specially qualified or restrained. The Duke of Marlborough, by the Act of the 3 & 4 Ann., c. 4, received from the public gratitude through the grant of the Crown the honour, manor and estate of Woodstock in fee simple, and we find in the preamble of the Act that he received it as a reward for his eminent national services. At this time the Duke of Marlborough had not the titles as at present limited, but the titles were limited in the ordinary course descendible only to the heirs male of his body, but it was afterwards considered by the Sovereign and Parliament to be fit that this illustrious person should have this pre-eminent distinction that all the dignities successively granted to him should be limited

to every possible issue that might descend from his body. When these honours were about to be conferred, the duke became desirous (for so it appears upon the recital of the next Act of Parliament) that the estate which had been granted to him in respect of his national services should annexed to those dignities which were at all times to descend to his posterity for the purpose of maintaining and supporting them, and the Sovereign and Parliament, upon this special occasion, consented to depart from that principal of legal policy which forbids the making of estates inalienable. The Act of 6 Ann., c. 6, was passed for both purposes, and the title of that Act runs thus :

“An Act for the settling the dignities and honours of John Duke of Marlborough upon his posterity, and annexing the honour and manor of Woodstock and house of Blenheim to go along with the said honours.”

The Act recites that it appeared to the Queen that it would be proper that the honour and manor of Woodstock and the house of Blenheim should always go along with the titles, and she did, therefore, recommend the matter to the consideration of Parliament. The Act then proceeds to grant the honours and dignities to all possible issue of the duke, and to annex to those honours the manor and park of Woodstock and the house then erecting there called Blenheim, and all the estate which was granted to the duke in fee simple, in pursuance of the statute 3 & 4 Ann., c. 4.

The next statute of 6 Ann., c. 7, which was not noticed in the former pleadings nor in the first argument, recites the important fact that the house of Blenheim was erected at the Queen's expense as a monument of the duke's glorious actions, and proceeds to settle a pension of £5,000 a year from the Post Office upon the duke and his posterity for the more honourable support of their dignities in like manner as his honours and the honour and manor of Woodstock and the house of Blenheim were already limited and settled. The question then is, taking these three Acts together, whether the legislature meant by the statute 6 Ann., c. 6, so to annex this house of Blenheim, thus built at the public expense and as a national monument, to the honours and dignities that it should, as a distinct subject, descend in all times as a suitable residence for those who enjoyed such pre-eminent distinctions, or whether it was meant to be confounded with the rest of the estate, so that the possessors for the time being were to have the same rights of property over it as, in their character of tenants in tail, they would necessarily have over the other parts of the estate. I cannot read these several Acts, attend to the circumstances of this property, and observe the manner and purpose of building the house of Blenheim and the special annexation of it to the honours and dignities of this family so particularly recited in the last Act without stating that there appears to me to be clear and necessary implication that it was the intention of the legislature that the house of Blenheim should in all times, as a distinct subject, descend and be enjoyed with the honours and dignities of this family, and that it was not the intention of the legislature that the successive possessors of these honours and dignities should have the rights of property over it which, with respect to the rest of the estate, were legally incident to their character of tenant in tail. I think the legislature thus imposed upon every possessor of these honours and dignities the obligation to maintain the house of Blenheim for the future residence of those to whom the succession was limited. and that this court is bound to interfere to prevent its destruction. I am clearly of opinion that the Duke of Marlborough, having no power of destruction over the house, has no power of destruction over timber which is essential to the shelter or ornament of the house, and I must overrule a demurrer which, in effect, insists upon an absolute and unqualified right to cut all timber.

It does not, however, follow that the absurdity is now to take place which would have taken place if the case could have been supported upon the principle of equitable waste- that the taste of the first proprietor must in all times remain

impressed upon the property. It does not follow that because it was the intention of the legislature to compel the successive dukes of Marlborough to maintain the house of Blenheim, therefore, it was the intention of the legislature that they should enjoy the property without the elegancies and conveniences which belong to the change of times. The court will distinguish between improvement and destruction. If any act be done by the duke, which the remainderman shall consider as tending to destruction the court will decide upon the quality of the act complained of, but in the present state of the case, it is not necessary to say by anticipation, what may or may not be so considered.

Demurrer overruled.

PREBBLE AND OTHERS v. BOGHURST AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C., Sir Richard Richards, C.B., and Abbott, J.), March 19, 1816, April 25, May 2, 4, June 2, 9, 1818]

[Reported 1 Swan. 309; 1 Wils. Ch. 161; 36 E.R. 402]

Bond—Marriage—Contemplation—Undertaking to settle on wife and issue land acquired “at any time during his natural life”—Inclusion of land acquired after death of wife.

By a bond dated Aug. 10, 1768, executed in contemplation of his marriage the husband agreed that, if the wife should survive him, his personal representatives would within three months of his decease pay to trustees £1,000 in trust for the wife, and that, if he survived her and there should be issue of the marriage, his representatives would within the same period pay the same sum to trustees for the benefit of the children. He further agreed that if he should at any time during his natural life become seised of any lands and hereditaments he would settle the same on his wife and the issue of the marriage to such use or uses as should be thought requisite the better to make a provision for the wife if she should survive him.

Held: on the true construction of the bond, the husband's obligation to settle the real estate did not depend on the contingency of the survivorship of the wife, and, therefore, his undertaking extended, not only to land of which he became seised during the continuance of the marriage, but also to all land which he acquired during the whole of his life.

Specific Performance—Bond—Contemplation of marriage—Bond securing payments to widow and issue of obligor—Adequacy of compensation.

Per LORD ELDON, L.C.: A bond made in contemplation of marriage to secure a payment to the widow if the husband should predecease her and a payment to the children of the marriage if she should predecease him constitutes an agreement of which a court of equity will decree specific performance. The doubt would be whether the obligee should have performance or compensation. A part of the consideration besides the pecuniary benefits is marriage.

Contract—Construction—Hardship—Amounting to gross inconvenience and absurdity.

On the construction of an agreement, hardship cannot be regarded unless it amounts to a degree of inconvenience and absurdity, so great as to afford judicial proof that such could not be the meaning of the parties.

Settlement—Marriage settlement—Consideration—Relevance of pecuniary consideration.

Where marriage is one of the considerations for a settlement the amount of pecuniary consideration is immaterial.

Notes. Referred to: *Wellesley v. Wellesley*, [1835-42] All E.R. Rep. 223; *Hill v. Gomme*, [1835-42] All E.R. Rep. 118; *Maclurcan v. Lane*, *Melhuish v. Maclurcan* (1858), 5 Jur. N.S. 56. A

As to bonds generally, see 3 HALSBURY'S LAWS (3rd Edn.) 329 et seq.; and for cases see 7 DIGEST (Repl.) 167 et seq.

Bill to enforce a bond executed by an obligor in contemplation of his intended marriage to secure provision for his wife and issue. B

By a bond dated Aug. 10, 1768, executed in contemplation of his marriage with Mary Townsend, John Prebble bound himself, his heirs, executors, and administrators to Hans Sloane and John Tilden, their executors, administrators, and assigns, in the penal sum of £2,000. The bond recited the intended marriage, that John Prebble was to receive, on or before the day of marriage, the sum of £200; that Mary Townsend was entitled to a considerable share or moiety of the personal estate of Thomas Townsend, her late father, which would come to her immediately after the decease of her mother Mary Townsend the elder; and that in consideration thereof and of the affection which John Prebble bore towards Mary Townsend, his intended wife, and for making a provision for her and the issue of the intended marriage, John Prebble had agreed, not only to pay such sums of money to such persons and at such times as therein mentioned, but that, if at any time during the term of his natural life he should be seised of any messuages, tenements, lands, and hereditaments in possession, he would settle the same upon Mary Townsend and the issue of the intended marriage in such parts and proportions and to such use and uses as should be thought requisite, the better to make a provision for her in case she should survive him (John Prebble). The condition of the bond was that if the intended marriage took effect, and Mary Townsend should survive John Prebble, then, if the heirs, executors, administrators, or assigns of John Prebble should, within three months next after his decease, pay to Sloane and Tilden, their executors, etc., £1,000 in trust for Mary Townsend, her executors, etc., for ever; and also if the intended marriage took effect, John Prebble should survive Mary Townsend, and there should be any child or children of the marriage living at the time of the decease of John Prebble, then if the heirs, executors, administrators, or assigns of John Prebble should, within three months next after his decease, pay to Sloane and Tilden, their executors, etc., £1,000, in trust to pay and dispose of the same unto and among the children of the intended marriage, in equal shares and proportions if there should be more than one, and, if but one, then wholly to that one, at their respective age or ages of twenty-one years, and in the meantime, to pay and apply the interest and proceeds arising from the said sum of £1,000 for the use of such son and sons, daughter and daughters, equally if more than one, and if but one, then wholly to that one, and, further, if the intended marriage took effect and John Prebble should at any time during his natural life become seised of any messuages, tenements, lands, and hereditaments in possession, and should settle the same upon Mary Townsend and the issue of the intended marriage to such use and uses as should be thought requisite, the better to make a provision for Mary Townsend in case she should happen to survive John Prebble, then the obligation should be void. C
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The marriage was solemnised, and in 1776 Mary Prebble, formerly Mary Townsend, died, leaving several children of the marriage. During her life, John Prebble did not become seised of any real estate. In 1782 he contracted a second marriage with Ann Day, and after that time became seised in possession of considerable real estates. On Dec. 19, 1812, John Prebble died, leaving issue by his second wife, in favour of whom he, by his will and codicils, disposed of the greater part of his property. I

The bill filed by the children of the first marriage, against the children of the second marriage, the widow, and other persons claiming under a settlement executed in contemplation of that marriage, or under the will and codicils, prayed

that the defendants, the devisees in trust, might set forth a list and description of the freehold, copyhold, and leasehold messuages, etc., of which John Prebble was at any time during his life seised in possession, what was become thereof, and of which estates he died seised in possession; that the condition of the bond might be specifically performed and all the freehold and leasehold messuages, etc., of which John Prebble died seised in possession be settled pursuant to such condition; and for an account. The plaintiffs also sought a declaration that they were entitled to the £1,000 with interest after three months from the death of John Prebble.

On Mar. 19, 1816, LORD ELDON, L.C., refused to appoint a receiver, and directed a Case for the opinion of the judges of the Court of Common Pleas as to whether John Prebble, not having become seised of any real estate during the continuance of the first marriage, committed a breach of the condition of the bond by not making a settlement of the estates of which he afterwards became seised in possession, on the issue of that marriage. The Court of Common Pleas certified in the negative [see 7 Taunt. 538]. The Lord Chancellor not being satisfied with the certificate, the question was now argued before his Lordship, in the presence of SIR RICHARD RICHARDS, C.B., and ABBOTT, J.

Sir Samuel Romilly, Hart, Bell and Wakefield for the plaintiffs.

Sir Robert Gifford, Sir Arthur Pigott, Roupel and Wingfield for the defendants.

LORD ELDON, L.C.—It strikes me that the argument in the Common Pleas did not unfold all the difficulties of the case. The bond, with this condition, was executed in contemplation of marriage, and there is no doubt that it constitutes an agreement which courts of equity will perform. It was not on that question that I desired the opinion of the court of law or of the judges who now assist me, but on whether, according to the true intent and meaning of this bond, an estate, call it Blackacre, of which the husband became seised after the death of the wife, is subject to the obligation. The question whether the bond is forfeited and the penalty to be raised is proper for a court of law, but, equity considering the bond as an agreement, the doubt there would be whether the obligee should have performance or compensation.

At present the simple question is whether Blackacre is affected by the condition. It strikes me thus. The obligor on the marriage was to become entitled to £200 absolutely, and also to a moiety or share of the personal estate of his wife's father on the death of her mother. What was his interest during the coverture in this part of the property does not appear, and it is unnecessary to state here what he could or could not have done with it. A part of the consideration besides these pecuniary benefits is marriage. I do not apprehend that the quantum of pecuniary benefit will affect the question, and I am surprised to find observations about the amount of the penalty as varying the reciprocity (7 Taunt. 543) where marriage is one of the considerations. An obligation to make a settlement on the wife and the issue clearly includes an obligation to make a settlement on the issue after the death of the wife. The obligor, undertaking to make a settlement on his wife and issue, engages, first, if the wife survives him, to pay £1,000 for her use, and so far there is no provision for the children either from this fund or from the moiety of her father's estate to which the wife was entitled at the death of her mother. He then adverts to the contingency of his wife dying in his life leaving children, and, providing that in that case the sum of £1,000 shall belong only to the children, he proceeds to state in what shares it shall be distributed among them. He then takes into consideration estates of which he might become seised. It is clear that this bond would not embrace copyhold or leasehold and left it entirely in the option of the obligor, whether he would ever acquire seisin, and unless, therefore, freehold property devolved to him, independently of his own act, so that he could be said to have become seised, the condition would never take effect except by his instrumentality. Having before recited that his intention was to provide, not for his wife only, but for his wife and children with respect to all the subjects of provision, and

having first mentioned the contingencies of their respective survivorship, he proceeds to undertake that, if he shall become seised of any real property, he will settle it in such parts and proportions, the word "such" having reference to something which had preceded with respect to proportions. He then recollects that the previous directions are not sufficient for this case except in the event of the death of the wife during his life—that, if she should survive, she would become entitled to the whole of the £1,000—but, his intention being that the real estates should in every event be a joint provision for the wife and the children, he, therefore, introduces the words, to such use and uses as may be thought proper, the better to make a provision for the wife, terms which may denote a design to secure to her a partial, and only a partial, interest in the real estates. The question may be stated whether on the whole he did not mean that, if his wife survived, she should have £1,000, which in the event of her death during his life should devolve to the children, and that the lands should be settled, if she did not survive, entirely on the children, but in the event of her surviving, to such uses as would secure to her a proper share.

I entertain no doubt that the decision of the judges of the Common Pleas was founded on an opinion that, according to the true intent and meaning of the bond, there would be no breach unless there had been a non-conveyance of lands of which the obligor had become seised during the life of his wife, and I think that they meant to mark that by the insertion and the certificate of the words (7 Taunt. 545):

"the said John Prebble having survived the said Mary Prebble, formerly Mary Townsend."

When the cause came from the Common Pleas I should have felt great relief could I have acceded to the opinion of the judges, but I thought, and still think, that the case requires further consideration. It is clear that this court is not bound by the certificate of the court of law.

The obligation, as collected from the condition, is threefold. The first two acts are to be performed, not in the life of the obligor, but by his representatives after his decease. Contemplating two contingencies—of his wife surviving him, or of her dying in his life—he stipulates that in the first event she should have £1,000, in which the issue would not participate, that in the other event the issue should have £1,000 in which she would not participate. He then adverts to the real estate of which he might become seised—any real estate which he then had would not be comprehended in the clause, for the words are, "if he shall become seised—and undertakes to settle it on the wife and the issue as counsel shall advise. Had it proceeded no further the circumstance of his having covenanted to convey to her and her issue would not have been the ground of a necessary inference that unless she survived there should be no conveyance to the issue. That is not the construction. The doubt is whether the subsequent words are intended only to secure a provision for her in case she survived him or whether they are to narrow the benefit which the issue would take if the clause had stood without them, and reduce their claim to the estates of which the obligor became seised before her death, limiting the extent of the phrase "during his natural life" to such part only of his natural life as passed during the coverture. On the point whether there is a breach of the condition the construction is the same at law and in equity, but, if a breach is established, the form of conveyance will remain to be determined and the considerations may be different. The question for the opinion of the learned judges is whether the obligor, on the death of his first wife having re-married and then and not before become seised of real estates, and having died without making a settlement of those estates in favour of the issue of the first marriage, has committed a breach of the condition.

ABBOTT, J.—This case, my Lord, has arisen upon a bond executed by John Prebble, upon his intended marriage with Mary Townsend. The marriage took place, there were issue of the marriage, and the obligor John Prebble, after the death of his wife Mary Townsend, but not before, became seised of an estate in fee in possession, called White Close. He died without making any conveyance thereof, in favour of his issue by Mary Townsend. This issue survived the obligor, the obligor having, after the death of Mary Townsend, married a second wife and left issue by that marriage also. The only question upon which I understand your Lordship to desire the opinion of my Lord Chief Baron and myself is

“whether attending to the legal construction of the condition of the bond, the obligor committed a breach of that condition.”

On that question, after considering the case and attending to the very full and able discussion, that the matter has received in this court, I am of opinion upon the facts mentioned that the obligor did commit a breach of that condition.

I have not formed this opinion without some reluctance, because I am aware that I differ from the very learned judges of the Court of Common Pleas. I hope, however, that I shall not have the further misfortune of being found to differ from my Lord Chief Baron and your Lordship. The terms of the bond on which the question arises have been so recently before your Lordship that I do not think it necessary to trouble you with a detail of them, but shall proceed at once to mention the grounds and reasons of the opinion that I have formed. I think the second marriage of the obligor and the birth of issue of that marriage are facts not material to the question proposed. I conceive the answer to the question must depend only upon the words of the bond and the intent of the obligor as it may be collected from the words, and must be the same in the present state of facts as it would have been if there had been no second marriage or no issue of such second marriage. There is no allusion to a second marriage in the bond. It is probable that the obligor did not, when he executed this bond, contemplate a second marriage; in fact, I believe a second marriage is very rarely thought of by those who are about to contract a first. If these facts are immaterial to the question, the topic of hardship, which was much urged at the Bar, by some of the learned counsel for the issue of the second marriage, must be excluded from our consideration. Indeed, it would be very easy to suppose a state of facts in which such a topic might have been urged with at least equal propriety on the part of the issue of the first marriage if I am not mistaken in the construction of this instrument, and perhaps it might be so, even upon the state of facts now before the court.

As to the construction of the bond itself, this instrument manifests a general intention to provide for the intended wife, Mary Townsend, and her issue, and to do this in two modes—first, by the payment of a specific sum of money, viz., £1,000 to the obligees and trustees, and, secondly, by the settlement of real estate if he should ever become seised of any such in possession, but whether the settlement of such real estate was to depend upon the contingency of her survivorship and the fact of the seisin taking place during her life is the question. Payment of the £1,000 is certainly not to depend upon the contingency of her survivorship; that contingency only regulates the trust to which the £1,000 shall be applied. It is to be applied to her use absolutely if she survives, whether there be or be not issue of the marriage. If she dies before her husband and he dies leaving issue, it is to be applied to the use of their children. These two events are made the subject of two distinct clauses, which might well be done because the contingency would cease before the payment was to be made. The condition of the bond then proceeds to provide for a settlement of real estate if he shall ever become seised of any. This is done by a single clause, which begins by mentioning the whole period of the natural life of the obligor as the period of his becoming seised, and it provides that, if the marriage shall take effect and he shall at any time during his natural life

become seised of any messuages, etc., in possession, he shall settle the same upon Mary Townsend and the issue of the marriage. A

If nothing further had been introduced, and the words, "then the bond shall be void," had followed immediately, I conceive it to be unquestionable that the bond would have been forfeited if the obligor had died before his wife without issue and had not settled the real estate upon her, or if he had survived her, had died leaving issue by her, and had not settled the real estate upon their issue, or if he had died first, leaving both her and issue by her surviving, and had not settled the real estate both upon her and their issue (always assuming that he had acquired any such in possession). If, however, nothing further had been added, it might be matter of doubt and controversy in what way the settlement should be made, whether the whole should be settled after his decease on the wife for life with a remainder to the issue, or jointly upon her and the issue, or even in such a way as to give her some beneficial interest during the life of the obligor. To obviate these doubts, and others of the like nature, and for no other purpose as it seems to me, and to show that the wife was to have no interest during his life, but was to have a substantial, not a merely nominal, interest after his death if she should be the survivor, the subsequent words are introduced providing expressly for such a division of the estate and such a declaration of uses as should be thought requisite the better to make a provision for her in the event of her becoming the survivor, an event that might be uncertain at the instant when it might be necessary to execute a settlement in order to guard against a possible forfeiture of the bond by his sudden death. B C D

I think the contingency of her survivorship which comes to be mentioned at the end of the clause refers only to the shares and uses, that is, to the mode and form of the settlement, supposing the husband to have become seised during her life, and does not govern the whole clause and make the necessity of any settlement at all to depend upon the contingency of his becoming seised during her lifetime. A construction that should make the whole clause depend on this event would render it necessary to narrow the words, "at any time during his natural life," and to construe them to mean only at any time during the joint lives of himself and his wife, whereas, these latter words are so obvious, that I think they must have occurred to the obligor if his meaning had been conformable to them. On the other hand, the construction which I think ought to be put upon this instrument gives effect to every part of the clause by requiring the obligor to settle all that he should at any time acquire, but to settle it in such a way that is in such shares and to such uses as would make a suitable provision for the wife if he should become seised before her death and she should be the survivor, and not allow in that event of a merely formal and fallacious settlement upon her giving everything short of the entire beneficial interest to her issue. E F G

For these reasons I am of opinion upon the facts proposed that the obligor did, according to the legal construction of the condition of this bond, commit a breach of that condition. All which, I submit to your Lordship's judgment. H

SIR RICHARD RICHARDS, C.B.—Concurring in the opinion of my learned brother and in the reasons which he has assigned, I shall not detain the court by examining the question at length.

From the recital it is clear that the intended husband agreed to provide for his wife and the issue of the marriage. The object was to make a provision for both, and there can be no doubt that the issue are in this court entitled to be considered as purchasers of everything which, according to the true construction, was intended for them by this condition. He then recites an engagement that, if he should become seised of real estates during his natural life, not during their joint lives, he would settle them by such conveyances as counsel should think necessary, not such as he should choose (and in default of counsel, a court of equity would decide what is proper), in such parts and proportions as should be thought requisite. When counsel, or the court in defect of counsel, has decided the proper settlement, that I

share, whatever it might be, which was intended for the wife, was clearly intended the better to make a provision for her in case she survived him. In that event the children are entitled to no provision from the sum of £1,000.

The condition follows the words of the recital, not confining the seisin to any period shorter than his life, and it seems to me that the construction which I have taken the liberty of putting on the words in the recital must be the construction of the same words in the condition. I think that they mean only a mode of distributing the estate as counsel or the court shall think proper, the wife taking a share in the event of her surviving. This argument seems to me conclusive in favour of the construction which my learned brother has put on this instrument. It was admitted in the discussion that any estate acquired by the obligor during the coverture would have been subject to the obligation. I see no ground for the distinction suggested. We cannot advert to the facts of the case as they have since occurred, but the consequence must have been the same had the obligor exhausted all his personal estate and left the issue of the second marriage without hope of provision. No words in the instrument authorise a distinction between estates acquired during the coverture, and estates acquired after its determination. To your Lordship's judgment I submit this conclusion, at which I have arrived not without anxiety, feeling the respect due to the high authority which has already pronounced a different decision.

May 4, 1818. **LORD ELDON, L.C.**—The question on which, in the discharge of my duty, I am now to pronounce an opinion, amid the discordance of high authorities, is whether the obligation of this bond is confined to lands of which John Prebble became seised during the continuance of the marriage on the solemnisation of which it was executed, or extends to all lands of which he became seised during the term of his natural life. The question must depend on the terms of the bond. The amount of the penalty, which is exactly double the stipulated sum of £1,000, is, I think, quite immaterial, because the penalty seems to have no relation in point of computation to the value of the lands. Marriage bonds being considered in this court as agreements, the question is: What lands are affected by the agreement contained in the condition?

The stipulation relative to the sum of £1,000 has not provided for any act to be done in the life of the obligor. It provides first for an act to be done by his representatives three months after his decease, namely, payment of £1,000 for the sole use of the wife if she shall survive, and it then provides for another act to be done by his representatives three months after his decease in case the wife shall not survive but there shall be at his decease one or more child or children, namely, payment of £1,000 for the use of the children. It is further to be observed that in this part of the condition there is an express contemplation of the coverture ceasing by the obligor's surviving or by his predeceasing his wife, so that the duration and the determination of the coverture are explicitly recognised in both those cases, the case of his surviving her and that of her surviving him. These two provisions are followed by the words on which the doubt arises, and it must not escape attention that though the husband had been speaking of the determination of the coverture in both ways—by his death and by her death—if he meant that the subsequent clause of the condition should refer to the period of coverture, he at least omitted to introduce any words relative to its duration unless the conclusion of that clause is to be understood as affecting the beginning. The obligor must be taken to say: "If my wife dies during my life, my children shall have £1,000; if I die in the life of my wife, she shall have £1,000." Having so provided in the event of the determination of the coverture, the condition proceeds:

"and, further, that if the said intended marriage takes effect and John Prebble shall at any time during his natural life become seised of any messuages, tenements, lands, and hereditaments in possession, and shall convey, settle, and

assure the same on Mary Townsend and the issue of the said intended marriage, by such good conveyances in the law as counsel shall advise . . .” A

Had it stopped there, no doubt could exist. The question is whether the succeeding words so qualify the introductory words relative to his being seised during his natural life as to show that the obligation is confined to lands of which he was seised during the coverture, or whether these words are to have their natural construction. B

The case has been represented by the defendants as a case of hardship, the issue of the first marriage claiming all the lands of which the obligor became seised during the second coverture as subject to the obligation, or, to give it another name, the agreement, but, unless hardship arises to a degree of inconvenience and absurdity so great that the court can judicially say, such could not be the meaning of the parties, it cannot influence the decision. The question might have arisen without a second marriage. Supposing the husband to have continued a widower, and purchased lands, the wife, being dead, could have had no benefit, and the contest, on his death, would have been between the eldest son and the younger children. It is impossible to deny that in many cases the parties to marriage agreements, not adverting to a second, devote their whole fortune to the children of a first, marriage. In this case, if the wife had survived, the children would have taken no pecuniary provision, and the obligor might have disposed as he pleased of the fortune of his first wife; he might have given it to the issue of the second marriage. He had also a power, by very little providence in the mode of acquisition, to exclude from the operation of this obligation all property which he should acquire by purchase in the ordinary sense of that term, for it clearly included no estate of which he did not become seised. C D E

It has been insisted that the words which introduce the covenant relative to lands are to be restricted, that their natural meaning is to be denied to them, and that the obligation which the obligor has incurred, relative to any lands of which he might become seised during his life, is to be confined to lands of which he should become seised during the coverture, or, in other words, to lands, the benefit of which the wife might have had. Considering the whole instrument, I cannot assent to the opinion that the latter is the true construction. First, the recital is that the husband shall make a provision for the wife and the issue. With respect to the money provision, which is intended in one event for the wife entirely and in another event entirely for the children, the word “and” must be construed “or”. That provision refers not to any act to be done during his life, and supposes, therefore, an express contemplation of her surviving him in the first instance and of her not surviving him in the second, or, in other words, the express consideration of what shall be done in one case within three months after the coverture shall cease, and in the other within three months after his natural life shall cease. F G H I

Then is introduced the provision with respect to the lands—an explicit engagement that, if at any time during his natural life the husband shall become seised of lands, those lands shall be settled for the benefit of the wife and issue. It is not and could not be contended that, if the wife had died before the settlement, the children would not have been entitled, but then follows the expression, the better to make a provision for the wife in case she should survive. Here, again, he adverts to the circumstance that his death may terminate the coverture during her life. Must I not consider that he had contemplated the opposite event? The question is whether the obligor did not mean, as to the money provision, that in one event it should go wholly to the wife and in another wholly to the children, but that the lands should not go wholly to the wife in one event or wholly to the children in another, but that each should take in certain proportions. whether, intending the money entirely for one in one contingency and entirely for the other in another contingency, he did not intend that the lands should be for the benefit of both so far as circumstances would admit. On that construction, if

the wife happened to be dead at his decease, there was no need for a specification of a provision which could not be made, but the concluding words are a declaration that, if then alive, she and the issue should take jointly. My opinion, therefore, after repeated consideration, is, that the bond affects all the lands of which the obligor was seised during his life.

June 2, 1818. It was this day stated by *Sir Samuel Romilly*, for the plaintiffs, and *Sir Arthur Piggot*, for the defendants, that the parties had agreed to refer to arbitration the subsequent questions in this case subject to the decision of the court, on what equitable interest the children of the first marriage took under the settlement: whether they took (according to the argument of the plaintiffs) as tenants in common in fee, or (according to the argument of the defendants) as tenants in common in tail with cross-remainders and with the ultimate remainder to the settlor in fee.

LORD ELDON, L.C. -I will state my present impression. The term "issue," must be understood to mean child or children, sons or daughters, and I think that, the wife not having survived the husband, and, therefore, not having become capable of any provision, the conveyance must be made to the children as tenants in common in fee. The words "parts and proportions" appear to refer to the antecedent pecuniary provision; and the trust of the money affords a construction of the trust of the real estate. The money was to be taken by the children, in the actual event of the death of the wife, equally and absolutely; and I think, therefore, that their interests in the real estate are absolute and equal. The question, however, is not exempt from difficulty, and I will not now finally dispose of it.

June 9. **LORD ELDON, L.C.**—I remain of opinion that the settlement could be made only in one of two ways, either on the children of the first marriage as tenants in tail, with cross-remainders, with remainder to the father in fee, which, being of age, they may destroy by virtue of their vested remainders, or (and I think that the true construction), on the children of the first marriage in fee. Whichsoever of these constructions prevails is equally fatal to the interests of the children of the second marriage.

EDWARDS v. HODDING

[COURT OF COMMON PLEAS (Gibbs, C.J., Heath, Chambre and Dallas, JJ.), November 26, 1814]

[Reported 5 Taunt. 815; 1 Marsh. 377; 128 E.R. 913]

Auction—Deposit—Payment by auctioneer to vendor—Payment before title made out to property sold—Liability of auctioneer.

An auctioneer received a deposit on property which he had sold by auction, and paid it over to the vendor. At that time queries raised on the title had not been cleared. On a demand by the purchaser for the return of the deposit the auctioneer stated that his principal would not consent to return it, and would enforce the contract. In an action by the purchaser for the deposit,

Held: he might recover the deposit from the auctioneer as money had and received to his (the purchaser's) use because (i) the auctioneer had notice that the title had not been completed before he paid over the money to the principal; (ii) he misled the purchaser to sue himself (the auctioneer), by not saying he had paid it over.

Notes. Explained: *Lee v. Munn* (1817), 8 Taunt. 45; *Horsfall v. Handley* (1818), 8 Taunt. 136. Considered: *Gray v. Gutteridge* (1827), 3 C. & P. 40. Distinguished: *Holland v. Russell* (1861), 1 B. & S. 424. Referred to: *Edgell v. Day* (1865), L.R. 1 C.P. 80.

As to the liability of an auctioneer regarding the deposit on a sale, see 2 HALSBURY'S LAWS (3rd Edn.) 75, 76; and for cases see 3 DIGEST (Repl.) 24-29.

Cases referred to:

- (1) *Sadler v. Evans, Lady Windsor's Case* (1766), 4 Burr. 1985; 1 Digest (Repl.) 768, 3018.
- (2) *Buller v. Harrison* (1777), 2 Cowp. 565; 98 E.R. 1243; 1 Digest (Repl.) 770, 3030.
- (3) *Burrough v. Skinner* (1770), 5 Burr. 2639; 98 E.R. 387; 3 Digest (Repl.) 25, 181.

Action for money had and received by the purchaser at auction of real estate against the auctioneer for the return of the deposit, the title not having been made out.

At the trial of the action before DAMPIER, J., at the Salisbury Summer Assizes, 1814, it appeared that the defendant was employed as auctioneer and solicitor to the assignees of certain bankrupts to sell by auction on Mar. 18, 1813, a freehold estate. Among the conditions of sale, the purchaser was immediately to pay down a deposit of 10 per cent. in part of the purchase-money. The plaintiff, who occupied the estate for a term which expired at Lady Day, 1814, was the purchaser of the third lot at the price of £11,260, and paid to the defendant £1,000 on account of the deposit, and duty. The abstract was not delivered by the time stipulated, but was received. The purchaser requiring some further elucidation of the title which was not furnished so promptly as to satisfy him, his solicitor on Mar. 21, 1814, wrote to the defendant that

"for want of a title, the latter would be pleased to return the plaintiff his deposit money with interest, and that he [the solicitor] would write to the plaintiff to prepare to quit according to the defendant's notice"

which had been served on the plaintiff in September, 1813, for quitting at the end of his term or paying double rent. On Mar. 23 the defendant wrote in answer that

"he was directed by the assignees to inform the plaintiff's solicitor that they were proceeding with the title to the estate, and that they would not consent either to return the plaintiff's deposit or to let him off his purchase."

The plaintiff and two other purchasers on Mar. 28 again wrote announcing their "determination to abandon their contracts, and required a re-payment of their several deposits with interest, and stated their intention to sue on refusal."

On Mar. 30 the defendant wrote that

"he had laid the last-mentioned letter before the assignees, who directed him to say that they would not return the deposit, nor suffer the plaintiff to abandon his purchase. They had lost no time in procuring answers to the objections, and were proceeding to complete the title as fast as possible."

At the trial the defendant's counsel did not attempt to prove that the title had been perfected in time, although they said it would shortly be made good, but relied on the fact that the defendant had received no notice from the plaintiff not to pay over the money, and they proved that before the plaintiff's first demand made from him of the deposit he had paid over the whole of it to the assignees who were his principals, and they contended that, therefore, the action could not be maintained against him. DAMPIER, J., thought that the defendant was not authorised to part with the deposit when he must, from his employment as solicitor for the vendors, have known long before he paid it over that there were objections to the title. He, therefore, thought the fact of the payment over did not protect the defendant. He also observed that when the defendant answered the plaintiff's letters he never communicated to him the fact that he had paid over the deposit to his principals, but left him under the impression that it was still in the defendant's hands, and thereby had misled the plaintiff and encouraged him to bring the present action. On that ground, if there were no other, he thought that the defendant had precluded himself from now insisting on the defence that he had paid over the money. Under this direction the jury found a verdict for the plaintiff.

Serjeant Lens obtained a rule nisi to set aside the verdict and have a new trial. The conclusion which had been drawn from the defendant's letters, he contended, was unwarranted, for there was nothing in them inconsistent with the fact of the defendant's having paid over the money; they rather pointed to that event by answering, to the demand made on himself, that the assignees would not consent to return it. He cited *Sadler v. Evans* (1) in support of the contention that such an action ought to be brought against the principal unless in special cases, as under notice, or mala fide. In this case there had been neither notice nor mala fides. *Buller v. Harrison* (2) was not the case of an auctioneer. If an auctioneer is, as has been said, the agent for both parties, yet he is the agent of each for different purposes. Though the purchaser may make the auctioneer his agent for the purpose of signing a contract, yet the auctioneer, in the act of receiving the money, is agent for the vendors only, not for the purchaser: the purchaser had no need of an agent for himself, to whom he should pay the deposit; he might as well keep the money in his own pocket.

Serjeant Best showed cause against the rule: The action was properly brought against the defendant, who was both auctioneer and attorney of the vendors. The plaintiff would have had great difficulty in recovering back the deposit from the assignees. But if his action could be sustained against them the defendant ought to have apprised the plaintiff by his answer that the money had been paid over, and who were the persons against whom the action was to be brought. In *Burrough v. Skinner* (3) it was determined that an auctioneer was a mere stakeholder, and that his having paid over the deposit after objections to the title had been disclosed to him, was no answer to an action to recover it back. The present case is still stronger; the defendant necessarily knew, on account of his being concerned as solicitor, the defects in the title, and, therefore, ought to have retained the money, at least, till he saw whether the title could be perfected.

Lens in support of his rule, admitted that he felt the weight of the last case cited, but urged that the plaintiff ought to have inferred from the letters that the

defendant had paid over the money, or at least they were sufficiently ambiguous to put the plaintiff on making further inquiry. It was incumbent on him to prove everything necessary to the success of his action, and it was his fault that he omitted to ascertain the fact. The defendant did not deny it, or in any way delude him. It was a very important question whether an auctioneer was to retain the deposit on large sales while the titles were making out. If he, as auctioneer, was agent for both parties, he was agent for the two *diverso intuitu*, and, therefore, unless an auctioneer was in a strict sense a depositary and entitled to retain the money, without determining at whose risk it was held, the money was not money had and received to the use of the plaintiff. It is not proved in this case that there had been any failure in the performance of the conditions of sale before the defendant had parted with the money, and, if so, it never was, while it was in his hands, money had and received to the plaintiff's use, for it was not originally received by him to the plaintiff's use, but to the use of the assignees, and, if the condition did not fail while he held the money, it never was the plaintiff's money in the defendant's hands. The circumstance that the defendant was attorney for the vendors makes no difference, so far as he is from being *conusant* of a defective title, he even now contends it is a good title. The case of *Burrough v. Skinner* (3) stands on the notice of the defects in the title being given to the auctioneer before the money was paid over. At all events, the cause ought to be submitted again to a jury to inquire whether this was an acquiescence by the defendant, and a misleading of the plaintiff, which was not distinctly left to them; and, therefore, the plaintiff is not entitled to retain his verdict.

GIBBS, C.J.—There is no question in this case but on the single point, whether the defendant has placed himself out of the reach of this action by having paid over this money to his principal. It is not disputed, but that the plaintiff has a title to recover back his deposit, but, says the defendant, he ought not to recover it from me, because I have paid over the money to my principal, and the plaintiff may sue the principal. On the first of the two grounds which **DAMPIER, J.**, took at the trial, we think, the action is maintainable. I do not say that *Burrough v. Skinner* (3) is not maintainable to the utmost extent to which it goes, but it is not necessary to go so far for the purposes of the present action, for this defendant is the attorney to the vendors, as well as auctioneer, and it is quite clear he must have known that the title was disputable in the view the purchaser had of it, for he knew no answer had been given in due time to the queries which the purchaser had made, even supposing that a satisfactory answer could be thereafter given. In this view we think he paid the money over in his own wrong, and that it may be recovered from him by the plaintiff.

HEATH, J.—I am of the same opinion. It is admitted, if express notice had been given to the defendant not to pay over the money, an action would have lain. The defendant's knowledge as the vendor's attorney of doubts which had been raised on the title, is equivalent to express notice.

CHAMBRE, J.—I am of the same opinion. This is not an absolute payment by the plaintiff to the defendant as the vendors' agent, but a conditional payment; or, as it is more properly called, a deposit. The defendant receives it, knowing the condition that there should be a good title and he knows that that condition is not performed; he nevertheless takes on himself, with this knowledge, to pay over the money, which he was not warranted in doing; and, therefore, the judgment must be for the plaintiff. I think the direction of the learned judge was right throughout.

DALLAS, J.—I wish distinctly to guard against saying what is the duty of an auctioneer in any other case; but upon this case I am quite clear that the defendant ought not to have paid over the deposit, and that the plaintiff is entitled to recover.

Rule discharged.

WINTER AND OTHERS v. LORD ANSON AND OTHERS

[VICE-CHANCELLOR'S COURT (Sir John Leach, V.-C.), July 23, 1823]

[Reported 1 Sim. & St. 434; 57 E.R. 174]

[LORD CHANCELLOR'S COURT (Lord Lyndhurst, L.C.), July 24, October 30, 1827]

[Reported 3 Russ. 488; 6 L.J.O.S.Ch. 7; 38 E.R. 658]

Sale of Land—Lien for unpaid purchase-money—Bond by purchaser to secure payment—Payment to be made within twelve months of death of vendor—Vendor's right to lien.

W., being seised of a certain estate, entered into an agreement for the sale of it to M. By the agreement, W., in consideration of the sum of money therein mentioned, agreed to convey the estate to M. in fee, free from all encumbrances, and M. agreed to pay to W. on Sept. 29 then next, on the execution of the conveyance and completion of the surrender, the sum of £75 per acre for the estate. It was also agreed that the amount of such consideration money should be secured by the bond of M. to W., with interest at 4 per cent., and should remain so secured during the life of W. on the regular payment of the interest. The estate was measured, and the purchase-money found to amount to £1,485. The conveyance expressed that the whole purchase-money had been paid, but in fact the sum of £485 was the only part of it which had been paid. M. executed a bond to W. in the penal sum of £2,000, conditioned to be void on payment by M. to the executors, administrators, or assigns of W. of the sum of £1,000, the remainder of the purchase-money, within twelve months after the decease of W., with interest in the meantime at 4 per cent. M., having paid the £485 and executed the bond, was let into possession of the estate. He afterwards became a bankrupt, and his assignees sold the estate to the defendant. The interest on the sum secured by the bond had been paid to the previous September, but not afterwards, and two years later W. died. In an action by W.'s representatives to establish a lien on the estate conveyed by W.,

Held: in general where a bond was given for the whole or part of purchase-money the vendor did not lose his lien for the unpaid money; the circumstance that the money was secured to be paid on a future day did not affect the lien, nor was it affected by the fact that the time of payment was dependent on the life of the vendor; and, therefore, the plaintiffs were entitled to succeed.

Notes. Considered: *Parrott v. Sweelland* (1835), 3 My. & K. 655; *Dixon v. Gayfere* (No. 3) (1855), 21 Beav. 118; *Jersey v. Briton Ferry Floating Dock Co.* (1869), L.R. 7 Eq. 409. Distinguished: *Re Brentwood Brick and Coal Co.* (1876), 4 Ch.D. 562. Referred to: *Clarke v. Royle* (1830), 3 Sim. 499; *Teed v. Carruthers* (1842), 2 Y. & C. Ch. Cas. 31; *Fuller v. Bennett* (1843), 2 Hare, 394; *Goode v. Burton* (1847), 1 Exch. 189; *Barker v. Stickney*, [1919] 1 K.B. 121.

As to vendor's lien, see 24 HALSBURY'S LAWS (3rd Edn.) 156-161; and for cases see 32 DIGEST (Repl.) 325 et seq.

Cases referred to:

- (1) *Mackreth v. Symmons* (1808), 15 Ves. 329; 33 E.R. 778, L.C.; 32 Digest (Repl.) 331, 598.
- (2) *Tardiff v. Scrughan* (1769), cited in 1 Bro. C.C. at p. 423; 28 E.R. 1216; sub nom. *Fordiff v. Scrugham*, cited in Amb. at p. 725, L.C.; 32 Digest (Repl.) 332, 602.

Also referred to in argument:

Elliot v. Edwards (1802), 3 Bos. & P. 181; 127 E.R. 100; 32 Digest (Repl.) 335, 636.

Fawell v. Heelis (1773), Amb. 724; 2 Dick. 485; 27 E.R. 468; sub nom. *Fowel v. Heelis*, 1 Bro. C.C. 422, n., L.C.; 32 Digest (Repl.) 352, 740.

Re Parkes, Ex parte Parkes (1822), 1 Gl. & J. 228; 32 Digest (Repl.) 350, 725.

Bond v. Kent (1692), 2 Vern. 281; 1 Eq. Cas. Abr. 143; 23 E.R. 782; 32 Digest (Repl.) 352, 745.

Nairn v. Prowse (1802), 6 Ves. 752; 31 E.R. 1291; 32 Digest (Repl.) 352, 744.

Bill by the personal representatives of a vendor against a purchaser who had become bankrupt and his assignees, and also against a purchaser from the assignees, to establish a lien upon the real estate conveyed by the vendor for part of the purchase-money.

William Winter, the vendor, was in June, 1814, seised in fee of an estate partly freehold and partly copyhold. By articles of agreement, dated June 16, 1814, made between Winter, of the one part, and William Mousley, of the other part, Winter, in consideration of the sum of money therein mentioned agreed to be paid to him by Mousley, agreed to convey the estate to Mousley in fee-simple free from all encumbrances, and Mousley agreed to pay to Winter on Sept. 29 then next ensuing and on the execution of the conveyance the sum of £75 per acre for the estate, and it was also agreed :

“That the amount of such consideration money shall be secured by the bond of the said William Mousley unto the said William Winter, and interest, at £4 per centum per annum, and shall remain so secured during the life of the said William Winter on the regular payment of such interest as aforesaid.”

The estate was measured and the purchase-money found to amount to £1,485, being £576 for the freehold and £909 for the copyhold. By indentures of lease and release, dated Sept. 28 and 29, 1814, and made in pursuance of the agreement, Winter, in consideration of £576 therein expressed to have been paid to him at or before the execution of the conveyance for the purchase of the fee-simple of the freehold part of the estate, conveyed the freehold part of the estate to Mousley in fee-simple. A receipt for the £576 was endorsed on the deed of release. On Oct. 1, 1814, in further pursuance of the agreement, Winter surrendered the copyhold to Mousley in fee-simple, and this surrender was expressed to be made in consideration of £909 paid by Mousley to Winter, the receipt whereof Winter thereby acknowledged. Notwithstanding the conveyance and surrender expressed that the whole purchase-money had been paid, the sum of £485 was the only part of it that had in fact been paid, and on Sept. 29, 1814, Mousley executed a bond to Winter in the penal sum of £2,000 conditioned to be void on payment by Mousley to the executors, administrators or assigns of Winter, of the sum of £1,000, the remainder of the purchase-money, within twelve months next after the decease of Winter, with interest at 4 per cent. Mousley having paid the £485 and executed this bond, was let into possession of the estate. By deed, dated Nov. 2, 1814, Mousley mortgaged the freehold part of the estate for the term of five hundred years to Anne Baggalay, to secure £400 which he had borrowed from her, and on May 10, 1815, he surrendered the copyholds to one Gould, in fee, to secure £1,000 which he had borrowed from Gould.

In May, 1817, a commission of bankrupt issued against Mousley, and, on June 7, 1817, the bargain and sale to his assignees was executed. In August, 1817, the assignees sold and conveyed the freehold and copyhold estate in question to Lord Anson, together with some other real estates belonging to Mousley, and allowed his lordship to retain £1,200 of the purchase-money as an indemnity against the claims of the plaintiffs. The assignees paid off the mortgages to Anne Baggalay, and Gould out of the personal estate of Mousley. The interest on the bond was paid down to Sept. 29, 1816, but not afterwards, and in 1818 Winter brought an action against Mousley on the bond, and in 1819 obtained a verdict against him. Mousley obtained his certificate under the commission of bankrupt. In May, 1819, Winter died without having entered up judgment on the verdict against Mousley.

A and the plaintiffs had not entered up judgment because Mousley had no property on which it could be made available.

B The plaintiffs contended that Anne Baggalay, and Gould, the mortgagees of the estate, had notice of the lien on the estate claimed by Winter in respect of the £1,000, and that, if the mortgages were still subsisting, they would not be entitled to any priority over the lien so claimed. They also said that the assignees had notice of the lien, and that, although they had paid off the mortgages out of Mousley's personal estate, they were not entitled to reimburse his personal estate out of the money produced by the sale of his real estates until they had discharged the sum in respect of which the lien was claimed, or, in case the court should be of opinion that the mortgages, if subsisting, would be a prior charge to the lien, that, inasmuch as the mortgages had been paid off by the assignees, the estates must now be considered as free from all claims and encumbrances except the lien claimed by the plaintiffs.

C The bill prayed that it might be declared that the plaintiffs, as the personal representatives of Winter, were entitled in equity to a lien upon the freehold and copyhold estate, in respect of the £1,000, as well against the mortgagees and all persons claiming on their behalf as against Mousley and for an injunction to restrain Lord Anson from paying over the £1,200 to the assignees until the claim of the plaintiffs was satisfied. The assignees, in their answer, stated that they had been informed, and believed that upon the occasion of Mousley executing the bond it was agreed between Winter and Mousley, that Winter should accept the bond as payment of so much of the purchase-money as the bond amounted to and that Winter should have no claim or lien upon the estate in respect of it.

D When the cause came on to be heard on Nov. 27, 1821, the vice-chancellor referred it to the Master to inquire whether, at the time of executing the bond, it was agreed between Winter and Mousley that Winter should accept the bond as payment of so much of the purchase-money as the bond amounted to and that Winter should have no lien upon the estate in respect of it. The Master reported that he found that upon the execution by Mousley of the bond it was not agreed between Winter and Mousley, that Winter should accept the bond as payment of so much of the purchase-money of the estates and premises in question as the bond amounted to and that Winter should have no lien upon the estate and premises, or any part of the same in respect thereof.

E *Heald and Wheatley* for the plaintiffs.

G *Skirrow, Bell, and Bickersteth* for the various defendants.

F **SIR JOHN LEACH, V.-C.**—This case is altogether new in its circumstances. The written agreement of the parties expresses that the price of the estate should not be paid till the death of the vendor, the vendee agreeing to pay interest upon it by half-yearly payments until that period and to give his bond accordingly. But the language of the conveyance does not proceed upon this agreement. It is expressed to be made in consideration of a sum of money then paid, the receipt for which is endorsed upon the deed. The terms of the written agreement, however, did in fact govern the conduct of the parties, and a bond was taken for the payment of the purchase-money at the death of the vendor, and for payment of interest in the meantime. The question is whether under these circumstances the vendor has a lien upon the estate.

I In ordinary cases, where the conveyance expresses, contrary to the fact, that the purchase-money is paid, there, though the estate passes at law by the conveyance, it does not pass in equity until the actual payment of the price—until the vendor has received that consideration for which it appears by the deed he contracted to part with his estate. Suppose it had been expressed in this conveyance that the price was not to be paid until the death of the vendor and there had been a covenant on the part of the purchaser then to pay the amount and to pay the interest in the meantime, could it then have been said that it appeared

by this deed that the vendor had contracted not to part with his estate until the actual payment of the price? Would it not rather have been the true effect of the language of the conveyance in such case that the vendor had contracted to part with his estate presently, not in consideration of the actual immediate payment of the price, but in consideration of the covenant for the future payment of that sum with interim interest, and that having, therefore, the covenant which was the consideration bargained for, the estate must pass by the conveyance in equity as well as at law. Although it is not expressed in this conveyance that the price was not to be paid until the death of the vendor, yet such was, in fact, the actual agreement and substantial dealing of the parties, and the language of the conveyance to the contrary is the mere result of the common form.

The question comes to this, whether the court is concluded by the form of the deed from entering into the truth of the case. If the language of the deed is to prevail, then the price is to be taken as actually paid, for so it is expressed in the deed. It is the vendor, therefore, who in the first place attempts to raise an equity against the allegations of the deed, and, if the vendor be permitted to repel the effect of the deed by showing that the price was not paid, it must necessarily follow that the vendee must be at liberty to disclose the whole truth and to explain the reason why that payment was not made. I consider, therefore, that the case is, in principle, the same as if the conveyance had stated the real contract of the parties, and that by the effect of that contract the vendor agreed to part with his estate in consideration of the bond for the future payment of the price; and that, when such bond was executed, the estate passed to the vendee in equity as well as at law.

Bill dismissed.

The plaintiffs appealed to **LORD LYNTHURST, L.C.**, who, on Oct. 30, 1827, delivered a judgment in which he stated the facts and continued as follows: The question is whether, under the circumstances of this transaction, the vendor retained a lien upon the premises sold to the vendee for that portion of the purchase-money which was secured by the bond. The assignees, who represent the vendee, contend that they are entitled to keep the estate without paying what remains due of the purchase-money.

In general, where a bill, note, or bond is given for the whole or any part of the purchase-money the vendor does not lose his lien for so much of the money as remains unpaid. The circumstance that in these cases the money is secured to be paid at a future day, does not affect the lien. In the present instance the bond was taken as a security for the payment of part of the purchase-money, twelve months after the death of the purchaser, with interest at the rate of 4 per cent. in the meantime. I do not think that the lien is affected by the fact of the period of payment being dependent on the life of the vendor. That circumstance does not appear to me to afford such clear and convincing evidence of the intention of the vendor to rely, not upon the security of the estate, but solely upon the personal credit of the vendee, as would be necessary in order to get rid of the lien. It would not be inconsistent with an express pledge, and I do not perceive why it is at variance with the lien resulting from the rules of a court of equity.

It was said in the argument that this was the case of an annuity, and *Mackreth v. Symmons* (1) was cited on the part of the defendant, but the grounds of the judgment in that case do not apply to the present. In observing upon that part of the question which related to the annuities **LORD ELDON, L.C.**, reasons upon the nature of the annuities which were upon lives. He said (15 Ves. at pp. 350, 351):

"If the annuities had been paid, there must have been a difference in the estimation; also, *de anno in annum*, the value was decreasing, not only as the annuities were wearing out, but also as the number of annuitants was decreasing by death. It is impossible, it is not natural to suppose that parties, dealing for the consideration of annuities and the purchase of a reversion,

which might not take effect in possession until all the annuitants were dead, relied on that reversion as security in addition to the indemnity by the bond. . . . I have felt from the first that there is upon the part of the plaintiff that natural justice and equity, which excite a wish that I could enforce the lien;"

but so far as related to the annuities, he was of opinion, upon the particular grounds which I have stated, that he could not. I may add, that, even in the case of an annuity for lives, LORD CAMDEN, in *Tardiff v. Scrughan* (2), was of opinion in favour of the lien. Here, however, what is called the annuity is in fact nothing more than the interest of so much of the purchase-money as remained unpaid, which interest was, of course, to continue until the principal should be discharged.

As in this case, then, there was no agreement for the extinguishment of the lien, and as, in my judgment, there is nothing in the transaction itself, as evidenced by the instruments, leading to a clear and manifest inference that such was the intention of the parties, I think it should be declared, that the plaintiffs have a lien upon the estate in question for the residue of the purchase-money. The only point argued was the question of the lien as between the vendor and vendee in whose place Lord Anson stands, and I wish to be understood, it is upon that point only that judgment is given.

Appeal allowed.

MOORSOM AND ANOTHER v. KYMER AND OTHERS

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Le Blanc, Bayley and Dampier, JJ.), January 28, 1814]

[Reported 2 M. & S. 303; 3 Camp. 549, n.; 105 E.R. 395]

Contract—Implication of contract—Express agreement between one party and third person relating to subject-matter of contract sought to be implied.

Shipping—Freight—Implied promise to pay—Alleged promise by endorsees of bills of lading—Express undertaking in charterparty by charterers to pay freight.

The law will not raise an implied promise where there is an express agreement between one of the parties to the alleged implied promise and a third person relating to the subject-matter of the promise.

By a charterparty under seal charterers chartered a ship for a voyage to deliver cargo at T. and then load cargo at S. for delivery to London, the charterers undertaking to pay freight. Before the homeward cargo was unloaded at London the charterers endorsed the bills of lading relating to that cargo to the defendants.

Held: there being an express provision in the charterparty for the payment of the freight the mere fact that the defendants received the goods did not raise an implied promise by them to pay the freight.

Notes. Distinguished: *Dougal v. Kemble* (1826), 3 Bing. 383. Referred to: *Bell v. Kymer* (1814), 5 Taunt. 477; *Nockells v. Lingham* (1838), 2 Jur. 438; *Sanders v. Vanzeller* (1843), 4 Q.B. 260.

As to implied contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 121-124; and for cases see 12 DIGEST (Repl.) 126-132. As to payment of freight, see 35 HALSBURY'S LAWS (3rd Edn.) 479 et seq.; and for cases see 41 DIGEST (Repl.) 538 et seq.

Cases referred to :

- (1) *Roberts v. Holt* (1685), 2 Show. 443; 89 E.R. 1031; 41 Digest (Repl.) 543, 3205.
- (2) *Leer v. Yates* (1811), 3 Taunt. 387; 128 E.R. 154; 41 Digest (Repl.) 469, 2458.
- (3) *Sodergren v. Flight and Jennings* (1796), cited in 6 East, at p. 622; 102 E.R. 1428; sub nom. *Lodergren v. Flight*, cited in 13 East, at p. 403, N.P.; 41 Digest (Repl.) 544, 3220.
- (4) *Cock v. Taylor* (1811), 13 East, 399; 2 Camp. 587; 104 E.R. 424; 41 Digest (Repl.) 544, 3221.
- (5) *Bell v. Kymer* (1814), 5 Taunt. 477; 3 Camp. 545; 1 Marsh. 146; 128 E.R. 775; 41 Digest (Repl.) 544, 3224.
- (6) *Wilson v. Kymer* (1813), 1 M. & S. 157; 105 E.R. 59; 41 Digest (Repl.) 503, 2761.

Action by the plaintiffs, owners of the ship *Lavinia* to recover freight from the defendants, endorsees for value of bills of lading relating to cargo carried in the vessel.

The plaintiffs were the owners of the ship *Lavinia*. By a charterparty under seal, dated July 3, 1809, between the plaintiff Moorsom, as part-owner, and Greaves & Co., Greaves & Co. chartered the ship for a voyage from London to the islands of St Thomas and San Domingo, and if required to the Mediterranean before returning to London, to deliver her outward cargo at St. Thomas, and take in goods at San Domingo; and it was stipulated that the goods should be delivered at London agreeably to the bills of lading. Greaves & Co. covenanted with Moorsom that they would take the brig from July 21, 1809, for eight calendar months and provide at San Domingo a cargo of coffee in bags, together with such a quantity thereof in casks as they might think proper to ship not exceeding the number of fifty, and would pay to the plaintiffs freight for the same at and after the rate of 15s. per cwt. in bags, and 16s. per cwt. in casks, together with 5 per cent. primage thereon, such freight and primage being in full for the freight or hire of the brig for the eight calendar months and to be paid in manner following, viz., £600, part thereof on the day the brig should be cleared outwards at the Custom House in London on her voyage by bill or bills payable two months after date, and the remainder, if she should return to London direct without proceeding to the Mediterranean, by good and approved bills payable ten weeks after date from the day she should be reported at the Custom House there.

The ship, having delivered her outward cargo at St. Thomas, proceeded to San Domingo, and there, by order of the charterers took in a cargo for London direct. The coffee, for the freight of which this action is brought, was shipped at San Domingo, and bills of lading were signed, stating it to be shipped by J. D. on the account and risk of Greaves & Co. to be delivered in the port of London to Greaves & Co. or their assigns, he or they paying freight for the goods as per charterparty, with primage and average accustomed. The ship likewise took in at San Domingo other goods, consigned by similar bills of lading to other persons in London from whom the plaintiffs received the stipulated freight.

The ship, with her homeward cargo, arrived at London, was reported, and entered the West India Docks on June 20, 1810.

Before any part of the cargo was discharged, bills of lading for the coffee were endorsed for a valuable consideration by Greaves & Co. to the defendants, and the coffee, before any part of it had been discharged, was, by virtue of those endorsed bills of lading transferred in the books of the West India Dock Co. into the names of the defendants. It was likewise entered at the Custom House in the defendants' names, and landed, and the duties upon landing were paid by the defendants. It was then lodged in the warehouses of the West India Docks in the defendants' names, and afterwards delivered out to their order. On July 14, Greaves & Co.

A stopped payment. In August the plaintiffs sent a freight-note, or account of freight, to Greaves & Co., that they might compare it with the charterparty. In September after the delivery of the ship the defendants, being considered as personally liable as having entered the goods in the above circumstances, were called upon to settle the freight of the coffee at the rate of 15s. per cwt. in bags, and 16s. per cwt. in casks as stipulated in the charterparty, but they refused to do so, alleging that they had made heavy advances for Greaves & Co. The sum of £3,000 was agreed to be the amount of the freight upon the coffee at the rate aforesaid.

The plaintiffs alleged that when the coffee was lodged in the warehouses it was subject to the lien of the plaintiffs for the freight, and that, in consideration of the plaintiffs' consenting to the coffee being delivered to the defendants, the defendants were liable to them for the freight. The defendants denied liability.

C At the trial before LORD ELLENBOROUGH, C.J., at the sittings after Trinity Term, 1813, the jury returned a verdict for the plaintiffs for the sum of £3,000 subject to the opinion of the court on a Case stating the facts as set out above.

D *Campbell* for the plaintiffs: If the defendants had been the consignees instead of endorsees of the bills of lading, there could not have been a doubt that by the receipt of the coffee they would have made themselves debtors for the freight: *Roberts v. Holt* (1); *Leer v. Yates* (2). There is no difference in point of law between consignees and the assignees of a bill of lading. The latter are clothed with the same rights and might sue the captain or owner for non-delivery of the goods, and, therefore, they are subject to the same liabilities. *Sodergren v. Flight and Jennings* (3), *Cock v. Taylor* (4), and *Bell v. Kymer* (5), all show that the endorsees of a bill of lading are liable for the freight.

E *Taddy* for the defendants: There is no case in which the bare receipt of the goods under the bill of lading by the endorsee has been held to render him liable for the freight agreed to be paid by the charterparty. *Roberts v. Holt* (1) was the case of a consignee, and it does not appear there was a charterparty. In *Cock v. Taylor* (4) there was no charterparty. The endorsee of the bill of lading may indeed have so conducted himself as to render himself liable for the objection *prima facie* is that there is a want of privity to raise an assumption, but that may be removed by the conduct of the party and such was the case in *Wilson v. Kymer* (6). But here it does not appear that the defendants had any dealings with the plaintiffs or that they had notice of the terms on which the freight was to be paid by the charterparty or ever assented to them. The whole case rests upon their having received the goods.

G LORD ELLENBOROUGH, C.J.—This case has been argued to an extent that would embrace almost every case upon record on a bill of lading or on the subject of freight within judicial memory. It is extremely dangerous to shake the authority of decided cases, and it is always mischievous unnecessarily to draw into question principles when the case before the court does not require it. I shall, therefore, forbear to enter into that wide field of argument which has been raised from the cases drawn into discussion. I shall forbear to go into the question how far any lien does or does not exist in this case. The freight, or more properly speaking the compensation for the hire of the ship, is constituted by the agreement between the plaintiffs and Greaves & Co., and whether, after the stipulation contained in that agreement by which the delivery of the cargo is not made to depend on the previous payment of the stipulated hire, nor even on the previous delivery of the bills, the party could stand upon his general right to retain, there is no occasion to consider at present, or how far that which is made the subject of express stipulation may be lawfully eked out and extended by the bill of lading. If the bill of lading refers to the charterparty for the rate of payment, it would seem as if it could not enhance its stipulations and vary the position of the parties.

I But, assuming that the right of lien existed and that it attached on the goods at the time of their coming into the hands of the endorsees of the bill of lading, the

question is whether there was any contract express or implied on the part of the endorsees to pay the freight. It has not been suggested that there was any express contract; has there been any implied contract? From what facts is it to be implied? The landing the goods and paying the duties seem to be the only facts. It does not appear that there was any forbearance on the one side, or security given on the other, but it is to be implied merely from the endorsees receiving the goods from on board the ship that they signified their acquiescence to become liable in the terms of the charterparty.

Why must a contract be necessarily inferred from that? If, indeed, there had been any previous communication with the defendants as to the plaintiffs' right to demand the freight of them, or as to their consent to waive their lien, that might have raised an inference that the defendants undertook to pay it, but in the absence of any such thing, I do not see on what basis such an inference can be raised except this, that wherever a party accepts the goods under a bill of lading, the permitting him to take them shall raise an implied assumpsit on his part to pay the freight. I am not prepared to agree to that as an universal proposition, and, therefore, cannot infer a promise in this case. The not exercising the lien might be either a voluntary recession from the party's right or might be done upon a consideration, but I do not discover any particle of evidence to make it referable to the latter presumption.

LE BLANC, J.—The question brought before the court is whether the owners of the ship can maintain any action on the promise, as stated in the declaration, to pay a certain sum for freight or carriage of goods which the defendants have received. It is not pretended that there was any express promise to pay, but it is contended that under the circumstances of this case the law will necessarily imply such promise. It is not necessary to enter into the consideration of the question whether the owner or the captain who is their servant could insist on detaining the goods until the freight was paid, because, taking that for granted without entering into the question and desiring to be understood as not determining it in this case, I think there is no ground for saying that the law will infer such a promise on the part of the defendants.

The plaintiffs were owners of this ship, which they let to Greaves & Co. on a voyage from London to St. Thomas and San Domingo, there to take on board a cargo of coffee in bags or casks for which they stipulated to be paid after a certain rate on the coffee brought home, that is, 15s. per cwt. for the coffee in bags and 16s. per cwt. for that in casks. Such was the contract between the plaintiffs and Greaves & Co. In pursuance of that contract Greaves & Co. sent the ship to San Domingo to their agents who shipped on board a cargo of coffee. The captain signed bills of lading whereby he undertook to deliver the coffee to the charterers or their assigns, he or they paying freight for the same according to the charterparty, so that it is clear that the captain was cognisant of the existence of a charterparty. The defendants became the purchasers of the cargo from Greaves & Co. before any part of it was discharged, and the bills of lading were endorsed to them, and were produced at the West India Docks, by virtue of which the coffee was transferred into their names, and they paid the duties and finally received them. Supposing the owner or captain to have had a lien on the goods, he might have insisted on detaining them until the freight stipulated for by the charterparty was paid, or he might have insisted on preserving his lien by the mode of entering them at the West India Docks, but it does not appear that any such thing was done.

The defendants were allowed to land the goods and pay the duties without any demand for freight being made, they standing in the situation of endorsees of the bills of lading under the charterers. The rule is that the law will not raise an implied promise where there is an express agreement between the parties. If the defendants are liable as purchasers it can only be as standing in the same situation

A as Greaves & Co., who agreed for the payment of a specific freight. Supposing the plaintiffs might have detained the goods until the specific freight was paid (and it is not pretended that they could have detained for more) or until the bills were given, if they have not insisted on that right, the law will not raise an undertaking between these parties, where there is another remedy, and it is not necessary for the purposes of justice that it should be raised, but will remit the plaintiffs to their original contract.

B The decision in *Cock v. Taylor* (4) has been pressed on us, but it does not appear that any charterparty existed in that case. The defendant claimed the goods under the bill of lading, but it did not appear that the party under whom he claimed was liable in any way whatever, so that there, if the defendant was not liable, it did not appear that the owner of the ship could have resorted to any other person.

C Therefore, taking that to be an authority that where the ship is a general ship and there is no other to whom the party can have resort the law will imply a promise in order to prevent a failure of justice, that is not the case here. Here there is no occasion to raise such an undertaking, where there is a clear original contract under seal. *Bell v. Kymer* (5), before SIR JAMES MANSFIELD, is still sub judice. There, however, this question did not arise, although in the course of the trial the subject was argued. The action there was not brought by the owners of the ship, but by the persons who hired it, who were the charterers and stood in the situation of Greaves & Co. in this case. There the plaintiffs had no means of resorting to any other persons for the freight.

D Under the present circumstances it seems to me that the law will not raise an implied undertaking where there is already an express agreement, as it will not interfere where it is not necessary for the purposes of justice, the shipowners having their remedy left entire under the charterparty.

E **BAYLEY, J.**—I am of the same opinion. There is no express contract between the parties, and there are no facts which would warrant us in raising a contract by implication of law. Counsel for the plaintiffs was unwilling in his argument to see the distinction between this and the other cases, but an unbiassed mind may easily see it. The question in *Sodergren v. Flight and Jennings* (3) was simply a question on the lien, and, when that was decided, there was an end of all other questions. The court there held that as the cargo belonged to the same person, was under one consignment, and came to one and the same person, the captain had a lien for the whole freight on the remainder of the cargo. *Cock v. Taylor* (4) was the case of a general ship where there was no special contract between the parties, but only a bill of lading. Counsel has argued that in that case the shippers would have been liable. I much doubt that, for where the bill of lading expresses that the goods are to be delivered to the consignee or his assigns, he or they paying freight for the same, if the captain deliver the goods to the assigns without procuring the freight for them, I am not prepared to say that he can resort back to A. B., the shipper, where A. B. has never expressly stipulated that he will pay the freight.

H Therefore, I think that a case in which there is no other contract but the bill of lading and the shipper has made no express stipulation for the payment of freight concludes nothing upon a question where there is an express contract under seal to pay freight. *Bell v. Kymer* (5) was, as between the parties to the action, like *Cock v. Taylor* (4), as between them the ship was a general ship. What contract was there in that case by which any person had undertaken to make good the freight to the plaintiffs, the charterers? If there was no contract, then it stood upon the bill of lading on the same ground as *Cock v. Taylor* (4).

I What is there in the present circumstances to raise any implied contract? I do not meddle with the question whether the captain had a right of lien. The fact is that the captain delivered the goods without any stipulation. It does not appear that he told the defendants that he meant to look to them, and here was a charterparty by which a person in this country stipulated to pay the freight. The captain

does not make any communication to the assignees of the bill of lading, and does not that warrant them in supposing that he means to have recourse to the parties who are liable under the charterparty? That is made abundantly strong in this case, because ten weeks elapsed before any demand was made on these defendants. Another objection to the plaintiffs' right to recover is that these defendants would have to pay more than the plaintiffs were entitled to receive, by reason that they have already received £600.

DAMPIER, J.—I am entirely of the same opinion. This case has been so fully gone into that it will only be necessary for me shortly to state the few grounds of my opinion.

This is a case where there is an express contract under seal, and there is no case which shows that where an express contract subsists with a third person for the payment of freight, the mere fact of receiving the goods has raised an implied promise by the person who receives them to pay the freight. That would be laying down a very extensive proposition. I admit, for the argument's sake, that the captain had a lien; he has, however, waived that lien. Is then that waiver a circumstance from which a promise is to be implied? The captain did not give any notice to the defendants when they took the goods that he would look to them for the freight, but, making a voluntary waiver of his lien, he permits the goods to be removed, looking for the freight to the person to whom the contract naturally led him. If he had said: "I will not part with the cargo unless you undertake to pay me the freight," there would have been a consideration, and to that point some of the cases are applicable. Here, however, there is a total absence of any evidence of that sort. There was no stipulation, nor any demand made of the freight. What has been observed by my brother **BAYLEY**, that the plaintiffs can have no right to demand freight at the rate of 15s. and 16s., because £600 have been already received, is material. The difficulty which I felt on the first reading of this case has not been removed by the argument which has not shown that any assumpsit can be implied to pay the freight. Where there is an express contract binding one party to pay, so that the other may look to the charterparty for the freight, there is no occasion to raise an implied assumpsit. *Expressum cessare facit tacitum.*

BAYLEY, J. added that he had omitted to observe, that *Wilson v. Kymer* (6) was decided entirely on the usage.

Judgment of nonsuit.

R. v. DE BERENGER AND OTHERS

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Le Blanc, Bayley and Dampier, JJ.), June 20, 1814]

[Reported 3 M. & S. 67; 105 E.R. 536]

Criminal Law—Conspiracy—Conspiracy to defraud—Spreading false rumours to raise price of securities on certain day.

An agreement by spreading false rumours to raise the price of government securities on a certain day is an indictable misdemeanour. The offence lies in the act of conspiracy and the combination to effect the purpose mentioned, and it would be complete although the object was not attained. If it were attained, it would be a fraud against all those members of the public who purchased the securities affected on the day in question.

Evidence—Judicial notice—State of war between Great Britain and foreign Power.

The court will take judicial notice that a war exists between this country and a foreign State, which war is referred to in different Acts of Parliament, and, therefore, an allegation to that effect need not be proved.

Notes. Followed: *R. v. Aspinall* (1876), 2 Q.B.D. 48. Considered: *Scott v. Brown, Doering, McNab & Co., Slaughter and May v. Brown, Doering, McNab & Co.*, [1891-4] All E.R. Rep. 654. Referred to: *King v. R.* (1845), 7 Q.B. 795; *R. v. Gurney* (1869), 11 Cox, C.C. 414; *White v. R.* (1876), 12 Cox, C.C. 318; *Mogul Steamship Co. v. McGregor* (1888), 21 Q.B.D. 544; *Salaman v. Warner* (1891), 65 L.T. 132; *Andrews v. Mockford*, [1896] 1 Q.B. 372; *R. v. Brailsford*, [1904-7] All E.R. Rep. 240; *R. v. Parker and Bulteel* (1916), 25 Cox, C.C. 145; *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, [1922] All E.R. Rep. 207.

As to conspiracy to defraud, see 10 HALSBURY'S LAWS (3rd Edn.) 834, 835; and for cases see 15 DIGEST (Repl.) 1199-1205.

Cases referred to:

- (1) *R. v. Edwards* (1726), 8 Mod. Rep. 320; 11 Mod. Rep. 386; 1 Sess. Cas. K.B. 336; 2 Stra. 707; 88 E.R. 229; 14 Digest (Repl.) 130, 927.
- (2) *R. v. Sterling* (1663), 1 Lev. 125; 1 Sid. 174; 83 E.R. 331; sub nom. *A.-G. v. Starling*, 1 Keb. 650; 14 Digest (Repl.) 125, 871.
- (3) *R. v. Best* (1705), 2 Ld. Raym. 1167; Holt, K.B. 151; 6 Mod. Rep. 137, 185; 1 Salk. 174; 92 E.R. 272; 14 Digest (Repl.) 126, 873.
- (4) *R. v. Robe* (1734), 2 Stra. 999; 93 E.R. 993; 14 Digest (Repl.) 240, 2054.
- (5) *Palfrey's Case* (1620), Cro. Jac. 527; 79 E.R. 451; 15 Digest (Repl.) 840, 8022.
- (6) *R. v. Hannon* (1704), 6 Mod. Rep. 311; 87 E.R. 1050; 15 Digest (Repl.) 840, 8026.

Motion in arrest of judgment by the defendants after their conviction on a charge of conspiracy.

The defendant de Berenger and seven others were tried in London before Lord ELLENBOROUGH, C.J., upon an indictment for a conspiracy. They pleaded Not Guilty, and the jury found them guilty upon the third and subsequent counts.

The indictment set forth that at the time of committing the several offences, there was and for a long time before, i.e., two years and upwards, war between our lord the King and his allies, and the then ruler of France, Napoleon Bonaparte, and the people of France. The third count stated that the defendants on Feb. 19, 1814, unlawfully contriving, etc., by false reports, rumours, arts, and contrivances, to induce the subjects of the King to believe that a peace would soon be made between the King and his subjects and the people of France, and thereby to occasion

without any just or true cause a great increase and rise of the public government funds and government securities of this kingdom, and to injure and aggrieve the subjects of the King, who should on Feb. 21 purchase and buy any part or parts, and share or shares of and in the public government funds, etc., then and there, i.e., on Feb. 21 unlawfully did conspire to make and propagate and cause to be made and propagated, unto and among divers subjects in the county of Kent, and also unto and among divers subjects at London, and places adjacent thereto, divers false reports and rumours that Bonaparte was killed and that a peace would soon be made between the King and his subjects, and the people of France, and that the defendants would by such false reports and rumours, as far as in them lay, occasion an increase and rise in the prices of the public government funds and other government securities, with a wicked intention thereby to injure and aggrieve all the subjects of the King who should on Feb. 21 purchase or buy any part or parts, share or shares of and in the public government funds and other government securities.

All the defendants (except two) appeared to receive judgment, when *Serjeant Best* on behalf of the defendant *Butt* and *Park* for de Berenger submitted as an objection to the conviction that the introductory averment, that there was a war, which was a material averment and applied to all the counts, was not proved at the trial. LORD ELLENBOROUGH, C.J., answered that there were so many statutes which spoke of a war with France, that it was impossible for the judges not to take judicial notice of it. *Serjeant Best* replied that he believed none of the statutes spoke of a war with the King and his allies, and France, the alliance being but a recent event.

They also moved in arrest of judgment on three grounds, which, they said, applied to all the subsequent counts as well as to the third: (i) that no crime known to the law was alleged in the count; (ii) that if there be any crime alleged, the persons to be affected by it were not particularised as they ought to be, or that it was stated too generally; (iii) that it was alleged to have been done with intent to raise the public funds and government securities of "this kingdom," that is, the United Kingdom of Great Britain and Ireland, whereas nothing was charged which had reference to any other funds or securities than the public funds and securities of England only.

No adjudged case of conspiracy had gone so far as this; the crime alleged was a conspiracy to raise the price of the government funds of this country, but if it be not a crime in itself to raise the price of the government funds of this country, a conspiracy to do so would not carry it further, unless some collateral object be stated to give it a criminal character. Generally speaking, the higher the price of the public funds, the better for the country, because the higher the state of public credit. It was true that the indictment charged that they conspired to raise the funds on a particular day, and the raising the funds on any given day might or might not be criminal according as the day had concern with the transaction, as if it had been shown that on that day the defendants were possessed of certain shares in the funds and intended to sell them, and thereby, by raising the price, to cheat the particular persons who should become purchasers, or if the indictment had alleged that it was the day on which the commissioners for reducing the national debt were wont to purchase and that the defendants did it with intent to enhance the price of such purchases. In these and such like cases, the object being criminal or injurious to the public, what was done with that object would be criminal also, but all that was alleged on this record was general, without showing to the court how it was criminal in the defendants to raise the funds, or in what way the public could be injured.

As to its being charged per conspiracyem, it was true that in *R. v. Edwards* (1), it was laid down that to conspire to do a lawful act to an unlawful end was a crime, and to that extent the doctrine has been carried in several cases, though formerly the rule relating to conspiracy seems to have been restrained to such

as conspired to indict a man falsely and maliciously, or falsely to move and maintain pleas, or to retain persons for maintaining the same. But the case above cited and all the cases prove that it is the end to which the court looks, and that end must be unlawful. Wherefore in *R. v. Sterling* (2), the defendants being acquitted of all but conspiring to impoverish the farmers of the excise, it was objected that there was no offence, but the court held it well because the information showed that the excise was parcel of the revenue of the Crown, and so the impoverishment of the farmers of excise tended to prejudice the revenue of the Crown. To the same effect in *R. v. Best* (3) it was agreed by the court that several people might lawfully meet and consult to prosecute a guilty person; otherwise if to charge one that was innocent, right or wrong, for that was indictable. So that unless the end be unlawful there is no offence.

Therefore, if the indictment had stated certain individuals by name who purchased stock on the day laid and that the defendants conspired to raise the price in order to cheat or prejudice those individuals or to benefit themselves at their expense, or that the public were concerned in the purchases of that day, and the defendants conspired to the prejudice of the public, the offence would have been complete, but it was not enough to allege generally that it was to the injury and grievance of all the subjects who should buy stock on the day. For a similar default in the indictment in *R. v. Robe* (4), the judgment was arrested. The only exception in which the law allowed of a general form of indictment, was in the case of barratry or a common scold: see *Palfrey's Case* (5), *R. v. Hannon* (6); and that is upon the reason of the thing, because those offences consist of a multitude of instances which it would be inconvenient to set forth.

Lastly, the indictment was framed upon a supposition that there were funds which were the general funds of the United Kingdom of Great Britain and Ireland, for after styling His Majesty King of the United Kingdom, it spoke of the funds of this kingdom, i.e., of the kingdom of which His Majesty was before styled King, whereas there were no general funds of the United Kingdom, but they were distinctly the funds of each kingdom, as they were respectively charged on and applied to each. By art. 7 of the Act of Union, it was expressly provided that the charge for the payment of interest and debt incurred in either kingdom before the union should continue to be separately defrayed by Great Britain and Ireland respectively.

LORD ELLENBOROUGH, C.J.—I am perfectly clear that there is no ground for the motion in arrest of judgment. A public mischief is stated as the object of this conspiracy. The conspiracy is by false rumours to raise the price of the public funds and securities, and the crime lies in the act of conspiracy and combination to effect that purpose and would have been complete although it had not been pursued to its consequences or the parties had not been able to carry it into effect. The purpose itself is mischievous, it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price by means of false rumours it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day. It seems to me also not to be necessary to specify the persons who became purchasers of stock as the persons to be affected by the conspiracy, for the defendants could not, except by a spirit of prophecy, divine who would be the purchasers on a subsequent day. The excuse is that it was impossible they should have known, and, if it were possible, the multitude would be an excuse in point of law. But the statement is wholly unnecessary, the conspiracy being complete independently of any persons being purchasers. I have no doubt it must be so considered in law according to the cases.

Upon the last point, in a large sense the Irish funds are the funds of this kingdom and so are the British, they form the resources and means of the United Kingdom. The Irish funds I believe are purchased and sold in the market here

and the interest is payable in this country, and they, as well as the funds of the other countries, though strictly applicable to each kingdom, could not in a large sense be correctly called otherwise than the funds of the United Kingdom. Since the Union [of Great Britain and Ireland in 1800] they are each a part of the stock and revenues of the United Kingdom, however they may be defrayed separately as they antecedently were.

LE BLANC, J.—This motion in arrest of judgment is made on three grounds. The first is that it is not a crime in itself to raise the price of the funds. We are to look to the indictment in order to see what is the charge, and the charge in the indictment is that the defendants conspired by false rumours to raise the price of the funds on a particular day. It may be admitted, therefore, that the raising or lowering the price of the public funds is not per se a crime. A man may have occasion to sell out a large sum which may have the effect of depressing the price of stocks, or may buy in a large sum and thereby raise the price on a particular day, and yet he will be guilty of no offence. But if a number of persons conspire by false rumours to raise the funds on a particular day, that is an offence; and the offence is, not in raising the funds simply, but in conspiring by false rumours to raise them on that particular day.

Upon the second objection, which is that the indictment does not specify the persons who were to be defrauded, it follows from the nature of the charge that they could not be named, because this is a charge of a conspiracy on a previous day to raise the funds on a future day so that it was uncertain who would be the purchasers. The offence being to raise the funds on a future day, its object was to injure all those who should become purchasers on that day, and not some individuals in particular. In the same manner it is if a false rumour be spread on a day prior to a market day in order to raise the price of a commodity in the market, whether it be an article of necessity or not.

The third objection is founded upon the indictment's calling them the public funds of this kingdom, which, it is said, since the Union must mean the United Kingdom of Great Britain and Ireland. But so they are the public funds of the United Kingdom and go in furtherance of the service of the United Kingdom, although particular sums are applied to the particular service of one part of the United Kingdom only. It appears to me, therefore, on all three objections that there is no reason why we should pause to consider whether this judgment should be arrested.

BAYLEY, J.—If the case admitted of any doubt I should be desirous of further time to consider it, but I have no doubt that there is not any foundation for the objections that have been made. To raise the public funds may be an innocent act, but to conspire to raise them by illegal means and with a criminal view is an offence—an offence, perhaps, not affecting the public in an equal degree as if it were done with intent to affect the purchases of the commissioners for the redemption of the national debt which would be affecting the public in its aggregate capacity, but still, if it be completed, it will certainly prejudice a large portion of the King's subjects who have occasion to purchase on that day. It is not necessary to constitute this an offence that it should be prejudicial to the public in its aggregate capacity, or to all the King's subjects, but it is enough if it be prejudicial to a class of the subjects. Here then is a conspiracy to effect an illegal end, and not only so, but to effect it by illegal means, because to raise the funds by false rumours, is by illegal means. The end is illegal, for it is to create a temporary rise in the funds without any foundation, the necessary consequence of which must be to prejudice all those who become purchasers during the period of that fluctuation.

The next objection is that the indictment does not state the persons by name whom the defendants intended to defraud, and it is suggested that the indictment would have been good if it had stated that the conspiracy was with intent to

prejudice certain persons by name, and that by means thereof those persons were prejudiced. But the conspiracy is the thing which constitutes the crime, and it is sufficient if the indictment states the conspiracy as it existed at the time when the crime was complete. It might have been detected before any purchases were made or the mischief was effected, yet that would not have altered the offence, because the parties had done everything in their power, and all that was essential to complete the crime when they had formed the conspiracy, and used illegal means for effecting it. It did not depend on them but on others whether their conspiracy would be mischievous to others. Still their criminality must depend on their own act, and not on the consequences that ensued from it.

Another objection has been made that the indictment speaks of the funds to be raised by this conspiracy as the funds of this kingdom, and that there are no funds of this kingdom. It is perfectly true that, since the Union, the funds are raised in certain proportions upon one part of the kingdom and upon the other, but they are raised by the legislature of the kingdom and when raised are applied by the government under the authority of Parliament to such purposes as Parliament may direct. Notwithstanding they may be found in part only applicable to England and in part to Ireland, yet they constitute the funds of the kingdom, and may be so called, though separated into British and Irish funds.

DAMPIER, J.—The charge in this indictment is that the defendants by false rumours conspired to give a temporary rise to the funds of this kingdom in order to deceive those persons who should purchase into the funds on a particular day. I own I cannot raise a doubt but that this is a complete crime of conspiracy according to any definition of it. The means used are wrong, they were false rumours; the object is wrong, it was to give a false value to a commodity in the public market, which was injurious to those who had to purchase. That disposes of the first objection.

The second objection is that the persons injured ought to have been named, to which one answer is that the criminality is complete when the concert to bring about a mischievous object by illegal means is complete; it is not necessary that the object should be attained. Therefore there was no need to set out the name of any person, because no person need be injured. That is the first answer, and the next is that it was impossible the defendants could know who those persons would be. It is said that, as the indictment was not preferred until after they were known, it might, therefore, have named the persons, but, if that were to be required, it would be making the consequential damage a necessary part of the crime. That disposes of the second objection.

The third objection, that there are no funds of this kingdom because there is none which is raised at the common charge of both parts of the United Kingdom, may be answered thus. Each fund, as it is raised from either part of the United Kingdom, becomes, when raised, strictly a part of the funds of the United Kingdom. The United Kingdom is answerable for them, and they are for the benefit of the United Kingdom, whether applied to one part of it or to the other. It seems to me, therefore, that they are better described in this than in any other way. For these reasons I conceive that there is no ground laid for arresting the judgment.

Motion dismissed.

TWEDELL v. TWEDELL AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), May 11, November, 1822]

[Reported Turn. & R. 1; 37 E.R. 992]

Family Arrangement—Transaction regarded with favour by court—Transactions between father and son not viewed in light of reversionary bargains—Reasonable degree of jealousy.

The court will not view transactions between father and son in the light of reversionary bargains, but will regard them as family arrangements, with a reasonable degree of jealousy, and will not look into all the motives and feelings which might actuate the parties in entering into such arrangements.

Notes. Considered: *Bellamy v. Sabine* (1835), 2 Ph. 425; *Hartopp v. Hartopp* (1856), 21 Beav. 259. Referred to: *Baker v. Bradley*, [1843-60] All E.R. Rep. 787; *Talbot v. Staniforth* (1861), 1 John. & H. 484.

As to the attitude of the court to family arrangements, see 17 HALSBURY'S LAWS (3rd Edn.) 223; and for cases see 24 DIGEST (Repl.) 1122, 1123.

Cases referred to in argument:

Gibson v. Jeyes (1801), 6 Ves. 266; 31 E.R. 1044, L.C.; 43 Digest (Repl.) 85, 731.

Gowland v. De Faria (1810), 17 Ves. 20; 34 E.R. 8; 25 Digest (Repl.) 295, 1007.

Gould v. Okeden (1731), 4 Bro. Parl. Cas. 198; 2 E.R. 135, H.L.; 25 Digest (Repl.) 273, 822.

Morgan v. Morgan (1737), West temp. Hard. 265; 1 Atk. 489; 26 E.R. 310, L.C.; 28 Digest (Repl.) 536, 505.

Heron v. Heron (1741), 2 Atk. 160; sub nom. *Herne v. Herne*, Barn. Ch. 430, L.C.

Kinchant v. Kinchant (1784), 1 Bro. C.C. 369; 28 E.R. 1183; 24 Digest (Repl.) 1127, 94.

Coleby v. Smith (1683), 1 Vern. 205; 23 E.R. 416; 33 Digest (Repl.) 596, 128.

Englefield v. Englefield (1691), 2 Vern. 236; 23 E.R. 753; 28 Digest (Repl.) 570, 848.

Robinson v. Litton (1744), 3 Atk. 209; 6 Cru. Dig. 428, 429; 26 E.R. 922; 2 Digest (Repl.) 96, 609.

Lord Dursley v. Fitzhardinge Berkeley (1801), 6 Ves. 251; 31 E.R. 1036, L.C.; 22 Digest (Repl.) 607, 6995.

Crowe v. Ballard (1790), 2 Cox, Eq. Cas. 253; 3 Bro. C.C. 117; 1 Ves. 215; 30 E.R. 118; 1 Digest (Repl.) 536, 1654.

Bill for an order setting aside certain recovery deeds and other documents as having been obtained by undue influence.

By his will, dated Jan. 15, 1748, John Aynsley, being seised in fee of freehold estates in Northumberland and Durham, devised the same, together with certain copyhold hereditaments, which he had duly surrendered to the uses of his will, to the use of Francis Tweddell for life with a limitation to trustees during his life to preserve contingent remainders, with remainder to the first and other sons of Francis Tweddell successively in tail male with remainders over.

On the death of the testator in 1752 Francis Tweddell entered into the possession of the devised estates. He had issue three sons—John Tweddell, his eldest son, Francis Tweddell the plaintiff, his second son, and Robert Tweddell one of the defendants, his youngest son. He had also issue two daughters. In the years 1776 and 1784 two Acts of Parliament were passed for enclosing the common fields in parishes in which some of the devised estates were situate, and allotments were made to Francis Tweddell the father, in respect of those estates. His proportion of the expenses of passing and carrying these Acts into execution amounted to £518 10s, and £180, and those sums were paid by him. By an indenture, dated

A Jan. 1, 1783, Francis Tweddell the father, by virtue of a power contained in the first mentioned Act, demised the lands allotted to him under that Act to Robert Ilderton for the term of one thousand years by way of mortgage for securing the sum of £369, being that part of the sum of £518 10s. which he was enabled to charge upon the allotments, and, by an indenture bearing even date with the mortgage, Ilderton declared that his name was made use of as a trustee for Francis Tweddell the father.

B In June, 1791, John Tweddell attained the age of twenty-one years, and towards the end of 1792 he agreed to join with his father in suffering recoveries of all the devised estates and limiting them to the uses after mentioned. Indentures of lease and release, dated Jan. 4 and 5, 1793, were accordingly prepared and executed. The release recited the facts before stated, that application was intended to be made to Parliament for an Act to effect the enclosure of other commons, and that Francis Tweddell the father had expended sums of money to a very considerable amount and more than a tenant for life could reasonably have been expected to do in erecting hedges and fences upon and making other lasting improvements to the devised estates.

D In performance of this agreement and in consideration of the said sum of £369 (part of the sum of £518 10s.) then due to Francis Tweddell the father by virtue of the mortgage to Robert Ilderton, and of the sum of £149 10s., being the residue of the sum of £518 10s., and of the sum of £180, and of the other sums of money expended by Francis Tweddell the father, as thereinbefore recited, and also, in consideration of the covenants thereafter contained on the part of Francis Tweddell the father and of a bond entered into by him for the payment to John Tweddell during the life of him Francis Tweddell, of an annuity of £180 and of a further annuity of £20, in the event in the bond expressed, they, Francis and John Tweddell, conveyed all the freehold estates in Northumberland to a tenant to the praecipe for suffering a recovery, which recovery, it was declared, should enure, as to the principal part of the same estates, to the use of Francis Tweddell the father for life without impeachment of waste, remainder (subject to an annuity of £100, thereby limited to Jane, the wife of Francis Tweddell the father, during her widowhood, in case she should survive her husband) to the use of John Tweddell for life without impeachment of waste, remainder to the use of his first and other sons successively in tail general, remainder to the use of his daughters as tenants in common in tail general, with cross-remainders between them in tail, remainder, as to one moiety of the premises to such uses generally as Francis Tweddell the father should by deed or will appoint, and in default of such appointment to the uses therein mentioned. As to the other moiety of the said premises it was to enure to the use of the defendant Robert Tweddell for life without impeachment of waste, remainder to the use of his first and other sons successively in tail general, remainder to the use of his daughters, as tenants in common in tail general, with cross-remainders between them in tail, remainder after and subject to a general power of appointment limited to Francis Tweddell the father to the use of the plaintiff Francis Tweddell for life without impeachment of waste, with the like limitations in favour of his sons and daughters in tail with the ultimate remainder to the use of Francis Tweddell the father, in fee, and as to all other estates in the said county of Northumberland, to the use of Francis Tweddell the father, in fee.

I By the indenture of release John Tweddell was empowered, when he should be in actual possession of the premises limited to him for life, to charge the same with an annuity, not exceeding £200, by way of jointure, for the life of any woman he might marry, and with any sum not exceeding £2,000 for the portions of daughters and younger sons, and Francis Tweddell the father covenanted to complete, at his own expense, the enclosure then in progress under the second mentioned Act of Parliament and to defray the expenses of obtaining and carrying into execution the Act of enclosure then intended to be applied for, provided such expenses should not exceed the amount which a tenant for life should be empowered

under the Act to charge upon the lands allotted to him. The term of 1,000 years, A
granted to Ilderton, was surrendered and merged.

In Easter Term, 1793, a recovery was suffered of the Northumberland estates, and, deeds having been executed by Francis Tweddell the father and John Tweddell for the purpose of making a tenant to the praeceipe of the Durham estate, recoveries were suffered thereof and of the copyhold premises, and they were respectively B
limited to the use of Francis Tweddell the father in fee. On July 25, 1799, John Tweddell died without issue, and in 1800 Francis Tweddell the plaintiff joined with his father in suffering a recovery of a portion of the Northumberland estate, which had been intended to be comprised in the recovery of 1793, but which had been omitted by mistake, and in limiting the same to his father in fee.

Francis Tweddell the father, having sold the freehold estate at Durham and part of the other freehold and copyhold estates limited to him in fee, by his will C
dated Mar. 14, 1805, exercised the power first reserved to him by the release of January, 1793, and limited the moiety subject to the power of parts of the estates to trustees for a term for securing certain annuities, remainder to the defendant Robert Tweddell for life, remainder to his first and other sons successively in tail general, remainder to his daughters, as tenants in common in tail general, D
remainder to the plaintiff Francis Tweddell for life, remainder to his first and other sons successively in tail general, remainder to his daughters as tenants in common in tail general, with remainder to his own right heirs, and he limited the moiety of the residue of the said estates to trustees for a term for securing annuities, remainder to the plaintiff Francis Tweddell for life, remainder to his first and other sons successively in tail general, remainder to his daughters as E
tenants in common in tail general, remainder to the defendant Robert Tweddell, and his issue, with remainder to his own right heirs. The testator devised certain parts of the estates limited to him in fee by the release of January, 1793, in moieties between his two sons, the plaintiff and the defendant, and their issue, and the residue of such estates he devised to trustees, upon trust to sell, and to stand possessed of the money produced by the sale upon trusts for the benefit of his daughters. The testator appointed the defendant Robert Tweddell and Simon F
Mewburn, executors of his will, and died on Oct. 14, 1805.

The bill was filed on Feb. 13, 1813, by Francis Tweddell the son against Robert Tweddell and the executors and trustees under the will of Francis Tweddell the father, and was amended by virtue of an order dated May 5, 1815. The amended bill, in addition to the facts before mentioned, alleged that undue advantage had G
been taken of the youth and dependent situation of John Tweddell, that the benefits obtained by Francis Tweddell the father were unreasonable and unjust and represented the plaintiff's embarrassments as the reason of his having joined in the recovery suffered by him after the death of his elder brother. It then prayed that the recovery deeds and the recoveries before mentioned might be declared to have been obtained by undue influence, and that the limitations, H
contained in the release of January, 1793, which were then undetermined, might be set aside and the plaintiff be declared entitled to equity to the fee-simple and inheritance of such of the estates devised by the will of the said John Aynsley as were then remaining unsold, and that the defendant Robert Tweddell and the other defendants, the trustees, might be decreed to convey the respective estates and interests vested in them by the recovery deeds and by the will of Francis I
Tweddell the father to the plaintiff in fee; that an account might be taken of the sums of money produced by the sale of the estates limited to Francis Tweddell the father in fee which had been sold by him and his devisees in trust; and that the executors of Francis Tweddell the father might be decreed to pay to the plaintiff what, upon taking such account, should be found to have arisen from the aforesaid sales (except the produce of the sale of the estates, devised by the will of Francis Tweddell the father in trust for sale, the bequest of which in favour of his sisters the plaintiff offered to confirm), and in case the executors should

A not admit assets sufficient to answer what might be found due to the plaintiff that the usual accounts might be taken of the personal estate of Francis Tweddell the father.

B The defendant Robert Tweddell by his answer admitted, that at the time when the recovery was proposed to be suffered, John Tweddell had no other means of subsistence beyond what was allowed him by his father except a fellowship at Trinity College, Cambridge, which did not then produce so much as £80 a year, that the recovery deeds were prepared by the directions of Francis Tweddell the father, and that the same solicitor was employed in the transaction on behalf both of John Tweddell and of Francis Tweddell the father. The defendant also admitted that part of the freehold and copyhold premises limited to Francis Tweddell the father in fee, not including the freehold estate at Durham, were sold by him for the sum of £4,233; that other parts of the aforesaid premises were sold by his devisees in trust for £1,350; and that the remainder of the aforesaid premises were of the value of £700 or thereabouts. The defendant also stated that the moiety of the premises which, upon the death of John Tweddell without issue, became subject to the power of appointment of Francis Tweddell the father did not exceed in value £15,000. The defendant denied that any undue advantage had been taken of John Tweddell, that the terms entered into were unreasonable, or that John Tweddell was ignorant of the value of the property proposed to be limited to Francis Tweddell the father, and stated that John Tweddell lived upwards of six years after suffering the recovery and never expressed himself dissatisfied therewith, or with the settlement made thereupon, and that the plaintiff had himself acquiesced in the settlement until the beginning of the year 1813. The defendant admitted the plaintiff's embarrassments, but submitted that by suffering the recovery of the premises omitted by mistake in the deeds of 1793, he had confirmed the recovery suffered by his brother. The answer set forth a clause in the will of the testator Francis Tweddell, by which, after reciting that his son Francis Tweddell the plaintiff was indebted to him on bond note and otherwise, the testator released and discharged his son from the payment of all such sum and sums of money, and directed that all the securities given by him for the money due should immediately after his decease be delivered up to be cancelled.

F James Losh, who was stated in the answer to have been consulted by John Tweddell on the subject of the fairness of the recovery, deposed that he did not believe that John Tweddell had executed the deeds in question without consideration or reflection, inasmuch as he had previously mentioned to the deponent his determination to propose an arrangement for the settlement of the family property, and his wish to have some permanent allowance out of the same; that John Tweddell was at the time of the transactions aforesaid, as the deponent had reason to believe, well acquainted with the nature and value of the property proposed to be barred and settled; and that after he had executed the deeds and perfected the arrangement he had frequently expressed himself to the deponent to be perfectly satisfied therewith, and perfectly to approve thereof.

G The solicitor who was concerned in the transaction for both parties deposed that he had at different times before the recovery was suffered and the deeds were executed conversed with John Tweddell upon the arrangement made by him with his father, and that upon such occasions he appeared to be satisfied therewith, and perfectly to understand the same, particularly that he had expressed himself glad to have it in his power, by executing the deeds and joining in suffering the recovery, to reimburse his father for the advances which he had made in order to improve the estates and to enable him to provide for his, John Tweddell's, brothers and sisters.

I On the cross-examination of these witnesses by the plaintiff it appeared that they were unacquainted with the property comprised in the deeds and recoveries and incompetent to form any opinion of the value of the interests purchased by Francis and John Tweddell of each other, and had not taken upon themselves to

explain to John Tweddell or advise him upon the value of such interests. The solicitor also deposed to his belief that no other person was employed on the behalf of John Tweddell, to explain or advise him upon the fairness of the bargain. Evidence was also entered into by the plaintiff, to show that John Tweddell was indebted at the date of the transaction. A

The cause having been heard before SIR JOHN LEACH, V.-C., on July 10, 1818, his Honour ordered the bill to be dismissed. The plaintiff appealed. B

Hart, Heald and Treslove for the plaintiff.

Horne and Duckworth for the defendants.

LORD ELDON, L.C.—When this case was first opened it appeared to me that there were some very important points in it, one of which is whether the plaintiff can come into court at all or not, under the circumstances of the case. [The LORD CHANCELLOR stated the case, and observed that under the original settlement, the father being only tenant for life, could make no provision for any of his children, and that John, being only tenant in tail male, could in his father's lifetime make no provision for daughters if he should have any, but that John and his father might unquestionably, without any consideration, have barred both the brothers, and the effect of the recovery which had been suffered was to introduce Roberts as a remainderman into the succession before Francis could become entitled. He continued :] C

The first question, therefore, to be considered is what Francis could have done in the lifetime of John, and I wish to be informed whether there is any case in which a remote remainderman has come into court complaining of what he is pleased to call a deception on the immediate remainderman where that immediate remainderman himself made no complaint. I recollect no such instance. If Francis had made the complaint in the lifetime of John, John might have replied: "I choose to prefer Robert to you, and to acquire such an estate as will enable me to provide for daughters." It seems, therefore, to me to be infinitely difficult to suppose that a remote remainderman could complain to the court of a transaction of which the party himself, the remainderman immediately interested, did not complain, and the new limitations are of such a nature that John Tweddell, the immediate remainderman, must have known that by that transaction he was altering the succession and order of the estate, both as to his brothers and as it might affect his daughters, if he should have any. The point, however, being new, and no decision having yet been made on it, I shall not pronounce judgment to that effect, and I wish it to be understood that I do not decide that after twenty years this gentleman could not complain at all or that he could not come to complain of this transaction although it was not complained of by the immediate remainderman. D

The court will not view transactions between father and son in the light of reversionary bargains, but will regard them as family arrangements, with a reasonable degree of jealousy, and will not look into all the motives and feelings which might actuate the parties in entering into such arrangements. There may be considerations in such cases, which the court could not possibly reach. It might be conducive for instance to the best interests of the parties that the father should be enabled to educate all his children in a liberal way; a principle on which the court acts in the case of an infant eldest son, by giving for his maintenance a much greater sum than he can possibly require, in order that his brothers and sisters may be so brought up and educated, and placed in such situations as to do him credit in the world. E

John Tweddell died in 1799, and, taking it that on his death a title did arise to the plaintiff, so far from prosecuting that title he does confirmatory acts with respect to the new settlement, and such confirmatory acts as to show that he must have understood what the new settlement was. In 1805 the father of the plaintiff dies, having made his will with reference to this settlement. By that will the F

- A plaintiff takes both positively and negatively, for I observe that the father forgave him debts. It is reasonable to suppose that the plaintiff, if he had considered that he had any cause for complaint, would at the death of his father have so complained, but he waits till the Statute of Limitations has run upon the simple contract debts and barred the father's executors of their remedy against him. Under these circumstances I do not see how it is possible to maintain this suit.
- B I cannot look at this transaction upon the mere principle of bargain and sale, but I consider it as a mixed case of bargain and sale and of family arrangement.

HURST AND ANOTHER v. BEACH AND OTHERS

[VICE-CHANCELLOR'S COURT (Sir John Leach, V.-C.), November 3, 4, 11, 25, 1819, January 21, 1821]

[Reported 5 Madd. 351; 56 E.R. 929]

D *Will—Double gift—Legacies given simpliciter to same person—Gifts prima facie cumulative—Legacies not given simpliciter—Presumption that second gift substitutional.*

E Where a testator leaves two testamentary instruments and in both has given a legacy simpliciter to the same person the court, considering that he who has twice given must prima facie be intended to mean two gifts, awards to the legatee both legacies, and it is indifferent whether the second legacy is of the same amount or less or larger than the first. If, however, the legacies are not given simpliciter, but the motive of the gift is expressed, and in both instruments the same motive is expressed and the same sum is given, the court considers these two coincidences as raising a presumption that the testator did not by the second instrument mean a second gift, but meant only a repetition of the first. This principle has no application to a case where the second instrument affords intrinsic evidence that it was intended by the testator in substitution of the first instrument.

F *Will—Evidence—Evidence to repel presumption—Presumption against double gifts.*

G The primary rule is that evidence is not admissible to contradict a written instrument. In some cases the court raises a presumption against the apparent intention of a testamentary instrument and then will receive evidence to repel that presumption, for the effect of such testimony is not to show that the testator did not mean what he has said, but, on the contrary, is to prove that he did mean what he expressed. So, where the court raises a presumption against the intention of a double gift to a legatee it will receive evidence that the testator intended the double gift he has expressed.

H **Notes.** Applied: *Lord v. Sutcliffe* (1828), 2 Sim. 273; *Thorne v. Rooke* (1841), 2 Curt. 799. Considered: *Suisse v. Lowther* (1843), 2 Hare, 424. Applied: *Kirk v. Eddowes* (1844), 3 Hare, 509; *Roch v. Callen* (1848), 6 Hare, 531; *Gordon v. Anderson* (1858), 32 L.T.O.S. 119. Considered: *Wilson v. O'Leary* (1871), L.R. 12 Eq. 525. Referred to: *Guy v. Sharp* (1833), Coop. temp. Brough. 80; *Lee v. Pain* (1844), 4 Hare, 201; *Thurnall v. Rayner* (1856), 4 W.R. 404.

I As to cumulative and substitutional gifts in wills and evidence as to effect of a will, see 39 HALSBURY'S LAWS (3rd Edn.) 955 et seq., 1108–1111. For cases see 44 DIGEST 614 et seq., 1003–1013.

Cases referred to:

- (1) *Gardner v. Parker* (1818), 3 Madd. 184; 56 E.R. 478; 25 Digest (Repl.) 597, 329.

(2) *Hassel v. Tynte* (1756), Amb. 319. A

(3) *Osborne v. Duke of Leeds* (1800), 5 Ves. 369; 31 E.R. 634; 44 Digest 1010, 8681.

(4) *Coote v. Boyd*, *Coote v. Coote* (1789), 2 Bro. C.C. 521.

(5) *Coote v. Coote* (1785), 1 Bro. C.C. 448; 28 E.R. 1233, L.C.; 22 Digest (Repl.) 575, 6565.

(6) *Duke of St. Albans v. Beauclerk* (1743), 2 Atk. 636; 26 E.R. 780, L.C.; 44 Digest 1013, 8712. B

(7) *Hookey v. Hatton* (1773), 1 Bro. C.C. 390, n.; 2 Dick. 461; 28 E.R. 1197; sub nom. *Hatton v. Hookey*, Lofft, 122, L.C.; 44 Digest 1003, 8606.

(8) *A.-G. v. Harleij* (1819), 4 Madd. 263; 56 E.R. 703; 44 Digest 1010, 8682.

Bill by executors praying a decree that the defendant should deliver up a mortgage under which the testatrix was mortgagee and the defendant mortgagor, and that a legacy given to the defendant by a codicil might be declared to be given in satisfaction of a legacy in the testatrix' will. C

A mortgage, dated Oct. 18, 1813, by way of demise for one thousand years, was made by the defendant Beach to B. Heath to secure £1,000 and the same was further secured by the bond of Beach. Beach was bailiff to, and a distant relation of, B. Heath, a lady much advanced in years. In the answer of Beach it was stated that a few days before her death and one day previous to the codicil, after mentioned, B. Heath called for the title-deeds and the mortgage, and, alluding to some former conversation respecting the title-deeds, said: "I'll make you safe; I'll give them up to you now." She then gave Beach instructions where to find the deeds, and, upon his bringing them to her, she gave the deeds back to him and told him "to take them, and to take care of them, that if she got well she was to have them back again, but if she died he was to have them for his own use." On the following day, she reminded Beach of what had passed, and advised him to keep the deeds safely. D

By the will of B. Heath, dated Jan. 2, 1812, several legacies were given and the will proceeded thus: E

"I also give and bequeath to John Bach [meaning the said John Beach] now living with me, the sum of £300 all which said legacies I direct and desire may be paid immediately after my decease, and bear legal interest from my death till paid." F

By a codicil to her will, dated Feb. 11, 1814, the testatrix, after giving several legacies of £500 each, gave "to my manservant, John Beach, a like legacy or sum of £500." The testatrix then gave a like sum of £500 to her maidservant, and all these legacies she directed to be paid at the end of six months after her decease. The testatrix died on Feb. 15, 1814. G

The present bill was filed by the executors, and prayed that the defendant might be decreed to deliver up the mortgage of Oct. 18, 1813, and all deeds in his possession relating to the mortgaged premises, and that the legacy of £500 bequeathed by the codicil to Beach might be declared to be given in lieu and satisfaction of the legacy of £300 left by the will. H

The first question was whether the delivery of the mortgage and bond and the title-deeds operated as a legacy mortis causa or as a release of the mortgage debt. The next questions were whether the legacy by the codicil was accumulative or substitutional, and, lastly, whether evidence was admissible to prove that the testatrix did not mean that the defendant should take both legacies. I

Horne and Spranger for the plaintiffs: Beach was a servant to the testatrix at low annual wages. The legacy to him in the will and the codicil describes him as a "servant." A mortgage cannot be the subject of a donatio mortis causa. A delivery of that which constitutes the debt, a bond, for instance, as in *Gardner v. Parker* (1), may so be given, but not a mortgage. The mortgage deeds do not constitute the debt, but only a security for it. Besides, it would be in the teeth of

A the Statute of Frauds, which requires the assignment to be in writing: see *Hassel v. Tynte* (2). Neither the bill nor the answer states that the bond given with the mortgage was delivered to Beach with the mortgage deeds. The evidence renders it very doubtful with what view the mortgage deeds were delivered to Beach, whether as intending a gift in case the testatrix did not recover or to prevent her personal representatives suing immediately on her death for the mortgage money.

B After the supposed gift the codicil was made, and it affords a strong inference that a gift of the mortgage was not intended as no mention of it is made in the codicil in which the testatrix gave the defendant a further bounty. The evidence is so strong, that the court will not, without directing an issue, say, that a *donatio mortis causa* was intended. As to the legacies. The £500 legacy by the codicil must be taken, not as additional, but as substitutional. Evidence is admissible to prove that the £500 given by the codicil was intended in lieu of the £300 given by the will. In *Osborne v. Duke of Leeds* (3), the Master of the Rolls doubted whether such evidence was admissible, but the case did not require a decision on that point and His Honour admits that in *Coote v. Boyd* (4), LORD THURLOW considered such evidence as admissible on either side.

C

D *Bell and Pepys* for the defendant Beach: Are we bound to deliver up these mortgage deeds? Beach was the agent of the testatrix and a relation. It appears from the evidence that she, being a widow, and without any family, intended to advance him in the world, and with that view she gave him back the mortgage he had granted to her. The mere delivering up of the mortgage deeds was not sufficient, and, therefore, with them she gave up the bond. Though she could not thus by parol transfer her interest in the land, she might give up the money due on the mortgage. When she gave up the bond she gave up the debt, for the bond constituted the debt, and the mortgage was only the security for the debt. It operated as a release of the demand in case she died. With respect to the legacies, Beach is entitled both to the legacy by the will and that by the codicil. The latter is an accumulative legacy. A bill was filed in the Court of Exchequer

E

F by one of the legatees under the will, and there the legacy to Beach was held to be accumulative. Evidence is inadmissible to show that the legacy by the codicil was intended in lieu of that given by the will.

G **SIR JOHN LEACH, V.-C.**—What is the rule of the ecclesiastical court in these cases? On a question as to a legacy, I should think it right to follow the rules by which they are guided in the reception of evidence. In general, they resort to the rule of the civil law, but not in all cases.

A Case was, accordingly, stated for the opinions of DR. SWABEY and DR. LUSHINGTON. After stating the will and codicil the following questions were submitted:

H (i) Whether, upon a question in the ecclesiastical court as to whether the legatee is entitled to the legacy given by the will and also by the codicil, any declarations of the testatrix of her intention that the legacy given by the codicil should be in substitution for the legacy given by the will, could, according to the practice of the ecclesiastical court, be received, and whether such practice is warranted by any decision of that court: see *Coote v. Coote* (5). (ii) Whether in questions as to the admissibility of evidence to explain a testator's intention as to whether legacies given by a will and codicil should be accumulative, or the one taken in substitution for the other, the ecclesiastical court adopts, or is regulated by, the principles of the civil law?

I

ANSWER.

It is very rarely that any suit is now brought in the ecclesiastical courts for the recovery of a legacy, and we are not aware that the point submitted to our consideration has ever received any decision in those courts, nor, indeed, been the subject of discussion. In all questions upon the admissibility of evidence to explain whether a testator intended legacies given by both will and codicil to be accumulative or

not, we are of opinion that the judges of the ecclesiastical courts would conform A
themselves to the rules established by the courts of equity, but, in doubtful points,
where the admissibility of any peculiar species of evidence had either not been
discussed in the courts of equity or left undecided by them, we think the rules of the
civil law would govern. Where legacies are given by will and codicil, the civil law
presumes them to be accumulative, but, according to that law, this presumption
might be rebutted by evidence produced on the part of the heir. Neither the text B
authorities nor the commentators define what species of evidence would be
admissible for such a purpose, nor do we believe that the nice distinctions upon the
admission of parol evidence to explain written instruments were adopted in that
law. We think that if such a case should arise in the ecclesiastical court the course
pursued would be to inquire whether the courts of equity had any decided rule on
the point, and, on finding that they had not, then, as the civil law has neither C
directly nor indirectly excluded that species of evidence, in our judgment the
ecclesiastical courts would admit the declarations of the testator as to his intention.

The questions and the answer being read, the VICE-CHANCELLOR said he would
look into the decisions.

Jan. 15, 1821. **SIR JOHN LEACH, V.-C.**—In cases of this class considerable D
confusion has been introduced from the inaccuracy of reporters. The material
errors in ATKYNS' report (2 Atk. 636) of the leading case of *Duke of St. Albans v.*
Beauclerk (6) are pointed out by LORD BATHURST in his judgment in *Hookey v.*
Hatton (7), and no person can read LORD THURLOW's reported judgment upon this
subject without observing that he is often made to contradict himself. I think the
true result of the decisions, as they apply to the present point, is to be stated thus. E
Where a testator leaves two testamentary instruments and in both has given a
legacy simpliciter to the same person the court, considering that he who has twice
given must prima facie be intended to mean two gifts, awards to the legatee both
legacies, and it is indifferent whether the second legacy is of the same amount, or
less, or larger, than the first. But if in such two instruments the legacies are not
given simpliciter, but the motive of the gift is expressed and in both instruments F
the same motive is expressed and the same sum is given the court considers these
two coincidences as raising a presumption that the testator did not by the second
instrument mean a second gift, but meant only a repetition of the former gift.

The court raises this presumption only where the double coincidence occurs,
of the same motive, and the same sum in both instruments. It will not raise it if
in either instrument there be no motive or a different motive expressed although G
the sums be the same, nor will it raise it if the same motive be expressed in both
instruments, and the sums be different. The presumption cannot, therefore, be
raised in this case, although it be admitted that the motives are the same, inasmuch
as the sums are different, and upon the face of these instruments the defendant
is entitled to both sums. This reasoning has no application to cases where the
second instrument affords intrinsic evidence that it was intended by the testator H
in substitution of the first instrument, as in *Duke of St. Albans v. Beauclerk* (6),
Coote v. Boyd (4), and the recent case of *A.-G. v. Harley* (8), before me.

On the question whether evidence is admissible to prove that the testatrix
did not mean that the defendant should take both sums, there are no decisions in
courts of equity. There are obiter dicta for the admission of such testimony, I
but, in *Osborne v. Duke of Leeds* (3) the point was fully argued, and LORD
ALVANLEY appears to have inclined against receiving it. It did not, however,
become necessary there to decide the question. It is to be collected from the
DIGEST that it was admitted by the civil law. This court has no original jurisdiction
in testamentary matters; it acts with respect to them only upon the ground of
administering a trust, and is bound to adopt, in questions of legacy, the principles
and rules of the ecclesiastical court. I found it necessary, therefore, to direct
inquiry to be made in that court upon this point, and the answer that I have

A received is that no decision has taken place there upon this question, and that no settled opinion is formed upon it.

B It remains, then, to be considered upon the principles of evidence which are received in our own law. Our primary principle is that evidence is not admissible to contradict a written instrument. In some cases courts of equity raise a presumption against the apparent intention of a testamentary instrument, and there they will receive evidence to repel that presumption, for the effect of such testimony is not to show that the testator did not mean what he has said, but, on the contrary, is to prove that he did mean what he has expressed. Thus, where the court raises the presumption against the intention of a double gift by reason that the sums and the motive are the same in both instruments, it will receive evidence C that the testator actually intended the double gift he has expressed. In like manner, evidence is received to repel the presumption raised against an executor's title to the residue, from the circumstance of a legacy given to him, and to repel the presumption that a portion is satisfied by a legacy.

D In all these cases the evidence is received in support of the apparent effect of the instrument, and not against it. Here the evidence tendered is not in support of the apparent effect of the instrument, but directly against it. This codicil leaves unrevoked the former legacy of £300 to the defendant, and makes to him a further substantive gift of £500. The evidence tendered is that the testatrix did not mean this as a further gift of £500 but meant to substitute the £500 in place of the former £300. I am of opinion, therefore, that such evidence cannot be received without breaking in upon the primary rule that parol evidence is not admissible E against the expressed effect of a written instrument.

F The minutes of the decree declared that the defendant, John Beach, was entitled as well to the legacy of £300 given to him by the will of Betty Heath, the testatrix, as to the legacy of £500 given to him by the codicil to the said testatrix's will; and it was ordered that the parties proceed to a trial at law on the issue whether the indenture of mortgage and bond dated Oct. 18, 1813, and the deeds relating to the premises demised by the said indenture of mortgage, were delivered up by the testatrix to the defendant for the purpose of releasing or acquitting the debt due from him in case she did not recover from the illness with which she was then afflicted.

It did not appear at the Registrar's Office that the decree was drawn up and passed. Probably, the suit was afterwards compromised.

EARL CHOLMONDELEY v. LORD CLINTON

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), January 16, 17, February 3, 1815]

[Reported 19 Ves. 261; Coop. G. 80; 34 E.R. 515]

Solicitor—Duty to client—Non-disclosure of confidential information—Right to leave one party to action and act for other party.

A solicitor who has been acting for one party in a cause is under an absolute obligation not to disclose confidential information which has consequently come to his knowledge, and he cannot discharge himself from acting for that party and then act for the other party to the action.

Notes. Explained: *Bricheno v. Thorp* (1821), Jac. 300. Considered: *Beer v. Ward, Ward v. Beer* (1821), post p. 534; *Johnson v. Marriott* (1833), 2 Cr. & M. 183; *Griffiths v. Griffiths* (1843), 2 Hare, 587; *Pearse v. Pearse* (1846), 1 De G. & Sm. 12; *Parratt v. Parratt* (1848), 2 De G. & Sm. 258. Distinguished: *Hutchinson v. Newark* (1850), 3 De G. & Sm. 727. Considered: *Re Holmes, Re Electric Power Co.* (1877), 25 W.R. 603. Applied: *Little v. Kingswood Collieries Co.* (1882), 20 Ch. D. 733. Explained: *Rakusen v. Ellis, Munday and Clarke*, [1911-13] All E.R. Rep. 813. Referred to: *Turquand v. Knight* (1836), 2 M. & W. 98; *Dietrichsen v. Cobburn* (1846), 1 Coop. temp. Cott. 72; *Manser v. Dix* (1855), 1 K. & J. 451; *Horsley v. Cox* (1869), L.R. 7 Eq. 464.

As to a solicitor's obligations towards his client, see 36 HALSBURY'S LAWS (3rd Edn.) 95-106; and for cases see 43 DIGEST (Repl.) 97 et seq.

Cases referred to:

- (1) *Vaillant v. Dodemead* (1748), 2 Atk. 524; 26 E.R. 715, L.C.; 22 Digest (Repl.) 412, 4428.
- (2) *Willson v. Rastall* (1792), 4 Term Rep. 753; 100 E.R. 1283; 22 Digest (Repl.) 399, 4284.
- (3) *Sandford v. Remington* (1793), 2 Ves. 189; 30 E.R. 587, L.C.; 22 Digest (Repl.) 405, 4353.
- (4) *Taylor v. Lewis* (1750), 2 Ves. Sen. 111; 3 Atk. 727; 28 E.R. 73, L.C.; 32 Digest (Repl.) 290, 358.
- (5) *Bishop of Winchester v. Fournier* (1752), 2 Ves. Sen. 445; 28 E.R. 284; 6 Digest (Repl.) 449, 3137.

Motion made by the defendant for an injunction restraining the plaintiff, Earl Cholmondeley, from employing William Montriou as his solicitor in this suit or as his attorney or solicitor in any other suit in equity or action at law commenced or to be commenced by Earl Cholmondeley against Lord Clinton in respect of any estates or property the title whereof came to the knowledge of Montriou as the clerk to William Seymour, one of the defendants, while he was the attorney and solicitor of the defendant Lord Clinton, or which came to the knowledge of Montriou as solicitor for Lord Clinton in partnership with Seymour or with Seymour and Squibb. An injunction was also sought to restrain Montriou from acting as solicitor or attorney for Earl Cholmondeley in any such suits or actions and from communicating to Earl Cholmondeley, his counsel, solicitors, attorneys, or agents, any information relating to the matters in dispute in such suits or actions which had come to the knowledge of Montriou as clerk to Seymour, or as solicitor to Lord Clinton.

Lord Clinton by his affidavit stated his information and belief that Montriou, first as clerk to and afterwards as partner with Seymour, acquired such information relative to the deponent's title to the estates in question in this suit and matters connected therewith as would render his being concerned in the management of the suit as solicitor for the plaintiff, Earl Cholmondeley, highly prejudicial and injurious to Lord Clinton, and that he was assured by the plaintiff, by letter dated Nov. 21, 1812, that it was not in his power to tell Lord Clinton who the person

was who gave him the information he had received relative to the estates in question, and that such information came by an anonymous hand.

Other affidavits in support of the motion by Messrs. Seymour and Squibb, the solicitors of Lord Clinton, and two of their clerks stated the original employment of Seymour in 1805 as Lord Clinton's attorney and solicitor, at which time Montriou was a clerk in Seymour's office, and he so continued until 1809 when articles of partnership were executed between them under which they continued the solicitors of Lord Clinton until March, 1813, when William Squibb was taken into the partnership. In 1812 the bill in this suit was filed by the plaintiffs to recover from Lord Clinton considerable estates in the counties of Devon and Cornwall, and Montriou, while clerk and partner with Seymour, became intimately acquainted with the affairs and property of Lord Clinton and the titles to the estates the subject of the suit, preparing abstracts, deeds, etc., relating to them, and Seymour conferring with him upon the title and the defence. The answer was prepared in 1812. The partnership was dissolved at Michaelmas, 1813, as to Montriou, who in December, 1814, communicated his appointment to be solicitor to the plaintiff Earl Cholmondeley for conducting his suits against Lord Clinton. All the deponents stated that Montriou, as such clerk and partner, acquired such information touching the titles, estates and affairs of Lord Clinton and his defence, as would, in their judgment and belief, render his being concerned in the management of this suit as solicitor for the plaintiff highly prejudicial and injurious to Lord Clinton.

Montriou's affidavit against the motion stated that Seymour was consulted confidentially by and on behalf of Lord Clinton, but he (Montriou) never was consulted confidentially, nor in any manner interfered but as the agent at the request and under the direction of Seymour who, as was usual where one partner in particular was employed for a defendant, appeared to the bill in his own name as solicitor and alone communicated with Lord Clinton, his counsel, the plaintiff's solicitor, and all other persons, touching the defence. Except in the public formal proceedings, and frequently as to them, Seymour corresponded in his own name; all confidential letters were addressed to him alone, many marked "private," and all such letters and copies were kept privately by him, no such papers, nor cases and opinions of counsel, ever being communicated to Montriou. All the deeds, papers, etc., relating to the estates were collected by Seymour in the beginning of 1812 and secured in his private office. Montriou admitting his acquaintance with some of Lord Clinton's affairs, stated that he never acted in them independent of Seymour's direction, or saw the estates or was acquainted with the tenants or receivers of the rents, and, except when he was clerk revising an old abstract relating to the estates in question, he did not recollect that he prepared any deeds, etc., or that Seymour conferred with him on the title further than by informing him of the plaintiff's claim and the objection on which it was founded, admitting that he was well acquainted with the abstract of the defendant's title which did not contain any deed or statement that was not on the pleadings. The answer was prepared under Seymour's immediate and exclusive direction; he (Montriou) was never consulted upon it; and from the dissolution of the partnership he wholly lost sight of the suit. The application to him to become the plaintiff's solicitor came from the plaintiff's agent, and he neither directly nor indirectly solicited or sought for such appointment, which was most unlooked for and unexpected on his part. He denied that he was in possession of information acquired as clerk or partner which would, in his judgment, render his being concerned with the plaintiff highly prejudicial to the defendant, and stated that the treaty for the dissolution of partnership commenced and was concluded, very soon after Lord Clinton appeared to the bill in November, 1812.

This affidavit, as to Montriou's appointment as the plaintiff's solicitor being unsolicited and unexpected and solely at the instance of the plaintiff's agent, was confirmed by the affidavit of that agent. It was stated at the Bar, but not by affidavit and was not admitted, that Lord Cholmondeley intended to continue

in all his other concerns except the suits against Lord Clinton the solicitors originally employed by him. It was admitted that one stipulation in the articles of dissolution was that Montriou should not act as solicitor for Lord Clinton. A

Sir Samuel Romilly, Bell, Heald and Preston in support of the motion: This application, certainly new, is made on general principles, but also under very particular circumstances. Montriou does not disclose the motive for his appointment, and we cannot demand that disclosure from him as the plaintiff's solicitor, but the clear result is that the plaintiff sought out the solicitor of his antagonist in this cause to be his solicitor in it, that measure not appearing to proceed from dissatisfaction with his former solicitors. A most material circumstance is that the plaintiff owes his claim to this great estate entirely to anonymous information from some person who could have acquired it only by inspection of the defendant's title. An attorney-at-law is not at liberty to reject his client and withdraw from his suit. The rule that he cannot be changed without leave is the privilege of the opposite party who would not know on whom to serve process, but the converse, that the attorney cannot withdraw, stands upon a different principle, for the benefit of the client, to prevent the communication of his secrets and that the attorney has pledged his duty to the client under the continuance of the suit: *Vaillant v. Dodemead* (1); *Wilson v. Rastall* (2); *Sandford v. Remington* (3); *Taylor v. Lewis* (4). All the information acquired by a solicitor in that character he not only cannot be compelled, but is bound not, to disclose, and that privilege of the client continues to exist in all future time when the solicitor has ceased to fill that situation, as BULLER, J., observes in *Wilson v. Rastall* (2). B C D

If the plaintiff could not compel Montriou to appear and disclose his information as a witness, can he obtain and make use of that information by employing him in the far more important situation of solicitor? The dissolution of partnership is nothing to the client, who trusted them both. Any inconvenience that Montriou may sustain in continuing Lord Clinton's solicitor is of his own creation. Though his agreement with his partners may deprive him of the profits, he has no right to consider himself discharged from the duty he had undertaken, and, as an independent man, at liberty to take the business of anyone who will employ him, if inconsistent with that duty. Had he been the sole solicitor of Lord Clinton, who refused to employ him any longer, the case might be different, but this is a solicitor, not rejected by, but rejecting, his client. It cannot be disputed that the sole motive to the appointment is that this gentleman, as he has been the defendant's solicitor, will be of more use than any other. Whatever his intention may be, it is not possible for him in his new situation to divest himself of the knowledge he has acquired in the defendant's service and bound himself by his oath as a solicitor to use for his benefit, which disables him from performing his duty to his new client. E F G

LORD ELDON, L.C.—If there is any ground for this application, either as a motion in the cause or upon the general jurisdiction, it must be furnished by a general principle, not the particular circumstances of the case, otherwise the court must try every such case on its particular circumstances, and it cannot be so discussed without a disclosure from the solicitor of all he knows. Yet, though I must decide upon a general principle, it would be unjust to prevent the party from going into the particular circumstances that have been referred to. I recollect many instances, both as to counsel and attorneys in which it was extremely difficult for a man to say that he should have been employed in both causes, and with regard to that "*Quod dubitas ne feceris*" is a good rule for the regulation of your own conduct, but I do not recollect an instance of a solicitor changing his situation from the defendant to the plaintiff. The case might easily be put that a most honest man, so changing his situation, might communicate a fact, appearing to him to have no connection with the case and yet the whole title of his former client might depend on it. Though SIR JOHN STRANGE's opinion in *Bishop of* H I

Winchester v. Fournier (5) was, that an attorney might, if he pleased, give evidence of his client's secrets. I take it to be clear that no court would permit him to give such evidence, or would have any difficulty if a solicitor, voluntarily changing his situation, was in his new character proceeding to communicate a material fact. A short way of preventing him would be by striking him off the Roll.

Sir Arthur Piggott, Hart, Leach, Roupel and Shadwell against the motion: This application, which is utterly unsupported by precedent, must, if successful, produce the most important and extensive consequences. The questions are, first, what jurisdiction there is upon this subject, and, if any, on what principle it is to be exercised. Does it stand upon a general abstract principle, applicable to all cases, or upon the particular circumstances of each case? Is it to extend to every clerk and to counsel who are frequently concerned after a very full communication of the opponent's case? What is a conveyancer to do having given an opinion on a title which is afterwards laid before him by another person? If a counsel, having advised upon pleadings and evidence, not being retained, the next day receives a retainer on the other side, which he is not only entitled, but, as a servant of the public, bound to receive, there is no practice requiring notice to be given of that. This applies equally to the other branch of the profession. In the instance of a cause and cross-cause is a solicitor or clerk, by having been a week in a great office, excluded from any participation in that business? Can he never be employed as clerk by the solicitor conducting the cause of the opposite parties, or, becoming himself a solicitor, undertake their cause? If this is expedient, it is the proper subject of a prospective general rule, but all these cases show that the principle, however specious, cannot be solid. If the general principle could be maintained, it must admit exceptions, and the reason cannot apply, where no inconvenience can be sustained by the former client. The effect of the defendant's conduct is that Montriou is given up as his solicitor. One of the stipulations upon the dissolution of partnership was, that Montriou would never be employed by Lord Clinton, who assented to that, and, therefore, could not complain of the effect of his own act. Suppose Montriou during the whole progress of this cause had been out of the kingdom and could not possibly have had any communication upon it—an extreme case certainly, but not going beyond the actual fact that he is an entire stranger to all the confidential communications between his partner and the defendant and every part of the title except what was public upon the face of the pleadings. The nature of this cause, a mere question of law upon the construction of deeds involving no secrets, confirms Montriou's assertion that he has no information the disclosure of which can prejudice the defendant.

LORD ELDON, L.C.—The facts upon which this application is made lie in an extremely narrow compass. They have led, perhaps from necessity, to considerable discussion at the Bar as it was impossible to consider such a case in any other point of view than one surrounding it with reference, not only to the legal right of the plaintiff and Montriou to act as they propose, but also to the propriety and delicacy of their so acting, and it is now avowed that this mode of discussing the case may have some effect if no legal effect can result from these facts.

How, or by whom the plaintiff, Lord Cholmondeley, was informed of his claim to these estates is not for my consideration. Whatever may be the rule as to preventing the clerk of an attorney or solicitor from giving evidence of facts the knowledge of which was acquired during that service, if I had to determine whether a distinction arises from the circumstance that the clerk afterwards becomes partner, great consideration would be necessary before I could decide against that distinction. Taking the rule, however, to be that the clerk may give evidence of facts the knowledge of which he acquired in the service of his master, no honest man would give that evidence without asking whether he could refuse. If he could not, that is not material to the case of the solicitor, to whom the same rule of law in that way of putting it would not apply.

In my view of the facts of this case both Seymour and Montriou were the solicitors of the defendant until the dissolution of their partnership. That dissolution was the effect of a contract between themselves, one term of which contract was that Seymour was, and Montriou was not, to continue the legal adviser of Lord Clinton, who, it is said, gave his consent to that, and, therefore, Montriou is, by that consent, that he should be no longer employed, under the contract between him and Seymour to be considered as in the situation of a solicitor discharged by Lord Clinton. I cannot agree that Lord Clinton and Montriou are in the relation of discharging client and discharged solicitor. The mischief is obvious. There may be a question whether solicitors in partnership can dissolve their partnership as against a client who, having employed them both, insists upon the benefit of their united exertions*. Can one partner say to his employer, according to Montriou's assertion, that he never acted but as agent to the other? Was it ever communicated to Lord Clinton that Montriou never acted in his affairs, and had not Lord Clinton a right to the talents and exertions of both? I am aware that a practice prevails among partners of dividing their business, and as between themselves they might make that agreement: but they cannot be heard to say so in a court of justice. If there is a principle on which the court will not permit a solicitor to change from one party to the other, it would be singular that, as they choose to dissolve their partnership, the retiring partner is to consider himself discharged. What is the situation of the client? If he is not to employ both, he must employ one, or neither: if he employs one, the other may, it is said, consider himself let loose as if discharged from all those obligations which he had undertaken, and both, if he employs neither of them, may consider themselves so let loose and at liberty to exert their separate efforts against him and to be as hostile to him as they please. The one ceases to be solicitor by the act of both, placing the client in such a situation that he must take the one or the other. He takes one as the lesser of two evils, between which their act compels him to choose. It is impossible, therefore, to consider Montriou as discharged in the sense that has been argued.

I lay out of my view all the particular facts of this case except as they may form any hypothetical case to represent the extent of the mischief which it may be necessary to contemplate for the purpose of excluding it. The naked question is whether a person, having been for a considerable time employed in a cause for the defendant, can, after discharging himself, as I must take Montriou to have done, from the relation of attorney for the defendant in that cause, become attorney for the plaintiff. The answer to the novelty of the application is that the question must be considered open unless in memory or tradition any instance can be shown of such a fact having actually occurred. I do not recollect, either in my own experience or from information in the memory of anyone, any such instance. The practice of the Bar in my time was this. If a retainer was sent by a party against whom the counsel had been employed, the retainer being in a cause between the same parties, the counsel, before accepting it, sent to his former client, stating the circumstance and giving him the option. That has, I believe, been relaxed, and the course now is, as it has been represented at the Bar. I do not admit that he is bound to accept the new brief. My opinion is that he ought not, if he knows anything that may be prejudicial to the former client, to accept the new brief though that client refused to retain him. If, however, the law is that a solicitor, under these circumstances, may discharge himself and carry all the knowledge he

* In *Cook v. Rhodes*, Jan. 14, 1815, on a motion to dissolve an injunction upon disputes between partners as attorneys and solicitors, LORD ELDON, L.C., laid down as clear, that they could not without the consent of their client, who confided to their joint skill, dissolve their partnership and turn him over to one of them, though they might give him notice that they would not be any longer concerned for him and have their bill to that time settled, and that the name of one, who had retired for several years, taking an annuity and permitting the use of his name and office, must continue to be used during the concerns of the client who employed them under that firm name.

has acquired as solicitor for the party, who employed him to the other party in that cause, that law must be administered, but, considering it hypothetically, a judge is justified under such circumstances in supposing that the attorney is employed for the reason alone that he had been employed by the other party, as a judge must consider every possible combination of circumstances to which the principle on which he acts may apply, but I disavow any conception that such is the real case before me.

Upon many of the grounds that have been agitated I shall not give any judgment. I shall decide this case upon the dry question whether this plaintiff has a legal right to employ Montriau, and whether he has a legal right to accept that employment. With regard to propriety or delicacy of conduct, I do not sit in this place to communicate my opinion upon such subjects, and, therefore, shall follow the example of LORD THURLOW who upon a question as to the interest of a debt which a noble lord, then sitting by him, admitted he ought to pay, said that he should decide only on the legal rights, desiring that the arguments of propriety and delicacy, submitted to him as Lord Chancellor for his legal judgment should be addressed to that noble lord himself. So I shall refer the arguments addressed to me upon those motives of propriety and delicacy to the plaintiff and Montriau, and shall consider only the dry question whether the attorney of the plaintiff, being removed, not by the discharge of the plaintiff, can, in that very cause in which he had been employed by him, become the attorney for the defendant. That depends upon a principle, applying to cases both in this court and at law, upon which I shall soon have an opportunity of consulting the judges, and will then give my opinion on that question of law, again disavowing a right to give my opinion upon any other view of this case.

Feb. 3, 1815. **LORD ELDON, L.C.**, declared the unanimous opinion of all the judges and the barons of the Exchequer, the Master of the Rolls, and the vice-chancellor, agreeing with his Lordships, that an attorney or solicitor was not at liberty to act in the manner proposed by Mr. Montriau, and that, having left the cause, he was not in the situation of a solicitor discharged by the client, and, therefore, could not become the solicitor for the other party in the same cause. His LORDSHIP added that he did not wish to say more upon it as Montriau had had no intention of acting wrongly, but was led by the advice he took to think he was right.

BEER AND OTHERS v. WARD

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), April 17, 1821]

[Reported Jac. 77; 37 E.R. 779]

Solicitor—Duty to client—Non-disclosure of confidential information—Privilege—Duty of solicitor to claim—Injunction against breach—When granted.

It would be a great offence if a solicitor voluntarily disclosed confidential information which had come to his knowledge as solicitor for a client or a former client. The privilege is that of the client and not of the solicitor, who cannot waive it. A solicitor may, semble, be restrained from communicating such confidential information to private persons or from giving up to others papers placed in his hands by a client. The court, however, will not restrain a solicitor from giving evidence in another court regarding confidential matters, but will leave him to claim privilege in the other court, which it is his duty to do, and the other court to adjudicate on the matter.

Notes. Considered: *Ramsbotham v. Senior* (1869), L.R. 8 Eq. 575; *Rakusen v. Ellis, Munday and Clarke*, [1911-13] All E.R. Rep. 813. Referred to: *Re Holmes, Re Electric Power Co.* (1877), 25 W.R. 603.

As to the confidential character of communications between solicitor and client, see 36 HALSBURY'S LAWS (3rd Edn.) 51, 52; and for cases see 18 DIGEST (Repl.) 48-51, 132-134, 228-232; 22 DIGEST (Repl.) 399 et seq.

Cases referred to:

- (1) *Earl Cholmondeley v. Lord Clinton* (1815), ante p. 528; 19 Ves. 261; Coop. G. 80; 34 E.R. 515, L.C.; 43 Digest (Repl.) 438, 4646.
- (2) *R. v. Withers* (1811), 2 Camp. 578, N.P.; 22 Digest (Repl.) 404, 4342.
- (3) *Bricheno v. Thorp* (1821), Jac. 300; 37 E.R. 864, L.C.; 43 Digest (Repl.) 126, 1157.

Motion to restrain a solicitor from giving evidence of confidential matters.

The defendant Ward had been for some years the committee of W. Cotton, a lunatic, who died in November, 1819, leaving three sisters and the grand-daughters of a deceased sister who were the plaintiffs in the original suit. The lunatic was tenant for life of a considerable real estate the ultimate remainder of which was limited to his father in fee. On his death, the remainder falling into possession, the estate was claimed by the plaintiffs as co-heirs at law to the lunatic who was heir to his father. The plaintiffs had been treated as the co-heirs and next of kin of the lunatic in the Master's reports, and other proceedings in the lunacy. Shortly after the lunatic's death, the plaintiffs applied for letters of administration of his personal estate when a caveat was entered on the part of the Crown, alleging that the lunatic was illegitimate. At the same time a claim to the real estate was made by the defendant Ward who alleged that the father and mother of the lunatic had married subsequently to his birth, but previously to that of his brother E. R. Cotton and that the ultimate remainder had, therefore, vested in E. R. Cotton under whose will he claimed. A suit arose out of these opposite claims, and a suit for the administration was depending in the ecclesiastical court between the plaintiffs and the Crown.

A motion was now made on the part of the plaintiffs in the original suit that the defendant's solicitor and his clerk might be restrained from disclosing (by the giving of evidence in judicial proceedings or otherwise) any facts, circumstances, or matters, relating to or concerning the rights and interests of the plaintiffs which came to the knowledge of the solicitor while he acted as the clerk or assistant to G. L. V., deceased, who was the solicitor for several of the plaintiffs or while he had himself acted as solicitor for the plaintiffs or any of them, and particularly in respect of the rights and interests alluded to by him in a letter of Nov. 12, 1819, to

the plaintiff Rebecca Beer, or which came to the knowledge of the clerk while employed as clerk to the solicitor or when acting as agent for the plaintiffs.

By the affidavit in support of the motion, it appeared that the defendant's solicitor had for a period of more than twenty years been employed by two of the plaintiffs to attend to their interests in the lunacy, and he had previously been clerk to their former solicitor. Shortly after the lunatic's death the plaintiffs, having determined to employ another solicitor in the business relating to the distribution of the property, informed him of their intention, upon which he wrote to the plaintiff Rebecca Beer a letter expressing his concern at their confidence being withdrawn. He added that at a critical moment like the present the preservation of their rights required the most extraordinary care and attention, and, above all, to be kept from the knowledge and interference of strangers, and he recommended them to pause before they took a step that might be regarded in an offensive light and tend to lay open matters that ought not to extend beyond the present circle. The plaintiffs, however, persevered in their intention. The affidavit then stated that the caveat on the part of the Crown was entered (as the deponent believed) in consequence of statements and representations made by the defendant's solicitor to the King's Procurator-General, and that in order to support the caveat he had given up to the officers of the Crown, documents and papers some of which had come to his hands as solicitor for the plaintiffs, and was otherwise actively engaged in assisting the Procurator-General in impugning the legitimacy of the lunatic. He and his clerk were about to be examined as witnesses, in the suit in the ecclesiastical court.

Hart and Buck in support of the motion: This is an application by clients to prevent their late solicitor from disclosing information acquired through the confidence reposed in him by them resting on the same principles as the decision in *Earl Cholmondeley v. Lord Clinton* (1), although, as the plaintiffs themselves discharged this gentleman, they cannot as in that case carry it to the extent of preventing his being employed for the other party. They only desire that the knowledge gained in their confidential service, at their expense, may not be employed against them. That knowledge is their property and it is their privilege that it should not be communicated; the solicitor cannot at any time divulge it, either against them or in an action to which they are not parties: *R. v. Withers* (2). This secrecy being the duty of the solicitor the court will enforce it by the exercise of its preventive jurisdiction. Its general control over its officer authorises it to compel him to do that which is his duty.

LORD ELDON, L.C.—He might be punished for not doing his duty, but can I compel him to do it? With respect to many facts that come to his knowledge as solicitor, if he were examined as a witness, the court would insist upon his deposing to them, and if I ordered him not to disclose anything that he learnt in that manner the Court of King's Bench might perhaps commit him for refusing. I think, therefore, that I cannot make this sweeping order. There cannot be irreparable injury, for it would be the duty of any court to stop him if he was about to disclose confidential matters. If he has received papers or deeds from his client, no doubt the court would prevent him from delivering them to anyone but his client. But there is a great difference in the modes of making such an order, for, though I might order him to deliver them to his client, which would have the effect of preventing him from giving them in evidence, yet I doubt whether I should compel him, while they are in his hands, not to give them in evidence, for the propriety of that must depend on all the circumstances. If he voluntarily makes communications of what has come to his knowledge confidentially, it is a great breach of his duty, but there is a difference between ordering him not to communicate to an individual and ordering him not to communicate to a court of justice by giving evidence, for the court knows the privilege of the client and it must be taken for granted that the attorney will act rightly, and claim that privilege, or, if he does

not, the court will make him claim it. If it is desired that he should be restrained from making communications to individuals, you must show me what has been done, for I could not interfere to restrain in this case any more than in cases of waste unless something has been done which ought not to have been done. A

Wetherell, Shadwell and Pepys against the motion, contended that no facts were stated to warrant it. Independently of that it was quite unnecessary as far as it regarded judicial examinations as the court before which the examination might take place would confine it within those limits which a due regard to the confidence of solicitor and client required. With respect to other disclosures by private communications the court would not make an order to prevent them as it would be impossible to execute it. An infraction of it could never be detected. The notice of motion in *Earl Cholmondeley v. Lord Clinton* (1) extended to restrain the communication of information, but the point does not appear to have been noticed in the argument or judgment; and no order was ever drawn up. B C

LORD ELDON, L.C.—There is an objection to the form of this proceeding, which, if it were insisted on, could not, I apprehend, be repelled. The motion, if in other respects right, could not be made in a cause. Being an application to the general jurisdiction of the court over its officers, it ought to be in the matter of the complainant. You cannot move in the cause for such an injunction as this. But I have no doubt that the gentleman against whom the motion is directed would not desire to avail himself of this objection. D

In *Earl Cholmondeley v. Lord Clinton* (1) I had great difficulty to know how to act, and I took the opinions of the judges. There the gentleman who had been concerned for Lord Clinton discharged himself and went over to the other side. It appeared to me, and to all the judges, that nothing could be more dangerous than to permit a solicitor employed by A. in a cause between him and B. to leave A. while still willing to retain him and enter into the service of B. E

It is unquestionably true that the right of the solicitor to refuse to answer when he can only answer by a breach of confidence is not the privilege of the solicitor, but of the client; if he answered, knowing what he was doing, it would be a great offence. But I do not see my way to grant a motion so extensive as this. It desires of me that I will not permit this gentleman to give evidence in other courts, which is that I will not trust them with the consideration whether he ought or ought not to answer a question to be put to him, as to which question I know nothing, and when I cannot, therefore, say what my opinion might be as to the propriety of the question being answered. F G

It is stated that he has given up papers placed in his hands by the plaintiffs, and, if a motion were made on that subject, it would be quite a different case from that now before me. If the papers came to his hands confidentially he could not give them to anyone but his client, and if a motion were brought forward properly, he might, perhaps, be ordered to give them up again. It would be a different question whether I could say, if he could not be compelled to give them up to the client, that no court of justice should compel him to give them in evidence. That must depend on other circumstances: see *Bricheno v. Thorp* (3). H

Motion refused.

STEEL v. PRICKETT AND OTHERS

[COURT OF KING'S BENCH (Abbott, C.J.), February 22, 1819]

[Reported 2 Stark. 463]

Highway—Roadside waste—Ownership—Presumption.

Waste land adjoining public highways is presumed in the first instance to belong to the owner of the adjoining land, but in an action for trespass by entering on such waste land the presumption can be rebutted by proof, e.g., that the land was in other ownership.

Notes. Referred to: *Doe d. Molesworth v. Sleeman* (1846), 1 New Pract. Cas. 434; *R. v. Brightside Bierlow*, *R. v. Attercliffe*, *R. v. Tinsley* (1849), 13 Q.B. 933; *Simpson v. Dendy* (1860), 6 Jur. N.S. 1197; *Harvey v. Truro Rural Council*, [1903] 2 Ch. 638.

As to ownership of roadside wastes, see 19 HALSBURY'S LAWS (3rd Edn.) 67; and for cases see 26 DIGEST (Repl.) 337-339.

Action of trespass against the defendant Prickett and two others for breaking and entering the close of the plaintiff holden by him of Dame Jane Wilson, lady of the manor of Hampstead, by copy of court roll.

The question raised by the pleadings was whether the locus in quo belonged to the dean and chapter of the collegiate church of St. Peter, Westminster, as parcel of their manor of Hampstead, in the county of Middlesex. The locus in quo was a small piece of land which adjoined the high road leading from Hampstead to London which had been enclosed by the plaintiff who was tenant to Lady Smith, lady of the manor of Hampstead. It was contended on his part that the locus in quo belonged to Lady Smith in right of her manor, as being part of the wastes of that manor. On the other hand, the defendant, who was tenant to the dean and chapter of Westminster, contended (i) that the locus in quo was the property of the dean and chapter of Westminster because it adjoined the freehold lands of the dean and chapter whence presumption arose that the waste and soil to the centre of the road also belonged to them; and (ii) that the dean and chapter were seised in fee of the estate and manor of Belsize and entitled to the locus in quo as parcel of that manor.

On the part of the plaintiff evidence was adduced to show that the lords of the manor of Hampstead had from time immemorial exercised the right of granting out parcels of the waste lands within the manor with the consent of the copyholders. Thirteen instances were adduced of grants of this nature, the first of which was made in the year 1694 and the two last in 1817. In some instances the portions of land so granted were situated between the road and the copyhold lands adjoining, in others between the road and freehold lands. An entry in DOOMSDAY Book was proved from which it appeared that the manor of Hampstead then existed, but no mention was made of the manor of Belsize; also a grant by King Henry VIII of the manor of Hampstead, with a special reservation of Belsize and its appurtenances, in which it was described as a messuage and not as a manor to Thomas, Bishop of Westminster. By another grant of the manor of Hampstead, Edward VI granted the same manor with several others to Thomas Wrothe, from whom Lady Wilson derived her title.

The defendants relied principally upon the presumption that the waste belonged to the dean and chapter of Westminster as owners of the adjoining freehold, but insisted also that the locus in quo was parcel of the manor of Belsize. They offered, first, a copy of a document in the augmentation office by which the King's Receiver acknowledged the receipt of rent in respect of the farm of the manor of Belsize, in 1540, and also a grant by Henry VIII in 1542 (the abbey of Westminster being then dissolved) of the manors of Eveny, Belsize, Knightsbridge, Hobforth, and Cowhouse, situate and being in Hendon and Hampstead, to the dean and chapter of

Westminster. They also put forward a grant of the same manors to the restored abbot and convent of Westminster and also another grant by Queen Elizabeth I (1566) of the same manor to the dean and chapter of Westminster who had remained in possession ever since. Evidence was offered by the defendants of reputation that Belsize was a manor, and as to the extent of the manor.

Evidence of reputation was admitted, and the defendant also proved that many enclosures of portions of the waste adjoining the road had taken place within the last thirty years which the lady of the manor of Hampstead had not disputed, except in one or two instances where it appeared that rails which had been erected had been broken down by her orders, but it appeared that these had been replaced and no actions had been brought for such encroachments. It also appeared that the tenants of the manor of Hampstead had been prevented from getting gravel upon the locus in quo.

Scarlett, Gurney, Serjeant Taddy and Comyn for the plaintiff.

Casberd, Taunton and Marriott for the defendants.

ABBOTT, C.J., in the course of summing-up to the jury said: The question is whether the small piece of land in dispute is the soil and freehold of the dean and chapter of Westminster. The adjoining land is beyond all doubt the property of the dean and chapter. In some of the more ancient books of law a difference of opinion appears to have existed as to the right to the waste lands adjoining public highways, but as far as my own experience goes, and I have heard the opinions of many learned judges upon the subject, it has uniformly been laid down that land under such circumstances is presumed in the first instance to belong to the owner of the adjoining land and not to the lord of the manor, but a presumption prevails only so long as proof to the contrary is wanting and the question is whether the plaintiff has in the present instance rebutted this presumption to your satisfaction.

In remote and ancient times when roads were frequently made through unenclosed lands, when the same labour and expense was not employed upon roads, and they were not formed with that exactness which the exigencies of society now require, it was part of the law that the public where the road was out of repair might pass along the land by the side of the road. This right on the part of the public was attended with the consequence that, although the parishioners were bound to the repair of the road, yet, if an owner excluded the public from using the adjoining land, he cast upon himself the onus of repairing the road. If the same person was the owner of the land on both sides, and enclosed both sides, he was bound to repair the whole of the road; if he enclosed on one side only, the other being left open, he was bound to repair to the middle of the road, and where there was an ancient enclosure on one side, and the owner of lands enclosed on the other he was bound to repair the whole. Hence it followed as a natural consequence that when a person enclosed his land from the road, he did not make his fence close to the road, but left an open space at the side of the road to be used by the public when occasion required. This appears to be the most natural and satisfactory mode of explaining the frequency of wastes left at the sides of roads. The object was to leave a sufficiency of land for passage by the side of a road when it was out of repair.

That the ownership of such land was in the owner of the adjoining land is the general presumption of law, but this presumption is capable of being rebutted, and here the plaintiff undertakes to rebut it. He says that Lady Wilson is lady of the manor of Hampstead, and that, she, as lady of the manor, is empowered by immemorial custom within the manor to grant out waste lands with the consent of the copyholders of the manor. This cannot be done without a special immemorial custom to warrant it, since a copyhold tenure cannot have been created within time of memory.

HIS LORDSHIP commented on the evidence supplied by the different grants of waste under the manor of Hampstead, observing that out of the ten grants which

A had been proved, some of which were of pieces of land between the road and copyhold land, and others (three in number) of parcels of land between the road and freehold lands, the latter were the only ones which were material for consideration, since, as to the wastes between the road and the copyhold lands of the manor of Hampstead, no doubt could arise as to the right, and it was only in respect of the parcels between the road and the freehold lands that the presumption applied. His
B LORDSHIP continued: This is the evidence adduced by the plaintiff in order to show that the usual presumption ought not to prevail in this case. The defendant, in answer to this case asserts: (i) that the presumption is in his favour which arises from the contiguity of the waste to the freehold estate, and (ii) that Belsize is a manor and the locus in quo is parcel of that manor.

C After commenting on the evidence which had been adduced on both sides. His LORDSHIP observed strongly upon the evidence of thirteen enclosures having been made of parts of the waste adjoining to the Belsize estate without any permission given by the lady of the manor. It was true that in some instances interruptions by her had been proved, but the occupiers had afterwards replaced the fences and no action had been brought. If the lady of the manor had intended to resist what she considered to be encroachments on her rights she should have brought an action. It had been contended, that the lady of the manor had a general title to all the wastes within the manor, but she had not in any one of these instances of enclosure asserted her general right, and it was for her to do so rather than for individuals whose interest was so minute. The evidence to prove that Belsize was a manor was but slight. It had been called a manor in some of the grants which had been read, but so also had Cowhouse and Hobforth, although the two latter never had been manors. If Belsize had been a manor, at some time courts must have been held for that manor, but there was no evidence that any court had ever been held, and, therefore, it was not improbable that the term "manor" had not been applied to Belsize in those documents in its proper and legal sense. In the grant of Henry VIII it had been specially reserved under the description of a messuage only, and not of a manor. If, however, the jury should be of opinion upon this evidence that Belsize was a manor, they were to find for the defendants, but, if they were of opinion that Belsize was not a manor, the material question for their consideration would be whether the plaintiff had given such evidence as in their minds rebutted the usual presumption of law that the waste belonged to the owner of the adjoining freehold.
F

Verdict for defendants.

DOE d. LEWIS AND OTHERS v. BINGHAM

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), July 5, 1821]

[Reported 4 B. & Ald. 672; 106 E.R. 1082]

Deed—Interlineation—Words added after signature by one party—Deed valid regarding party previously executing it.

A deed operates as to the different parties to it from the time of the execution by each, but it is not perfect till execution by all the parties. Any alteration made in the progress of such a transaction leaves the deed valid as to the parties previously executing it.

Deed—Cancellation—Destruction—Rights conveyed not re-vested.

Per HOLROYD, J. : The cancellation or destruction of a deed does not re-vest the rights conveyed by it.

By deed a mortgagee conveyed to the mortgagor the legal estate upon being paid the mortgage money, and the mortgagor re-conveyed it to trustees to secure an annuity. At the time of the execution by the mortgagee there were several blanks in the deed, but not in that part which affected him. The blanks left were for the sums to be received by the mortgagor from the grantees of the annuity, and they were all filled up at the time of the execution of the deed by the mortgagor after the execution by the mortgagee.

Held: the deed was not avoided by the additions and interlineations made after signature by the mortgagee, but operated as a good conveyance of the estate by the mortgagor to the trustees for the payment of the annuity.

Notes. Considered: *Hibblewhite v. McMorine* (1840), 6 M. & W. 200; *Re Athenaeum Life Assurance Society, Richmond's Case and Painter's Case* (1858), 4 K. & J. 305; *Adsetts v. Hives* (1863), 33 Beav. 52. Referred to: *Jones v. Jones* (1833), 2 L.J. Ex. 249.

As to cancellation of and alterations and erasures in deeds, see 11 HALSBURY'S LAWS (3rd Edn.) 365-371; and for cases see 17 DIGEST (Repl.) 241, 242.

Cases referred to :

(1) *Doe d. Griffin v. Mason* (1811), 3 Camp. 7, N.P.; 22 Digest (Repl.) 197, 1842.

(2) *Pigot's Case* (1614), 11 Co. Rep. 26 b; 77 E.R. 1177; 17 Digest (Repl.) 248, 512.

(3) *Denn d. Dolman v. Dolman* (1794), 5 Term Rep. 641.

(4) *Doe d. Jones v. Wilde* (1813), 5 Taunt. 183.

(5) *Bolton v. Bishop of Carlisle* (1793), 2 Hy. Bl. 259; 126 E.R. 540; 17 Digest (Repl.) 251, 542.

(6) *Roe d. Earl of Berkeley v. Archbishop of York* (1805), 6 East, 86; 102 E.R. 1219; sub nom. *Doe d. Earl of Berkeley v. Archbishop of York*, 2 Smith, K.B. 166; 17 Digest (Repl.) 251, 551.

(7) *Kinnersley v. Orpe* (1780), 2 Doug. K.B. 517; 99 E.R. 330; 21 Digest (Repl.) 265, 428.

Rule Nisi obtained by the defendant for a new trial in an action of ejectment.

The defendant was a beneficed clergyman and the premises in question were his glebe upon which, until December, 1815, one Richard Lassam had been the mortgagee. To prove the plaintiff's case a deed bearing date Dec. 23, 1815, was produced, which appeared, by the certificate of the proper officer endorsed thereon, to have been enrolled, but no enrolment was produced. The deed was in five parts—the defendant of the first part, Thomas Woodham and John Dunn of the second part, Richard Lassam of the third part, James Boston and James Kilvington of the fourth part, and Benjamin Lewis of the fifth part. The object of the deed

A was to discharge the premises of a mortgage to Lassam's trustees, who were Woodham and Dunn, and to vest the legal estate in Lewis as the trustee of Boston and Kilvington (who had advanced £3,000 to the defendant) as a security for the payment of an annuity of £450 to the latter during the defendant's life and incumbency. It was proved that this deed was executed by Lassam and his two trustees on Dec. 21, and Lassam thereby acknowledged the receipt of his mortgage money, and he and his trustees surrendered their legal estate in the premises. Then **B** Bingham conveyed the fee to Lewis, the trustee of Boston and Kilvington. At the time of the execution of the deed by Lassam and his trustees, there were several blanks left in it, but there were none in that part of it which related to Lassam's mortgage. The blanks left were for the sums to be received and paid by the defendant, and several interlineations were also made in that part of the deed, after Lassam and his trustees had executed the deed. The execution by **C** Bingham took place on Dec. 23, 1815, at which time the blanks were all filled up. It was objected by the defendant at the trial before GRAHAM, B., (i) that these alterations and interlineations avoided the deed in toto, and, consequently, that the lessors of the plaintiff, who claimed under it, had not the legal estate in them. and (ii) that it was necessary for the plaintiff not only to produce the deed, but **D** also to produce the enrolment of it. Both these objections were overruled. The defendant further tendered his daughter as a witness to prove that she was tenant in possession of the premises. The learned judge rejected her testimony. A rule nisi for a new trial having been obtained by the defendant,

Serjeant Pell and *A. Moore* for the plaintiff, showing cause against the rule: **E** This deed was complete as a conveyance to the lessor of the plaintiff at the time when the defendant executed it. It operated differently as to the mortgagee and the defendant, viz., as to the mortgagee as a surrender of his interest, and as to the defendant as a conveyance of the legal estate to the lessors of the plaintiff. The interest of the mortgagee was not affected by the alterations, and, therefore, the alterations were, as to him, immaterial. Besides, the defendant **F** is estopped by his executing the deed from saying that it is different from what it purports to be. It was not necessary for the plaintiff to prove the enrolment of the annuity. If the defendant meant to insist that the deed was void, in consequence of some defect in the memorial, it was for him to substantiate that by proof: *Doe d. Griffin v. Mason* (1).

G *Scarlett, Chitty*, and *R. Scarlett* for the defendant, in support of the rule: The plaintiff is to recover on the strength of his own title, and he insists that the person having the legal estate had conveyed that to him by executing a deed. That deed is entire, relating to one subject-matter, viz., the securing of the annuity. If it is bad in part, it is bad in the whole. *Pigot's Case* (2) is an authority to show that where any deed is altered in a part material, even by a stranger, whether it be **H** by interlineation, addition, erasure, or by drawing a pen through the midst of any material word, it becomes void, and 2 *ROLLE'S ABRIDGMENT* 29, pl. 29, is a strong authority to the same effect. In *Denn d. Dolman v. Dolman* (3), A. being entitled to a life estate subject to a condition not to charge or encumber it, granted an annuity and demised the land as a security, but, there being a defect in the memorial of the annuity, the court held that the whole deed was void to all intents and purposes, even though the other parts of it were not connected with the **I** annuity. That case is an authority expressed in point. Secondly, it was incumbent on the plaintiff to show that the annuity was duly enrolled for his title depends upon it. In the case of a bargain and sale by deed enrolled, it is not enough to put in and prove the deed, but it is also necessary to produce and prove the enrolment, and that is an analogous case to the present. As to the third point, the witness ought to have been received for her testimony would subject her to the ejectment and to the action for mesne profits. It was not, therefore, her interest to prove herself tenant in possession.

BAYLEY, J.—It seems to me that this deed, notwithstanding the interlineations and the filling up of the blanks subsequently to its execution by Lassam, was still valid so as to convey the property from the defendant to the lessors of the plaintiff. A

The whole deed may be considered as one entire transaction, operating as to the different parties to it from the time of the execution by each, but not perfect till the execution by all the conveying parties. I am of opinion that any alteration made in the progress of such a transaction still leaves the deed valid as to the parties previously executing it, provided such alteration has not affected the situation in which they stood. In this case it appears that there had been upon the property a mortgage to Lassam, for a term of years, for £1,000. Boston and Kilvington, two of the lessors of the plaintiff, agreed to advance Bingham £3,000, he granting them an annuity of £450 per annum. To make this security valid, it was necessary that there should be a conveyance from Lassam of his interest, and the form in which that was effected was by taking a conveyance in fee from Bingham and a surrender from Lassam of his interest. The deed, therefore, as to Lassam and Bingham operates in a different manner. As to the former, it extinguishes his term, and by so doing vests the fee in Bingham. Then it is that the deed is proposed to Bingham to be executed, and before he executed it the alterations in question were made. At that time the deed was not perfect in all its parts. As against Lassam it was complete. But with respect to the other parties, it was in progress only, and the alterations made were only for the purpose of rendering it conformable to their wishes. There is no authority which says (and it would be contrary to common sense if there were one) that an alteration so made and not operating upon the provisions of the deed relating to the parties who had previously executed it should avoid it. Here the alterations do not in any respect touch the part of the deed affecting Lassam. As to him, therefore, they are alterations made in an immaterial part of the deed, and being made while the deed was in progress, our decision does not clash with any of the authorities cited. I think, therefore, that the deed was valid. B C D E F

As to the second objection, that the enrolment of the memorial was not produced, I am of opinion that such production was not necessary. It was sufficient for the lessors of the plaintiff to produce the deed, and it lay on the party relying on the want of the enrolment, to show that it had not been enrolled. It is like the case of a proviso in an Act of Parliament, in which it is a settled rule that the party wishing to avail himself of it must bring himself within it. As to the third point, it is clear that Miss Bingham was not a witness. *Doe d. Jones v. Wilde* (4) is exactly in point. The rule, therefore, must be discharged. G

HOLROYD, J.—As to the last point, I am entirely of the same opinion, and shall add nothing to what has fallen from my brother BAYLEY. I am also of opinion, that the deed having been executed by Lassam and his trustees, was complete as to them. The subsequent alteration did not, at all events, re-vest the term in them. For even the cancelling of a deed does not re-vest the property conveyed. That appears from *Bolton v. Bishop of Carlisle* (5), and the same principle is to be collected from *Roe d. Earl of Berkeley v. Archbishop of York* (6). Those cases show that even the destruction of a deed does not re-vest the rights conveyed by it. Lassam, therefore, and his trustees, by the execution of the deed, extinguished the term, and the deed, therefore, remains a valid deed as to Bingham. With respect to the other point, I am of opinion, that the onus probandi lies upon the party seeking to avoid the deed for want of enrolment, and *Doe d. Griffin v. Mason* (1) is an authority in point. The case of a bargain and sale is distinguishable, for a bargain and sale do not operate at common law, but by statute, if enrolled. It is, therefore, in that case, necessary to prove the enrolment; for there it is part of the title. H I

- A BEST, J.**—I am of the same opinion. The deed of the mortgagee was in this case complete before the blanks were filled up in the other parts of the deed, and if the subsequent alteration had the effect contended for by the defendant, the absurdity would follow that a mortgagee, by an irregularity to which he was no party and which, in no respect affected that part of the deed relating to him, would have the legal estate re-vested in him, although, if the deed had been altogether cancelled, that effect would not have taken place. There is, however, no such absurdity in the law, and it is not open to the defendant to take this objection, his part of the deed being entire and untouched subsequently to the time of his execution. I agree also that there was no necessity for producing evidence of the enrolment. But if it had been necessary, the evidence was sufficient; for the endorsement by the officer who is authorised to do that act, is, upon general principles, sufficient evidence of the fact of an enrolment: *Kinnersley v. Orpe* (7). If the defendant, however, meant to rely upon a defect in the enrolment, it is necessary for him to make out that objection by producing it. On the other point, I think the evidence was properly rejected.

- D ABBOTT, C.J.**—Not having been in court during the whole of the argument, I have not given any opinion, but I think it right now to say that I entirely concur in the judgment pronounced by the court and the reasons on which that judgment is founded. The rule for a new trial must be discharged.

Rule discharged.

E

HAMMOND v. NEAME

- F** [ROLLS COURT (Sir Thomas Plumer, M.R.), January 29, 1818]

[Reported 1 Swan. 35; 1 Wils. Ch. 9; 36 E.R. 287]

Will—Gift for particular purpose—Maintenance of children—Payment to donee not conditional on birth of children.

- G** By his will a testator gave to a trustee stock in trust to pay the dividends to M.H.H., the niece of the testator, "for and towards the maintenance, education, and bringing up of all and every the child and children of the said M.H.H. until he, she, or they shall attain twenty-one." Then the trustee was directed to transfer the principal equally among the children, there being a bequest over in default of such issue to the nephews and nieces of the testator living at the death of M.H.H.

- H** **Held:** the purpose of the gift was to enable M.H.H. to provide for the maintenance of the children, but its terms were absolute that payment should be made to her, and that payment was not conditional on there being children to be maintained.

- I** **Notes.** Considered: *Hamley v. Gilbert* (1821), Jac. 354; *Camden v. Benson* (1835), 4 L.J.Ch. 256; *Thorp v. Owen* (1843), 2 Hare, 607; *Cowper v. Mantell* (1856), 22 Beav. 231. Applied: *Lonsdale v. Berchtoldt* (1857), 3 K. & J. 185; *Re Skinner's Trust* (1860), 8 W.R. 605. Referred to: *Hodgson v. Green* (1842), 11 L.J.Ch. 312; *Byne v. Blackburn* (1858), 26 Beav. 41; *Lloyd v. Lloyd* (1858), 26 Beav. 96; *Re Springfield, Chamberlin v. Springfield* (1894), 8 R. 466.

As to gifts for particular purposes, see 39 HALSBURY'S LAWS (3rd Edn.) 1081, 1082; and for cases see 44 DIGEST 965-972.

Cases referred to in argument:

- (1) *Barlow v. Grant* (1684), 1 Vern. 255; 23 E.R. 451; 44 Digest 968, 8220.
- (2) *Nevill v. Nevill* (1701), 2 Vern. 431; 23 E.R. 876; 44 Digest 968, 8221.

(3) *Barton v. Cooke* (1800), 5 Ves. 461; 31 E.R. 682; 44 Digest 969, 8226.

Bill for a declaration of the rights of the plaintiff under a will and for a consequent order relating to the payment of dividends and the transfer of stock.

By his will, dated Jan. 4, 1812, Austin Neame bequeathed to Richard Gibbs, his executors, administrators, and assigns, the sum of £3,400 3 per cent. reduced annuities upon trust to pay and apply the yearly interest and dividends thereof, as the same should become due and payable, into the hands of his, the said testator's, niece, and his, the said Richard Gibbs', daughter, Mary Hills Hammond, for and towards the maintenance, education, and bringing up of all and every the child and children of the said M. H. Hammond, until he, she, or they should attain the age of twenty-one years, and when and so soon as he, she, or they should have attained that age, then upon further trust to pay, assign, and transfer the said sum of £3,400 unto and equally among all and every the child and children of M. H. Hammond, equally to be divided between them, share and share alike, and to their several and respective executors, administrators, and assigns, and in default of such issue, upon trust to assign and transfer the said sum of £3,400 unto all and every his, the said testator's nephews and nieces, the children of his, the said testator's, brothers, that was to say, the children of his brother John Neame and the children of his brother Thomas Neame the elder, living at the decease of M. H. Hammond, and the child or children of such one or more of them as should be dead, equally to be divided between them, share and share alike, and to their several and respective executors, administrators, and assigns; provided always, and he thereby declared, that the first half-year's interest on the said sum of £3,400 which should become due next after his decease, should go, and he thereby bequeathed the same unto his nephew and residuary legatee Thomas Neame, the younger, his executors, administrators, and assigns. The testator died on Dec. 1, 1813. The plaintiff, Mary Hills Hammond, not having any children, claimed to be entitled to the dividends accrued on the sum of £3,400 stock since the decease of the testator (except the first half-yearly dividend payable after his decease) and also to such as should accrue during her life or till she should have a child which attained twenty-one. The bill prayed a declaration of the rights of M. H. Hammond, payment of past dividends, and transfer of the stock into the name of Richard Gibbs, the trustee, on the trusts of the will.

Hart and Roupell for the plaintiff: This legacy is not left in the hands of the executors to be applied or not applied by them, but is an immediate gift at law in favour of Gibbs on an express trust to pay the dividends to the plaintiff. She, and not her children, of whom none is in existence, is the object of the testator's bounty, but that bounty is connected with an obligation imposed on her of maintaining her children out of the funds. Upon the construction that the plaintiff is not entitled till the birth of a child, the gift, which is in terms absolute and immediate, becomes contingent, and may be suspended during her life. In the interval the dividends would be payable to the residuary legatee, an implied benefit inconsistent with the express gift to him of the first half-year's dividend. The bequest over is not to take effect till her death. The testator believed, therefore, that during her life the dividends were disposed of, and he has given them to no person but her. A legacy bequeathed for a special purpose on failure of the purpose without default in the legatee, as by the death or lunacy of an infant to whom a sum is bequeathed for an apprentice fee, becomes absolute: *Barlow v. Grant* (1); *Nevill v. Nevill* (2); *Barton v. Cooke* (3).

Wingfield for the nephews and nieces of the testator: The testator has specified a particular purpose for which the dividends are to be paid into the hands of the plaintiff, and she is not entitled to receive them till they can be applied for that purpose. Had he designed them for her own benefit, he would not have expressed that he gave them for the maintenance and education of her children. The birth of children, though none was born at the date of the will, might probably be expected

A before his death. The first half-year's dividends are given to the residuary legatee whether the plaintiff had or had not children; his title to the subsequent dividends is contingent on the event of her having no children. The cases cited are not applicable. A legacy for putting the legatee apprentice is a benefit to the legatee; to assume that a benefit was designed to the plaintiff, is an assumption of the question. The bequest contains no words marking the distinction that the dividends should be paid to the niece for her own benefit till the birth of children and after that event for the benefit of the children.

B *Sir Arthur Pigott, Fonblanque and Boteler for formal parties.*

C **SIR THOMAS PLUMER, M.R.**—The stock is given to Gibbs as a mere trustee. If the children were intended to be the only cestuis que trust, it seems needless to direct payment by the trustee to a third person. In terms this is an immediate bequest of the dividends to the testator's niece, and it occurs in a will containing many bequests to nephews and nieces, but none other for her. The words are express to pay the dividends into her hands. If the birth of children is necessary to entitle her to payment, the legacy is conditional, but the terms are absolute. The payment is to be made into her hands; the purpose of the payment is to enable D her to provide for the maintenance of the children; from her they are to derive it; by her it is to be apportioned and distributed. The children are no direct objects of bounty, but only the occasion of bounty to the niece. It is a gift to a parent who, as mother, is under no legal obligation to support her children.

E The testator, her uncle, must have known that she had no children. Had he intended that she should take nothing till the birth of children, would he not, providing for the event of her death without issue, have made a bequest of the accumulated dividends? He has expressly provided for that event, and bequeathed the principal only. The bequest of the first half-year's dividend to the residuary legatee, affords a further argument in support of the same conclusion. The intention certainly might be to secure to him those dividends in both events of F there being or not being children, but, if the testator meant that he should continue to receive the dividends till the birth of children, he would then have been led to express that meaning. I am of opinion, therefore, that the plaintiff M. H. Hammond is entitled to receive these dividends.

WILSON AND OTHERS v. HART

[COURT OF COMMON PLEAS (Dallas, Park and Burrough, JJ.), February 5, 1817]

[Reported 7 Taunt. 295; 1 Moore, C.P. 45; 129 E.R. 118]

Document—Parol evidence as to effect—Bought note stating purchase of goods by R. from plaintiff—Parol evidence to show R. acted as agent for defendant.

A bought note stated that R. had bought of C. a certain quantity of goods. The transaction had been effected by W. acting as broker on behalf of C.

Held: parol evidence by W. was admissible to prove that R. had bought the goods, not personally, but as agent for the defendant.

Notes. Explained and Distinguished: *Higgins v. Senior*, [1835-42] All E.R. Rep. 602. Distinguished: *Graham v. Musson* (1839), 3 Jur. 483. Considered: *Beckham v. Drake* (1841), 9 M. & W. 79. Referred to: *Marston v. Roe* (1827), 2 Nev. & P.K.B. 504; *Marston v. Roe d. Fox*, *Roe d. Fox v. Marston* (1838), 8 Ad. & El. 14; *Taylor v. Salmon* (1838), 4 My. & Cr. 134; *Trueman v. Loder* (1846), 11 Ad. & El. 589; *Dale v. Humfrey* (1858), E. B. & E. 1004; *Armstrong v. Stokes* (1872), L.R. 7 Q.B. 598; *Maspons v. Mildred* (1882), 9 Q.B.D. 530.

As to proof of an agent's signature, see 8 HALSBURY'S LAWS (3rd Edn.) 106, 107; and for cases see 12 DIGEST (Repl.) 176 et seq.

Cases referred to:

- (1) *Gunnis v. Erhart* (1789), 1 Hy. Bl. 289; 126 E.R. 169; 3 Digest (Repl.) 18, 134.
- (2) *Powell v. Edmunds* (1810), 12 East, 6; 104 E.R. 3; 3 Digest (Repl.) 18, 134.
- (3) *Addison v. Gandassequi* (1812), 4 Taunt. 574; 128 E.R. 454; 1 Digest (Repl.) 670, 2356.
- (4) *Paterson v. Gandasequi* (1812), 15 East, 62; 104 E.R. 768; 1 Digest (Repl.) 748, 2883.
- (5) *Kemble v. Atkins* (1817), 1 Moore, C.P. 6; 7 Taunt. 260; 129 E.R. 104; 1 Digest (Repl.) 431, 873.

Rule Nisi to set aside the verdict in an action brought by the assignees of Gauntlett Clarke, a bankrupt, and Gray, who was his partner previous to the bankruptcy, to recover the sum of £1,000 12s., being the price of thirty bags of Spanish wool sold to the defendants by one Wilkins, who acted as broker for Clarke and Gray, before the former became bankrupt.

At the trial before GIBBS, C.J., at the sittings at Guildhall after Trinity Term, 1816, it appeared that on July 8, 1813, Wilkins requested a person by the name of Read, with whom he had previously dealt, to purchase some wool. Read said that the defendant, who was a clothier in Wiltshire, would become a purchaser, and would allow him (Read) one penny per lb. for buying. Wilkins, in consequence, told Clarke and Gray that Read would purchase the wool in question which they then had to dispose of, and that he had agreed to pay for them by the defendant's acceptances. To this they assented, and Wilkins in consequence left samples of the wool with Read, which defendant inspected, and approved of. The defendant requested time for payment by being given credit for six months from the time of weighing and then an acceptance at two months, to which the bankrupt and Gray, through the medium of Wilkins, acquiesced. Wilkins then sent the terms of the contract to Read in the following bought note:

"Mr. Rd. Read.

"I have bought of G. Clarke, for your account, thirty bags, Spanish wool. Tare and draft, 11 per cwt., to be paid for by W. Hart & Co. Bills at two months date, from six months. Twenty-one days allowed to weigh one-half, and thirty-five days allowed to weigh the remainder.

July 10, 1813.

Jno. Wilkins."

Wilkins made an entry in his contract-book in similar terms. The invoice, after

A the wool was weighed, expressed it to be purchased of Clarke by Read. The defendant ordered it to be forwarded from Clarke's to a wharf to be shipped on his account. Some time afterwards Clarke requested Read to accept bills for the amount of the wool for his accommodation, for which he promised to provide. He accordingly drew two bills on Read, one for £500 12s., dated July 31, 1813, the other for £500, dated Aug. 14, 1813. Both of these bills were payable at six months after date in order that they might fall due on the same days as those of the defendant. These acceptances of Read were to be provided for by the defendant's bills. In January, 1814, Read became insolvent, and assigned his estate to trustees for the benefit of his creditors. The bills were dishonoured, the plaintiffs demanded payment of the defendant, which being refused, the present action was brought. On the examination of Wilkins (the plaintiffs' broker), he swore that this was a sale to the defendant for whom Read acted merely as an agent. On the other hand, Read swore that he purchased on his own account, and that he was authorised neither to buy for the defendant nor to pledge his credit. On this conflicting evidence his Lordship left it to the jury to determine whether this was in fact a sale to the defendant or to Read. They found that it was a sale to the defendant, and the plaintiffs had a verdict accordingly.

D *Serjeant Best* for the defendant obtained a rule nisi that the verdict should be set aside and a new trial granted on the ground of the inadmissibility of Wilkins' evidence in contradiction to the terms of the contract between the parties.

E *Serjeant Lens* and *Serjeant Copley*, showing cause against the rule, argued that, although the transaction appeared from the written documents to be a sale from Clarke to Read, it was in reality a sale to the defendant for whom Read acted in the capacity of broker. The testimony of Wilkins confirmed this, and the transaction was known to all the parties. The acceptances given by Read were merely for the accommodation of Clarke, and were not intended for the payment of the wool, or to be placed to the credit of the defendant. Wilkins's evidence was admissible for the purpose of showing that Read acted as the broker of the defendant. That testimony would not vary the terms of the contract, but would merely tend to show, that the wool was purchased by him for the defendant who consequently received it. *Gunnis v. Erhart* (1) and *Powell v. Edmunds* (2), where the declarations of an auctioneer at the time of sale were held inadmissible to contradict the printed conditions, were distinguishable. The question here is whether where one broker makes out a contract note and invoice in the name of another whom he credits in his books, he can give parol evidence that the contract was made with a third person as principal and not with the broker whose name only appears on the face of the instrument. In *Addison v. Gandassequi* (3), the question was whether the credit was given to the broker or to the principal. Here the jury have decided that it was given to the defendant, as principal, and that Read acted in the capacity of broker. *Paterson v. Gandassequi* (4) differed materially from the case last cited, as the credit was not explained. It has been proved by Wilkins that the defendant inspected and approved of the wool, arranged as to the payment, superintended the weighing, and ordered it to be forwarded to him. This, therefore, was a contrivance between Read and the defendant to whom the former was indebted. The jury have well weighed the conflicting evidence of both the witnesses and have given credit to Wilkins, and, therefore, their verdict ought not to be disturbed.

I *Serjeant Best* and *Serjeant Vaughan*, in support of the rule, contended that, on the face of all the documents, this appeared to be a bargain between the plaintiffs and Read, and unless it were clear that the conduct of the latter and the defendant was fraudulent the parol evidence of Wilkins was inadmissible. It has been strongly insisted on, for the plaintiffs, that Read acted as the broker of the defendant, but that did not appear to be the case for he purchased on his own account alone. He must be considered as the principal. Wilkins could not say he sold to Hart, having signed the contract as a sale to Read, and it was, therefore, repugnant to the general

rule of law that a contract in writing could not be varied by parol testimony. It appears by the bought note, that Read was the principal, and that Hart's bills were the security for the payment of the wool. This note was confirmed by the invoice, which stated it to be a sale from the plaintiffs to Read. *Addison v. Gandassequi* (3) was expressly in favour of the defendant. The defendant was never debited, for the contract was solely with Read. The facts in *Paterson v. Gandassequi* (4) were nearly similar, as the defendants there had a verdict, because it was known on whose account the goods were bought. The wool was bought and paid for by Read's bills. He had no authority to pledge the defendant's bills although it was intended that the goods should be paid for by them. Suppose the plaintiffs had brought their action against Read, could it be possibly contended that he would not be liable for the payment of the wool? If, therefore, he would be liable, the defendant cannot be, for there would then be two principals. Read has sworn that he purchased on his own account. The bought note and invoice are in direct confirmation of this testimony.

DALLAS, J.—We are not called upon in this action to determine whether the jury were right or wrong in their decision but whether they gave their verdict so clearly against evidence as to authorise us to grant a new trial. The question left to them was whether this was not a contrivance between Read and the defendant to induce the plaintiffs to consider the latter responsible. This being a case of contradictory evidence, the jury judged of the credit due to each of the witnesses, and, having duly considered the nature of the written documents, decided in favour of the veracity of Wilkins. The only question was whether Read acted in the capacity of agent. That circumstance did not depend on the testimony of Wilkins alone. It has been decided in *Kemble v. Atkins* (5), that a broker may make a contract in his own name without inserting that of his principal. The circumstances as to the purchase and disposition of the goods were in that case somewhat similar to the present. The jury have deemed this to be a contract made by Read as the agent of the defendant, and, therefore, are not wrong in the conclusion they have drawn.

PARK, J.—I am of the same opinion. This application appears to be made on two grounds: (i) that parol declarations cannot be received to explain a written contract, and (ii) that there is not sufficient evidence of fraud between Read and the defendant for the jury to give a verdict for the plaintiff. The decision of my brother DALLAS will neither infringe on the Statute of Frauds, nor affect those cases which have been previously determined. It is clear that parol evidence to vary a written contract, cannot be received, but that the parties contracted in the capacities of principals or agents may be explained. Putting the documents out of the case, and presuming on the contradictory testimony of the two witnesses that there was a fraud between Read and the defendant, the verdict of the jury is satisfactory and conclusive.

BURROUGH, J., assented.

Rule discharged.

A CROWDER AND OTHERS v. TINKLER AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), May 16, 18, July 3, 12, 1816]

[Reported 19 Ves. 617; 34 E.R. 645]

B *Injunction—Quia timet motion—No injury accruing to plaintiff—Possibility of future irreparable injury.*

Per LORD ELDON, L.C.: Where a right of the plaintiff has been infringed and no injury has accrued to the plaintiff, but there is evidence that it may accrue at some future date, and in that event the damage would be irreparable, the court has jurisdiction to grant an injunction.

C *Injunction—Trade—Large lucrative business—Injunction to stop—Caution in granting.*

Per LORD ELDON, L.C.: Great caution is required in granting an injunction where the effect will be to stop a large concern in a lucrative trade.

Injunction—Nuisance—Public nuisance—Need for Attorney-General to be party.

Per LORD ELDON, L.C.: In the case of a public nuisance I could not interfere [by granting an injunction] as the Attorney-General is not a party.

Notes. Distinguished: *Cooke v. Forbes* (1867), 37 L.J.Ch. 178. Considered: *A.-G. v. Manchester Corpn.*, [1891-4] All E.R. Rep. 1196. Referred to: *Haines v. Taylor* (1846), 10 Beav. 75; *Thorne v. Taw Vale Rail. and Dock Co.* (1850), 13 Beav. 10; *Lond v. Murray* (1851), 17 L.T.O.S. 248; *Soltau v. De Held* (1851), 2 Sim. N.S. 133; *A.-G. v. Sheffield Gas Consumers Co.* (1853), 3 De G. M. and G. 304; *Hepburn v. Lordan* (1865), 2 Hem. and M. 345; *M' Murray v. Cadwell* (1889), 6 T.L.R. 76; *Graigola Merthyr Co. v. Swansea Corpn.*, [1928] Ch. 235.

As to *quia timet* motions for injunction and proceedings by Attorney-General, see 21 HALSBURY'S LAWS (3rd Edn.) 355, 356, 365, 403, 404; and for cases see 28 DIGEST (Repl.) 781-786; 36 DIGEST (Repl.) 310, 311.

F Cases referred to:

(1) *A.-G. v. Cleaver* (1811), 18 Ves. 211; 34 E.R. 297, L.C.; 36 Digest (Repl.) 267, 194.

(2) *Robinson v. Lord Byron* (1785), 1 Bro. C.C. 588; 28 E.R. 1315, L.C.; 47 Digest (Repl.) 644, 41.

Also referred to in argument:

G *London Corpn. v. Bolt* (1799), 5 Ves. 129; 31 E.R. 507, L.C.; 36 Digest (Repl.) 271, 232.

A.-G. v. Nichol (1809), 16 Ves. 388; 3 Mer. 687; 33 E.R. 1012, L.C.; 19 Digest (Repl.) 146, 954.

Motion for an injunction to restrain the defendants from using a building for the manufacture or storing of gunpowder.

H The plaintiffs were assignees of a lease, of which several years were to come, of paper mills at Chilworth, Surrey. One of them resided in a house adjoining the mills. The defendants were manufacturers of gunpowder, established at the same place for many years at the distance of about four hundred yards from the premises of the plaintiffs. In October, 1815, the defendants began to erect a building at the distance of about two hundred yards from the paper mills. The plaintiffs, apprehending, that the new building was intended for a corning house or magazine, on Nov. 23 gave notice to the defendants that they would take steps to relieve themselves.

I The bill charged that the defendants made and kept on their premises large quantities of powder to the amount of one or two thousand weight; that no corning mill or store house for powder had been there for thirty-six or thirty-seven years, within which time the paper mills had been erected at an expense of above £10,000; that other buildings had been erected near the plaintiffs' mills which were inhabited

by nearly one hundred families composed of persons employed there; that the new building was improperly constructed for a corning house, viz., with brick and stone and a tiled roof, instead of light materials, as usual; that the plaintiffs intended to proceed against the defendants to abate or remove the new building, as a public nuisance, but the danger from explosion was so great and imminent, that it was necessary for the safety of the property of the plaintiffs and the lives of themselves, their families, and workmen, and of the King's subjects passing along the high road, that the court should immediately interfere. The bill prayed an injunction, and a motion was made for that purpose, supported by affidavits of the facts stated by the bill. A

LORD ELDON, L.C., after hearing argument, said that he thought that an injunction might be granted upon the head, not of nuisance, but of danger to property, and he granted an injunction restraining the defendants from using the new building, or any other building adjoining thereto, as a corning mill or corning house for the making of gunpowder or as a storehouse or magazine for the depositing of gunpowder therein until answer or other order to the contrary. B

July 3, 1816. *Hart, Leach, Heald and Rose* for the defendants, moved to dissolve the injunction. C

Sir Samuel Romilly and Roupell for the plaintiffs. D

July 12, 1816. **LORD ELDON, L.C.**—The bill represents this building which the defendants are now erecting for the purpose of a corning house as being in a situation which renders it a public nuisance and a public nuisance combined with private injury to the plaintiffs, not only from that character, but also from the manner, in which it is constructed. I repeat now what I observed in *A.-G. v. Cleaver* (1) that great caution is required in granting an injunction of this nature, where the effect will be to stop a large concern in a lucrative trade. In this instance, therefore, as in the former, I hesitated to grant it *ex parte*, giving an opportunity to oppose it on affidavit, before I took any step. That, however, being declined, I granted the injunction on the affidavits *ex parte*, taking care to give the other parties the opportunity to file affidavits, answer, or demur. E

Upon the question of jurisdiction, if the subject was represented as a mere public nuisance I could not interfere in this case as the Attorney-General is not a party [see 28 HALSBURY'S LAWS (3rd Edn.) 158], and, if he was a party, unless it was clearly a public nuisance generally the court would not interpose by injunction until it had been tried at law [law and equity are now administered by the court concurrently: Supreme Court of Judicature (Consolidation) Act, 1925, s. 36]. The complaint is, therefore, to be considered as of, not a public nuisance simply, but what, being so in its nature, is attended with extreme probability of irreparable injury to the property of the plaintiffs, including also danger to their existence. On such a case, clearly established, I do not hesitate to say that an injunction would be granted. F

As the case is represented, not upon the bill alone, but upon the whole of the affidavits, certainly very contradictory, this proceeding, if likely to be attended with this private irreparable injury, must of necessity be a public nuisance as dangerous to the public, as it can be to the individuals. The legislature has thought proper to regulate this subject by Act of Parliament [Gunpowder Act, 1772, repealed by Protection of Royal Arsenals Act, 1860]. It is conceived that at common law the erection of a corning house of this sort, if attended with danger to the public, would not be a nuisance. To that I do not agree, as, though gunpowder is an article of recent origin, the principle of law is that any subject of modern discovery cannot be used in such a manner as to constitute nuisance merely on the ground that the materials are of modern discovery. The instance has occurred of a conviction upon a prosecution for employing a reservoir of gas in a place where an explosion might be dangerous to the King's subjects or their property. G

A It is supposed that the Act of Parliament justifies the erection of a corning house everywhere upon the site of an old one, but that is not the meaning of this Act. To the penalties of the Act a person carrying on the concern in a mill where he was actually carrying it on at the commencement of the Act would not be liable, but, if the mill was so constructed or placed on such a site that it would have been a nuisance in law from the danger attending it, this statute, prohibiting the carrying
B on the manufacture of gunpowder except where it was carried on at the commencement of the Act or where it shall afterwards become lawful to carry on such manufacture by licence under the Act, would not thereby make it legal if carried on in a mill which from its construction or site would be a nuisance at common law. Such a mill, though exempt from the operation of this Act, would be subject to the consideration whether the law would have endured it previously to the
C Act, whether if an hour before a corning house had been placed within five yards of these mills, it would have been a nuisance. The question, therefore, is not to be determined merely upon this Act. Certainly, considerable regard must be had to the fact, that this erection is upon the site of the old corning house, but it does not necessarily follow that, therefore, it is not possible to consider this an illegal erection.

D The result of the affidavits, which on both sides are very unsatisfactory, is that these paper mills and a corning mill have been established in this place for fifty-one years at least. The former at the commencement stood on their present site and the then corning mill stood upon the site on which they are now erecting the new one. The old one, standing at the distance of about two hundred and nine yards from the paper mills, being destroyed by explosion in 1778, was not re-built, but
E another was built, or some other building was used for corning, about four hundred yards from the paper mills, and has been so used thirty-seven years. For nearly twenty years, therefore, before the plaintiffs commenced their paper mills in 1797 there was no corning mill on this site. The plaintiffs have expended £10,000 in improving their mills, and they say that in 1815 the defendants began to erect a building of some species in the place where this corning mill now stands. When
F the plaintiffs first conceived it to be a magazine, when they knew it to be a corning house, and their conduct since, are uncertain upon these contradictory affidavits. No objection was made until November, when notice was given to desist. In January last under a notion, which seems to me erroneous, that the magistrates had under the Act authority to deal with this, complaint was made to them, representing the building first as a magazine, and in a second instance as a corning
G house.

The case being now brought here, the question is whether upon all the affidavits the case is so clear that either upon the nature and construction of this building, or the site, or the conduct of the defendants, I can sustain this injunction without putting the question in a course of trial, and, if there ought to be a trial, whether
H I ought to sustain the injunction in the interval, or, taking pledges from the defendants, let it go on until the determination whether it is a public nuisance, as, if it is not, it cannot be made out to be injurious to the property of the plaintiffs, the consequences producing that effect being such as must make it a public nuisance. The questions are whether this is clearly a dangerous building (i), from its site; (ii) from the nature of its construction; (iii) from both these circumstances combined. The case is in some respects most embarrassing. *Robinson v. Lord Byron* (2), which might be represented as somewhat novel, had a circumstance that distinguished it from this case. That was not a case in which Lord Byron had done nothing exposing him to an action for damages, or the act done could be regarded as one that might, or might not, depending on the event of further acts, be injurious to the plaintiffs. There was an action then depending for what had been done already. The court, therefore, imposed upon them the necessity of going speedily to trial of that action, maintaining the injunction in the meantime and providing
I against delay, and, the right being established, the injunction was made perpetual.

Here no actual injury has accrued to the plaintiffs, but it is to be represented that it may accrue, and the misfortune is that it may be of such a nature that in one view it may be utterly irreparable, and it is not, therefore, a case where the party may have an action, but the court is to say instantly that it is so dangerous, that it shall not go on. A

With regard to the site alone, fifty-one years ago, it is clear these paper mills and the corning mill stood upon sites exactly as they now stand. These are stated to be the most ancient powder mills in the kingdom, but it is not ascertained where particularly the buildings were placed with reference to each other or the surrounding property. Whichever of these mills came to the other, the weight of evidence, though it is not clear, is that the corning mill stood where it is now to stand, and so continued until the explosion thirty-seven years ago, and the property was under the same ownership. The circumstance that they stood together originally for a considerable time is a circumstance of evidence that they might safely stand there, but at the period I have mentioned an explosion happened, and, putting the effect as low as possible, mischief both to life and property ensued about the premises and the neighbourhood. B C

Another circumstance of evidence is the conduct of the parties for the thirty-six years to 1815 while the corning house was at the distance of four hundred yards from the paper mills instead of being placed where it stood before, a circumstance material in the consideration whether it is highly dangerous on its present site. The proximity of the dusting house must certainly increase the danger. There is also much evidence of opinion as to the actual danger relative, not to the situation, but to the construction of the corning house, and it is obvious that a building of one species may be liable to little danger and another upon the same site to much, and to more or less according to the quantity of combustible matter. Upon this neither party has produced evidence of the weight that might be attributed to the opinions of engineers in a more strict sense than millwrights can be so described. I have always understood that buildings of this sort, composed of those hard materials, are more dangerous than if composed of light materials. There is positive contradiction, not only upon that, but also as to the quantity of powder. D E F

Another part of the case is whether such countenance was given to the improvement of the paper mills as makes the erection of the corning house in this situation a breach of good faith by the defendants. To raise that ground besides the proof of danger there must be something more than passive conduct represented as active encouragement.

Upon the whole the proper course is that the plaintiffs shall indict this building as a nuisance, and the defendants shall plead without traversing, so that it may be tried at the next assizes, and put the concern in such circumstances that it may be carried on without imminent danger. If they will undertake to carry it on so that no more powder shall be kept there than is necessary for the purpose of carrying on the trade, with liberty to apply upon the result of the trial, that appears to be the best way to dispose of this case. G H

Order accordingly.

WOOKEY v. POLE AND OTHERS

[COURT OF KING'S BENCH (Abbott, C.J., Best, Holroyd and Bayley, JJ.), Michaelmas Term, 1820]

[Reported 4 B. & Ald. 1; 106 E.R. 839]

Bill of Exchange—Promissory note—Transfer—Transfer by delivery—Title of transferee—Note payable to order and endorsed in blank or payable to bearer—Taken bona fide for valuable consideration.

Bills of exchange or promissory notes, either payable to order and endorsed in blank or payable to bearer, when taken bona fide and for a valuable consideration pass by delivery and vest a right thereto in the transferee without regard to the title or want of title in the transferor.

Notes. Considered: *Goodwin v. Roberts* (1875), L.R. 10 Exch. 337. Referred to: *Lang v. Smyth* (1831), 7 Bing. 284; *Barnett v. Brandao* (1843), 6 Man. & G. 630; *Picker v. London and County Banking Co.* (1887), 18 Q.B.D. 515.

As to delivery of bills of exchange and promissory notes, see 3 HALSBURY'S LAWS (3rd Edn.) 163-167; and for cases see 6 DIGEST (Repl.) 174 et seq.

Cases referred to:

- (1) *Higgs v. Holiday* (1600), Cro. Eliz. 746; 78 E.R. 978; 34 Digest (Repl.) 144, 990.
- (2) *Ford v. Hopkins* (1701), 1 Salk. 283; Holt, K.B. 119; 90 E.R. 964; 46 Digest (Repl.) 456, 42.
- (3) *Anon.* (1698), 1 Salk. 126.
- (4) *Miller v. Race* (1758), 1 Burr. 452; 2 Keny. 189; 97 E.R. 398; 6 Digest (Repl.) 418, 2954.
- (5) *Hartop v. Hoare* (1743), 3 Atk. 44; 2 Stra. 1187; 1 Wils. 8; 26 E.R. 828; 3 Digest (Repl.) 117, 370.
- (6) *Collins v. Martin* (1797), 1 Bos. & P. 648; 126 E.R. 1113; 6 Digest (Repl.) 125, 928.
- (7) *Grant v. Vaughan* (1764), 3 Burr. 1516; 1 Wm. Bl. 485; 97 E.R. 957; 6 Digest (Repl.) 177, 1227.
- (8) *Peacock v. Rhodes* (1781), 2 Doug. K.B. 693; 99 E.R. 402; 6 Digest (Repl.) 43, 348.
- (9) *Maclish v. Ekins* (1753), Say. 73.
- (10) *Truettel (Treuttel) v. Barandon* (1817), 1 Moore, C.P. 543; 8 Taunt. 100; 129 E.R. 320; 1 Digest (Repl.) 399, 591.
- (11) *Goldsmid v. Gaden* (1796), cited 1 Bos. & P. at p. 649.

Also referred to in argument:

- Nightingal v. Devisme* (1770), 5 Burr. 2589; 2 Wm. Bl. 684; 98 E.R. 361; 44 Digest (Repl.) 434, 391.
- Fenn v. Harrison* (1790), 3 Term Rep. 757; 100 E.R. 842; 6 Digest (Repl.) 302, 2199.
- Paterson v. Tash* (1743), 2 Stra. 1178; 93 E.R. 1110; 1 Digest (Repl.) 397, 578.
- Newsom v. Thornton* (1805), 6 East, 17; 2 Smith, K.B. 207; 102 E.R. 1189; 1 Digest (Repl.) 398, 585.
- Daubigny v. Duval* (1794), 5 Term Rep. 604; 101 E.R. 338; 1 Digest (Repl.) 397, 579.
- De Bouchout v. Goldsmid* (1800), 5 Ves. 211; 31 E.R. 551; 1 Digest (Repl.) 396, 566.
- Wilkinson v. King* (1809), 2 Camp. 335, N.P.; 33 Digest (Repl.) 491, 476.

Action of trover for an exchequer bill and for the payment of £1,000 and interest. The cause coming on to be tried at the sittings in London after Michaelmas Term, 1818, before ABBOTT, C.J., a verdict was found for the plaintiff subject to the opinion of the court upon the following Case.

On Nov. 1, 1817, the plaintiff was proprietor and possessor of a legal and valid A
exchequer bill which was worded and signed as follows :

"No. 8333, May 12, 1817. By virtue of an Act of Parliament . . . for raising
the sum of £24,000,000 by exchequer bills, for the service of the year 1817, this
bill entitles or order to £1,000 with interest after the rate of
2½d. per centum per diem payable out of the first aids or supplies to be granted B
the next session of Parliament, and this bill is to be current and pass in any of
the public revenues, aids, taxes, or supplies, or at the receipt of exchequer at
Westminster after April 5. Dated at the Exchequer, May 12, 1817. If the
blank is not filled up the bill will be paid to bearer."

Early in the month of November the plaintiff sent his exchequer bill by his wife
to Messrs. Pawsey and Eaton, stockbrokers carrying on business in partnership for C
the purpose of being sold, and the wife delivered it to them with orders to sell it for
the plaintiff and to invest the proceeds of the sale in 5 per cent. stock in the plain-
tiff's name. They, however, did not sell the exchequer bill as they were directed
nor did they buy any stock for the plaintiff, but they took the bill so delivered
to them to the defendants (who carried on business in partnership as bankers,
with whom Pawsey and Eaton had a banking account) deposited it with them, the D
bill continuing to be in blank as to the name of any payee, and in consequence,
on Nov. 7, got them to place to the credit of their banking account a sum of £800
and on Nov. 8, another sum of £200 before the defendants had any knowledge
of the circumstances or terms upon which Pawsey and Eaton held the bill. The
defendants did not place the exchequer bill to the credit of Pawsey and Eaton. The
latter afterwards, at various times, paid in to the credit of their banking account E
with the defendants moneys amounting to £300 and upwards, and also drew moneys
out at various times, and on Jan. 27, 1818, they had drawn out of the defendants'
hands all the funds to their credit within £46 10s. That balance remained unsettled.
On January 14, 1818, the plaintiff, as soon as he was informed of this misconduct
of Pawsey and Eaton, applied to the defendants, explained the facts and required
to have the exchequer bill in question delivered up to him, but the defendants F
refused to deliver it up to the plaintiff saying they had advanced money to Pawsey
and Eaton on its security. On Jan. 27 the defendants sold the bill on their own
account, and received the proceeds.

Sir W. Owen for the plaintiff.

Chitty for the defendants.

Cur. adv. vult. G

BEST, J.—The question which the court is called on to decide is whether
exchequer bills are to be considered as goods, or as the representatives of money
and, as such, subject to the same rules as to the transfer of the property in them
as are applicable to money.

The delivery of goods by a person who is not the owner (except in a manner H
authorised by the owner) does not transfer the right to such goods, but it has been
long settled that the right to money is inseparable from the possession of it. I con-
ceive that the representative of money, which is made transferable by delivery
only, must be subject to the same rules as the money which it represents. It was
said by the court in *Higgs v. Holiday* (1) (Cro. Eliz. 746), that "where the owner
of money had lost the possession of it, he had lost the property in it because it can-
not be known," and *HOLT, C.J.*, recognising this doctrine in *Ford v. Hopkins* (2)
adds (1 Salk. at p. 284) :

"But if bank-notes, exchequer notes, million tickets, or the like, are stolen
or lost, the owner has such an interest in them as to bring an action into what-
soever hands they are come."

It is not because the loser cannot know his money again that he cannot recover
it from a person who has fairly obtained the possession of it, for if his guineas I

or shillings had some private marks on them by which he could prove they had been his he could not get them back from a bona fide holder. The true reason of this rule is that by the use of money the interchange of all other property is most readily accomplished. To fit it for its purpose the stamp denotes its value, and possession alone must decide to whom it belongs.

If this be correct as to money, it must be so as to what is made to represent money, and HOLT, C.J., has himself so decided. In *Anon.* (3) he held that trover would not lie by one who had lost a bill of exchange against one who had given for it a valuable consideration. The same judgment was given in the case of a lost bank-note in *Miller v. Race* (4). It cannot be disputed but that this exchequer bill was made to represent money as much as a bank-note or bill of exchange. It was given for a debt due from government. It is payable (the blank not being filled up) to bearer, and transferable by delivery, and is on its face made current and to pass in any of the public revenues or at the receipt of the exchequer.

It has been said that these bills are not used as negotiable instruments, as bank bills and bills of exchange are, but are the objects of sale. I do not see why they should not be used as negotiable instruments: they are transferred with the same facility as other bills, and I know from the legislature that they may be used in payments for the statutes direct that they should be received for taxes. We also know that bills of exchange are as frequently sold as they are delivered in payment. It is the business of bill brokers to negotiate these sales. The great point is that they are not like goods taken on the credit of the person from whom you receive them, but on that of government. The receiver never inquires from whom they come further than to satisfy himself that they are genuine bills. Indeed, when they are in blank, he has no means of ascertaining from whom they come. How could the defendants in this case find out that this bill had ever belonged to the plaintiff? It was the plaintiff's own negligence in not filling up the blank that rendered it impossible for the defendants to ascertain that he had any right to it, and it would, therefore, be inconsistent with law and justice that under such circumstances he should be allowed to call on them to make good the loss that has arisen from the fraud of his agent.

It seems to be the opinion of LEE, C.J., who pronounced the judgment of the Court of King's Bench in *Hartop v. Hoare* (5), that there is no difference between money, bank-notes, and exchequer bills. His Lordship observes (3 Atk. at p. 50) that HOLT, C.J., had decided in *Ford v. Hopkins* (2) (1 Salk. at pp. 283, 284):

"that if money is stolen and paid to another, the owner can have no remedy against him that received it; but if bank-notes, exchequer bills, or million tickets, or the like, are stolen or lost, the owner has such an interest or property in them as to bring an action into whatever hands they come."

LEE, C.J., says:

"This must mean that the owner can bring an action into whatever hands they come, without a valuable consideration paid for them; for if it be not thus understood, what HOLT says here will not agree with his former opinion."

This also gives me the authority of HOLT, C.J., for saying that there is no difference between bank-notes and exchequer notes, and the same learned judge has decided that bills of exchange pass as money. Should the deposit of this bill with the defendants, under the circumstances in which it was deposited, be considered as pledging the bill, that circumstance will make no difference if the property in the bill passes by delivery. In *Collins v. Martin* (6) a banker pledged bills, endorsed in blank, that had been deposited with him by a customer. The banker had no authority from the owner to part with these bills, but the court held that with respect to bills of exchange endorsed in blank property and possession are inseparable. The pawnee had a right to detain the bills until the sum raised on them by the bankers was paid. On these grounds, I think that a nonsuit should be entered in this case.

HOLROYD, J.—It has been long and fully settled that bank-notes or bills, drafts on bankers' bills of exchange, or promissory notes, either payable to order and endorsed in blank, or payable to bearer, when taken bona fide and for a valuable consideration, pass by delivery and vest a right thereto in the transferee without regard to the title or want of title in the person transferring them.

This was decided, as to a bank-note, in *Miller v. Race* (4), as to a draft on a banker in *Grant v. Vaughan* (7), and as to a bill of exchange endorsed in blank, in *Peacock v. Rhodes* (8). Those cases have proceeded on the nature and effect of the instruments which have been considered as distinguishable from goods. In the case of goods the property, except in market overt, can only be transferred by the owner or some person having either an express or implied authority from him, and no one can, by his contract or delivery, transfer more than his own right or the right of him under whose authority he acts. The courts have considered these instruments, either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to money, and following the nature of their principal. In the one case they are payable to the person, whoever he may be, who is the bearer or holder of the instrument, and so also in the other case unless the payment is restrained by a special endorsement.

In *Peacock v. Rhodes* (8) LORD MANSFIELD says (2 Doug. K.B. at p. 636) :

"The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes, it would stop their currency. . . . I see no difference between a note endorsed in blank, and one payable to bearer."

In *Miller v. Race* (4), speaking of bank-notes, he says (1 Burr. at p. 457) :

"They are not goods, nor securities, nor documents for debts, nor are so esteemed, but are treated as money, as cash in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes: they are as much money as guineas themselves are, or any other current coin that is used in common payments, as money or cash."

These authorities show, that not only money itself may pass, and the right to it may arise by currency alone, but, further, that these mercantile instruments which entitle the bearer of them to money may also pass, and the right to them may arise in the like manner by currency or delivery. These decisions proceed upon the nature of the property (viz., money) to which such instruments give the right and which is itself current, and the effect of the instruments, which either give to their holders, merely as such, the right to receive the money, or specify them as the persons entitled to receive it.

The question, then, is whether these principles apply to the present case or whether this exchequer bill and the right thereto follow the nature of goods which, except in market overt, can only be transferred by the owner or under his authority. In order to ascertain that, we must consider the nature and effect of the instrument, both as to the property which it concerns and as to its negotiability or currency by law. In its original state it purports to entitle the holder to the sum of £1,000 and interest, and the original holder may, if he pleases, secure it to himself, but it is payable to the bearer until some name is inserted, and when that is done it becomes payable to such nominee or his order. But if the original holder parts with it or keeps it in blank, he by that very act, or by his negligence if he loses it, authorises the bearer, whoever he may be, to receive the money, and so, if he were to insert his own name, but endorse it in blank instead of restraining its negotiability either by not endorsing it at all or by making a special endorsement, he thereby authorises and empowers any person who may be the holder

bona fide and for value to receive it, and he cannot revoke that authority when it has become coupled with an interest.

The instrument is created by the stat. 48 Geo. 3, c. 1 [relating to the issue and payment of exchequer bills] and is thereby made negotiable and current. By s. 2 the Commissioners of the Treasury are to make out exchequer bills in such manner and form as they shall direct, and, after certain things are done, to put them into circulation. By s. 5 they may be paid in to the receivers of taxes, and in s. 13 are these words:

"And for the better supporting the currency of the said exchequer bills, and to the end a sufficient provision may be made for circulating and exchanging the same for ready money, during such time as they or any of them are to be current, the Commissioners of the Treasury are empowered to contract with persons who will undertake to circulate and exchange them for ready money."

By s. 18:

"On proof as therein specified, if any exchequer bill is lost, burnt, or destroyed, and on a certificate obtained, as therein mentioned, the Commissioners of the Treasury are authorised to pay the money, as if the bill had been brought in to be paid off, provided the payee gives security to pay into the exchequer, for the use of the public, so much as shall be paid him, if the exchequer bill shall be afterwards produced."

An exchequer bill is, therefore, an instrument for the repayment of money originally advanced to the public, purporting thereby to entitle the bearer to receive the money, put into circulation, and made current by law. It is not like goods saleable only in market overt and not otherwise transferable except by the owner, or under his authority, but is, in all those several respects, similar to bills of exchange and promissory notes, and transferable in the same manner as they are. The case, therefore, stands thus. This exchequer bill was a current and negotiable instrument for the payment of money. Money passes from one person to another by reason of its currency, and for that reason only and not because it has no earmark it cannot be recovered from the person to whom it has been passed. The exchequer bill, therefore, seems to me upon the same principle to follow the nature of the money for which it is a security.

Maclish v. Ekins (9) has been cited, to which this case is said to bear a resemblance. That case is very distinguishable from the present. It was the case of a navy bill payable to the plaintiff or his assigns, and not to bearer. By the very terms, therefore, of that instrument, the holder was not entitled to receive the money, and the question in that case went upon the ground of the want of an assignment. There, too, the defendant received the navy bill under circumstances which showed that he doubted the broker's authority to dispose of it. Here the brokers had a distinct authority to sell, and they might have sold the exchequer bill to the defendants as their own. This is like the case of a bill endorsed in blank, payable to bearer, where the right arises from the instrument itself and it is not necessary to deduce the title through the intermediate holders, and in that case *Collins v. Martin* (6) is a distinct authority to show that, if the party with whom such bills are deposited, raise money upon them by pledging them with A., the owner cannot afterwards maintain trover for them. The authority of that decision was confirmed in *Truetzel v. Barandon* (10). If it be clear that this exchequer bill follows the nature of bills of exchange payable to bearer, these authorities are expressly in point to show that the brokers might pledge this exchequer bill and by the delivery of it transfer the property in it to the defendants. On these grounds, it seems to me that there ought to be judgment of nonsuit.

BAYLEY, J.—This was an action of trover for an exchequer bill. The bill was dated May 12, 1817, and purported to be payable out of the first aids to be granted

the then next session of Parliament and to be current in any of the public revenues and taxes after April 5. The form of the bill was : A

" . . . this entitles or order to £1,000, with interest after the rate of 2½d. per day,"

and it had a memorandum at the foot, that if the blank were not filled up, it would be paid to bearer. B

This bill belonged to the plaintiff, and early in November, 1817, he sent it to Pawsey and Eaton, stockbrokers, that they might sell it on his account, and invest the amount in his name in 5 per cent. stock. They did not sell the bill or buy the stock, but deposited it with the defendants, who were their bankers, and the defendants, upon the faith of such deposit, carried to the credit of Pawsey and Eaton £800 on Nov. 7, and £200 more on Nov. 8. On Jan. 27, 1818, Pawsey and Eaton C had exhausted these sums and £300 more to within £46 10s., and their balance with the defendants still remains unsettled. The question is whether this wrongful deposit by Pawsey and Eaton gives the defendants a right to withhold the bill against the plaintiff, the right owner. Had Pawsey and Eaton sold the bill to the defendants in the usual and ordinary course of dealing there can be no doubt that they would have had good title to the bill because Pawsey and Eaton would have been acting within the scope and limits of the authority conferred upon them by the plaintiff which was an authority to sell. The neglect of Pawsey and Eaton to apply the money to the purpose prescribed would not have invalidated the defendants' title unless they had lent themselves to the fraud of Pawsey and Eaton, because the sale of the bill was to precede the purchase of the stock and to be an independent transaction, and had Pawsey and Eaton sold the bill the plaintiff, who trusted them with the application of the money, must have borne the loss if they misapplied it. D

But though Pawsey and Eaton could have conferred a good title by sale because they were authorised by the plaintiff to sell, the question is: Could they confer a good title by deposit? A pawnee of goods or chattels or a vendee out of market overt has in general no better title than his pawner or vendor and cannot resist the claim of the rightful owner, but bank-notes and bills of exchange stand upon a different footing in this respect from ordinary goods and chattels. The holder, bona fide, and for a valuable consideration, of a bank-note or bill of exchange has a good title against all the world because, in the case of bank-notes, they are considered as money and pass as such and it is essential for the purposes of trade that delivery should give a perfect title, and because, in the case of bills of exchange, this is the law and custom of merchants. It makes no difference in case of bank-notes or bills of exchange whether such holder has received them as pawnee or otherwise: *Collins v. Martin* (6). E F

The question here is whether such a bill as this is to stand upon the footing of bank-notes or bills of exchange or on that of ordinary goods and chattels. It seems to me that it stands on the footing of ordinary goods and chattels, not on that of bank-notes or bills of exchange. The holder of a bank-note or a bill has in general no muniment to show his title; the holder of an exchequer bill generally has the broker's note, stating the fact and particulars of the purchase. If the holder buys from the government broker, he gives him a broker's note; if he buys from any other broker, that broker does the same. The only case in which he does not buy from a broker and get a broker's note is where he exchanges at the Exchequer an old bill for a new one, but then he will retain the note for the bill he gave up in exchange. In this case, therefore, had the defendants asked Pawsey and Eaton for their broker's note, they would have found they had no title. Bank-notes and bills of exchange are passed from hand to hand, from one proprietor to another, in all parts of the kingdom, and are used as the media of commercial payments. The sale of exchequer bills is confined almost exclusively to London, and to one particular part of London, the Stock Exchange. That, I apprehend, is the market overt for the G H I

sale of such bills, and a sale there will, I take it, give the same security to the buyer which other sales in market overt give. There is no market overt for bank-notes and ordinary bills of exchange, and they, therefore, require a protection which exchequer bills do not.

Considering exchequer bills, therefore, as differently circumstanced from bank-notes and bills of exchange and upon the same footing as other saleable goods and chattels, it follows that a pawnee thereof will not have a better title than the pawner. The cases to this effect are many, and not disputed. Even if this were not the case in general, I think it would be so, under the circumstances of this case. Pawsey and Eaton were stockbrokers. The defendants knew that they were so. It is part of the business of stockbrokers to sell exchequer bills for others, and when they offered this deposit, the defendants should have inquired in what character they held this bill, whether as owners or as agents, and the result of the inquiry might have been a discovery of the truth. It was urged in argument that by filling up the blank in the bill, and making a proper endorsement on the bill the plaintiff might have prevented the fraud upon the defendants, and no doubt he might if he had inserted his own name in the blank, and had endorsed it "to the vendee of Pawsey and Eaton," but it does not follow, because he might have prevented fraud by these means that he is to bear the loss for not having used them. Had such an endorsement been usual, the neglect to take the ordinary precaution might have thrown the loss on the plaintiff, but to make him bear the loss, it should be shown that that is a common precaution.

I think no stress can be laid upon the memorandum on the bill, "if the blank is not filled up the bill will be paid to bearer." That does not imply that a bona fide bearer shall have a right against the proper owner, but that payment, under such circumstances, to the bearer should discharge government. I lay no stress upon *Maclish v. Ekins* (9), because there the bill was payable to the plaintiff or his assigns and the plaintiff had never endorsed or assigned it or authorised an assignment. In *Goldsmyd v. Gaden* (11) the broker had bought the navy bills and scrip as agent for the defendants, and they left the navy bills and scrip in his possession, so that he had all the muniments of title and common inquiry would not have detected his want of title, and it was from want of proper caution, viz., the taking of the possession of the muniments from him that he was enabled to impose upon the plaintiffs.

On the whole, on the ground that exchequer bills are not bills of exchange, that it is not necessary for the purposes of trade that they should stand on the same footing as bills of exchange, that in the case of exchequer bills there are muniments of title which will show in whom the title is, and that the defendants were guilty of negligence in not ascertaining whether Pawsey and Eaton had the proper muniments of title, I am of opinion that they have no right to these bills and that the plaintiff is entitled to recover.

ABBOTT, C.J.—I am of opinion that a nonsuit ought to be entered. The question in the present case is whether the transfer of the property in an exchequer bill is to be governed by those rules which regulate the transfer of property in bank-notes and bills of exchange originally made payable to the bearer or become so payable by the effect of an endorsement according to the custom of merchants, or by those rules which regulate the transfer of the property in goods and chattels. If by the former, the authorities are clearly against the plaintiff; if by the latter, they are as clearly with him.

Upon this question my mind has fluctuated, but I am ultimately of opinion that the transfer is to be governed by those rules which apply to notes and bills of exchange. I do not rely upon *Goldsmyd v. Gaden* (11), because the facts of that case are not given with sufficient fullness and perspicuity to enable me to judge of the ground and principle of the decision. But, abstracted from authority, I think this instrument is of the same nature as notes and bills of exchange. Like them,

it is neither valuable nor useful in itself as goods and chattels, such as a horse, a book, a picture, or a pipe of wine, are; it is valuable only as entitling the holder to receive, at some future time, a certain sum of money, which is a value precisely of the same nature as the value of a note or bill. Notes and bills have been distinguished from goods in regard to their transfer for the convenience of trade and commerce, and in regard to their being mercantile and commercial instruments, and by law negotiable. It may be true that exchequer bills are not so frequently negotiated as some other bills or notes, but I think we are to regard the negotiability of the instrument and not the frequency of actual negotiation. Exchequer bills are not made for very small sums, and on that account alone they would not become the subject of frequent actual negotiation. A bank-note for £5,000 passes through very few hands; a bank-note for £5 usually passes through a great number. Many country bank-notes have no ordinary circulation beyond a very narrow district. Bills of exchange usually pass through very few hands, but the character of these instruments is in no degree affected by those circumstances.

In *Grant v. Vaughan* (7), which arose upon a draft on a banker payable to the ship *Fortune* or bearer, the court held that it ought not to have been left to the jury to say whether such drafts were in fact and practice negotiable, for that the question whether a bill or note be negotiable or not is a question of law. On such a question of law regarding an exchequer bill I should, looking at the form of the instrument and observing that the money is to be payable to the bearer, answer that it is by law negotiable. I believe also that exchequer bills are in fact negotiated in like manner as other bills or notes, though not to the same extent, or among all people generally, but confined chiefly to those who deal in money. I have already said that I think the frequency or extent of actual negotiation is not to be regarded. It was objected, however, at the Bar that there are words which show that this instrument was not to be negotiable before April 5, which day had not arrived when it was deposited with the defendants. I think the words have no such import. They are affirmative that the bill will be received as a payment at the Exchequer after April 5, which may reasonably lead to a conclusion in the negative that it will not be received in payment there before that day. But compulsion to receive an instrument in payment is not by any means requisite to give to it the character of a negotiable instrument. No man is compellable to take a bill of exchange in payment. It was also objected that exchequer bills are the subject of sale and usually are transferred by sale. This is true in fact, but I think the fact does not affect the character of the instrument, for bills of exchange also are often made the subject of sale and are actually transferred by sale.

For these reasons, I am of opinion that exchequer bills are negotiable and may be transferred in the same manner as bills of exchange, and that in those bills, as in bills of exchange, the property passes with the possession by every mode of transfer, fraud and collusion apart. I think this opinion is most consonant to public policy which requires the utmost facility of transfer because the value is in some degree increased thereby, though I should not think myself justified in deciding the case upon the ground of public policy alone. It will be understood that I have been speaking of exchequer bills in which the blank is not filled up with any name, and which, therefore, according to the note at the foot, are to be paid to the bearer.

Judgment of nonsuit.

TEBBS AND OTHERS v. CARPENTER AND OTHERS

[VICE-CHANCELLOR'S COURT (Sir Thomas Plumer, V.-C.), February, 1816]

[Reported 1 Madd. 290; 56 E.R. 107]

Executor—Duty of executor—Due diligence in administration of estate—Negligence—Liability for loss to estate—Rents allowed to fall into arrear—Liability for arrears—Liability for interest—Care of estate entrusted to another.

An executor must use due diligence in administering the estate of which he has accepted the trust. If he is guilty of gross negligence and a loss be sustained by the estate, it falls on him.

If rents forming part of the estate fall into arrear and are lost to the estate by the executor failing to use proper means to recover them, he must be charged with the arrears, but not with interest thereon. It is no excuse that he devolved the care of the estate to another person.

Executor—Duty of executor—Investment—Money kept in executor's hands—Negligence—Misfeasance—Money applied to own purposes—Liability to pay interest.

Where the testator has directed that a balance in the hands of the executor shall be invested, and, although the exigencies of the testator's affairs do not require its retention, nevertheless the executor keeps it in his hands, he is liable to be charged simple interest [usually at the rate of 4 per cent.], but a distinction is to be drawn between mere negligence and corruption or misfeasance as by the executor applying the money in his business on the payment of his debts, in which case interest may be charged at a higher rate, or, quære, compound interest. "A special case is necessary to induce the court to charge executors with more than 4 per cent. upon the balances in their hands": per SIR THOMAS PLUMER, V.-C.

The employment of an agent who alone had possession of the balances, though not any ground of excuse, **held** in the circumstances of the case to show that executors did not derive any benefit or profit to themselves, nor act with that view, and, therefore, were guilty of negligence and not of misfeasance.

Executor—Costs—Misconduct in administration—Liability to pay costs of suit.

If a suit relating to the administration of an estate would have been proper and the executor a necessary party even if he had not misconducted himself, but in the course of the suit it appears that he has misconducted himself, he should not be ordered to pay all the costs of the suit, but if his misconduct was the sole occasion for the suit he ought then to pay the costs.

Notes. Considered: *Crackelt v. Bethune* (1820), 1 Jac. & W. 586. Referred to: *Law v. Hunter* (1826), 1 Russ. 100; *Docker v. Somes*, [1824-34] All E.R. Rep. 402; *Buxton v. Buxton* (1835), 1 My. & Cr. 80; *Cotham v. West* (1837), Donnelly, 199; *Clough v. Bond* (1838), 3 My. & Cr. 490; *Heighington v. Grant* (1840), 5 My. & Cr. 258; *Massey v. Moss* (1842), 1 Hare, 319; *Heighington v. Grant* (1845), 1 Ph. 600; *A.-G. v. Alford* (1854), 2 Sm. & G. 488; *Pride v. Fooks* (1858), 4 Jur. N.S. 678; *Bell v. Turner* (1877), 47 L.J.Ch. 75; *Re Gasquoine*, *Gasquoine v. Gasquoine*, [1894] 1 Ch. 470; *Re Roberts*, *Knight v. Roberts* (1897), 76 L.T. 479.

As to the liability of an executor for his acts in administering the suit, see 16 HALSBURY'S LAWS (3rd Edn.) 474-479; and for cases see 24 DIGEST (Repl.) 707 et seq. See also 38 HALSBURY'S LAWS (3rd Edn.) 967, 1046-1051, and 47 DIGEST (Repl.) 348-353, 473 et seq.

Cases referred to:

- (1) *Powell v. Evans* (1801), 5 Ves. 839; 31 E.R. 886; 23 Digest (Repl.) 322, 3905.
- (2) *Lowson v. Copeland* (1787), 2 Bro. C.C. 156; 29 E.R. 89; 23 Digest (Repl.) 322, 3904.

- (3) *Raphael v. Boehm* (1805), 11 Ves. 92; 32 E.R. 1023, L.C.; subsequent proceedings, (1807), 13 Ves. 407; 33 E.R. 347, L.C.; 13 Ves. 590; 33 E.R. 415, L.C.; 24 Digest (Repl. 749, 7366 et seq. A
- (4) *Dornford v. Dornford* (1806), 12 Ves. 127; 33 E.R. 49; 24 Digest (Repl.) 749, 7369.
- (5) *Ashburnham v. Thompson* (1807), 13 Ves. 402; 33 E.R. 345; 24 Digest (Repl.) 747, 7337. B
- (6) *Adams v. Gale* (1740), 2 Atk. 106; 26 E.R. 466, L.C.; 23 Digest (Repl.) 385, 4558.
- (7) *Child v. Gibson* (1743), 2 Atk. 603.
- (8) *Perkins v. Baynton* (1784), 1 Bro. C.C. 375; 28 E.R. 1305; 24 Digest (Repl.) 746, 7322.
- (9) *Newton v. Bennet* (1784), 1 Bro. C.C. 359; 28 E.R. 1177, L.C.; 24 Digest (Repl.) 746, 7321. C
- (10) *Forbes v. Ross* (1788), 2 Cox, Eq. Cas. 113; 2 Bro. C.C. 430; 30 E.R. 52, L.C.; 24 Digest (Repl.) 737, 7239.
- (11) *Littlehales v. Gascoyne* (1790), 3 Bro. C.C. 73; 29 E.R. 416, L.C.; 24 Digest (Repl.) 747, 7333.
- (12) *Browne v. Southouse* (1790), 3 Bro. C.C. 107; 29 E.R. 437; 1 Digest (Repl.) 519, 1530. D
- (13) *Franklin v. Frith* (1792), 3 Bro. C.C. 433; 29 E.R. 627, L.C.; 24 Digest (Repl.) 747, 7334.
- (14) *Seers v. Hind* (1791), 1 Ves. 294; 1 Hov. Supp. 128; 30 E.R. 351, L.C.; 31 Digest (Repl.) 433, 5601.
- (15) *Piety v. Stace* (1799), 4 Ves. 620; 31 E.R. 319; 24 Digest (Repl.) 746, 7324. E
- (16) *Pocock v. Reddington* (1801), 5 Ves. 794; 31 E.R. 862; 47 Digest (Repl.) 483, 4345.
- (17) *Rocke v. Hart* (1805), 11 Ves. 58; 32 E.R. 1009; 24 Digest (Repl.) 747, 7336.

Consideration of report of Master in suit for maladministration of estate by executors. F

Sir Benjamin Tebbs, among other bequests, gave to his wife an annuity of £600 a year, and directed that, after payment of his debts and funeral expenses

“the money arising from collecting my rents, and after paying Lady Tebbs’ annuity, the overplus shall be put out into the 4 per cents. until after the death of Lady Tebbs, then such sum as may be found may and shall be equally divided among Jane Tebbs, Elizabeth Hodgson, and the son of my son John Tebbs, or his other children that are living, to share and share alike. To my son William, and Susan Tebbs, and to my son George Tebbs, together with the above, share and share alike.” G

Lady Tebbs, the testator’s widow, survived her husband eleven years. John Tebbs, the son, had only two children at the death of the testator, viz., the defendants John Searls Tebbs and Eliza Ann Tebbs (who afterwards died), but he had three other children born after the death of the testator and before the death of the testator’s widow, viz., the plaintiffs Henry Tebbs, Susan Tebbs, and Mary Ann Tebbs. H

On the death of Lady Tebbs, doubts arose whether the distribution of the residue should be into six or nine shares, and thereupon the plaintiffs, who were the children of John Tebbs born after the death of the testator, but before the decease of his widow, filed the original bill against Collick and Carpenter, the executors, and also against the other residuary legatees, praying the usual accounts against the executors and that the clear residue might be ascertained, and a declaration of the rights of the plaintiffs to three ninth parts or shares of the residue, etc.; and also praying, that the defendants might answer for the interest of such part of the residuary personal estate of the testator as had not been properly laid out and invested. Before any answer was put in Collick died, and a bill of revivor was filed I

against his representatives. On Mar. 9, 1810, SIR WILLIAM GRANT, M.R., by his decree declared that the clear residue of the testator's personal estate should be distributable among Jane Tebbs, Elizabeth Hodson, William Tebbs, Susan Mann, George Tebbs, and all the children of the testator's son John, who were living at the time of the death of the testator's widow in equal shares and proportions. The decree also directed the usual accounts against the surviving executors and the representatives of Collick, the deceased executor, and all further directions and the costs of the suit were reserved till the Master should have made his report. From this decree such of the defendants as were residuary legatees appealed.

The Master made his report on July 6, 1811. On Feb. 8, 1814, the cause came on for further directions and also upon the petition of appeal, when the decree was affirmed, and the costs of all parties, including the costs of the appeal, were directed to be taxed as between solicitor and client, except the costs of the defendant Carpenter the executor, and of Jarvis, Blake, and Crohall, the executors of Collick the deceased co-executor, and such costs, when taxed, were directed to be paid out of the fund in court. It was also further ordered that the Master should carry on the accounts of the testator's estate against the defendant Henry Carpenter, the surviving executor of the testator, and that the Master should inquire into the particulars of the arrears of rents reported to be outstanding on account of the testator's estate and to state from what time the same became in arrear, the amount of the several annual rents, and the nature of the several tenancies of the persons reported to be in arrear. It was ordered that the Master should inquire what balances were from time to time in the hands of the defendants Henry Carpenter and John Collick, or either of them, or any other person or persons, by their order or that of either of them, or on their account or that of either of them, on account of the receipts and payments of the testator's estate, set forth in his report containing such account at the end of one year after the testator's death, and making annual rests. It was further ordered that the Master should inquire and state what investments were from time to time, and when, made out of the residue or overplus of the testator's estate by the defendant Carpenter and the late defendant Collick, or either of them, in the purchase of bank 4 per cent. annuities, as directed by the testator's will. The consideration of the costs of the defendants Carpenter, Jarvis, Blake, and Crockett, and of further directions and subsequent costs of the suit were reserved until after the Master should have made his report.

The Master by his report stated the particulars of the arrears (amounting to £1,500) of the tenants, and the nature of their tenancies, and also the balances in the hands of the executors, which, in each year from 1797 to 1811, with the exception of the years 1803, 1808, 1810 and 1811, were very considerable, and he also stated the investments which had been made in the 4 per cents. which still left considerable balances in their hands.

Sir Samuel Romilly, Dowdeswell and Shadwell for the plaintiffs.

Leach and Wingfield for such of the defendants as were in the same interest with the plaintiffs.

Hart and Roupell for the defendant Carpenter.

Heald for the representatives of the deceased executor Collick.

SIR THOMAS PLUMER, V.-C.—Three points have been raised: (i) as to the arrears of rent and interest upon them; (ii) as to the balances and interest; (iii) as to the costs.

With respect to the arrears of rent, the question is whether the executors are to be charged with them, or a part of them, and with interest. The management of the houses, which were old, was left to the executors, and the trust was troublesome and gratuitous. The surviving executor and the representatives of the deceased executor have not produced any evidence in their exculpation, and I am under the necessity of deciding in the absence of all evidence on behalf of the executors. It

is possible there might have been great difficulties in recovering part of the rent, but is, therefore, the whole amount of the arrears to be lost to the estate? The impression on the Master's mind, as appears by his report was that by using proper means the whole of the arrears might have been recovered. It cannot be admitted as an excuse that they devolved the care of this estate to another; they must answer for his negligence. A

I am anxious not to discourage persons from acting as executors by throwing difficulties in their way, and I am willing to make every proper allowance, but I must not forget the established doctrine of this court. If persons accept the trust of executors, they must perform it; they must use due diligence; and not suffer infants to be injured by their negligence. There are many cases in which executors have been adjudged responsible for gross negligence, crassa negligentia. Where executors had neglected to call in money lent by the testator upon bond and the obligee became a bankrupt, *SIR RICHARD PEPPER ARDEN, M.R.*, though inclined to favour the executors, held them to be responsible: *Powell v. Evans* (1); and in a previous case of *Lowson v. Copeland* (2), an executor was charged with a debt, which had not been recovered, in consequence of his neglect. If, therefore, there be crassa negligentia and a loss sustained by the estate, it falls upon the executors. Here, for want of evidence, I cannot say that all this rent could not have been recovered, and I am reluctantly obliged to assume that no exculpatory evidence could be produced, and, therefore, they must be charged with these arrears. Interest upon the arrears was but faintly pressed for, and ought not to be given. Interest was asked for in *Lowson v. Copeland* (2), but refused. B C D

The next question to be considered is with respect to the balances in the hands of the executors. In 1797, the end of one year after the testator's death, they had a balance in their hands of £790. The testator's will directs: E

"After my executors paying my just debts and funeral expenses, the money arising from collecting my rents, and after paying Lady Tebbs' annuity, the overplus shall be put out into the 4 per cents. until after the death of Lady Tebbs, then such sum as may be found shall and may be equally divided among." F

That sum, therefore, of £790 ought, according to the directions of the will, to have been laid out in the 4 per cents. unless it could be shown that the exigency of the testator's affairs required such a balance to be kept in hand. The same observation applies to the balances, all of them considerable, received by the executors in the subsequent years except in 1803, 1808, 1810, and 1811. The argument that it was necessary to keep the balance which they had in 1797 to answer the contingencies of the next year would have had weight if in fact it was necessary and there were pressing demands which required it, but the current receipts were greatly more than sufficient to answer the current payments, and no evidence was adduced to show there was any necessity for keeping that balance in their hands. The same remark applies as to the subsequent balances in the succeeding years. Under these circumstances it is contended that these executors should not only be charged with these balances, but also with compound interest as in *Raphael v. Boehm* (3), except that annual rests are to be made by this decree instead of half-yearly rests as in that case, it being said that the estate would have derived that benefit if the executors had, according to the directions in the will, laid out each yearly balance in the 4 per cents. It is a point of great importance to executors that the rule should be clearly ascertained. G H I

The decree in *Raphael v. Boehm* (3) was made by LORD LOUGHBOROUGH in 1798. There is no report of his decision. The cause came on afterwards, before LORD ELDON, upon exceptions to the Master's report (11 Ves. 92), and before LORD ERSKINE upon a petition to re-hear the decree of LORD LOUGHBOROUGH (13 Ves. 407). and again before LORD ELDON upon the question of costs (13 Ves. 590). The decree was founded on the very particular circumstances of that case. £30,000 was given

there, in solido, to be laid out. There could not be a more manifest violation of the executor's duty. He did not lay out the money as directed, but used it in his trade. It was a wilful violation of the will which prohibited retainer and directed accumulation. LORD LOUGHBOROUGH's decree was very severe, for he directed the account to be taken from the moment of the testator's death and interest to be charged upon all the sums received, and rests to be made half-yearly upon the balance, including intermediate interest, so that double compound interest was given. LORD ELDON did not approve of the decree, in that respect, and said (11 Ves. at pp. 110, 111): "It was expressed in terms that were never inserted, and which he hoped would never again be found in any decree", but he agreed in the propriety of giving compound interest. When the case came before LORD ERSKINE, he said (13 Ves. at p. 412):

"The duty of of this executor does not depend upon the general rule, as it relates generally to the administration of assets, but upon the special rule prescribed by this particular will, by which accumulation is pointed out; and the executor is told by the will, that he is to derive no advantage from the trust."

I have stated thus much as to *Raphael v. Boehm* (3), because it was the only case cited in support of the present claim to compound interest. No case has been stated previous to *Raphael v. Boehm* (3), where compound interest was given. Two cases on the subject have subsequently occurred; one is *Dornford v. Dornford* (4), and the other *Ashburnham v. Thompson* (5).

Dornford v. Dornford (4) was a case arising in bankruptcy. The will is not noticed in the report, but I have consulted the Register's Book, and it appears that the will directed the executors

"to collect and receive the rents and profits arising from all the above-mentioned premises [the premises before-mentioned in the will] together with all the arrears of salary due to me from government, and all other my real and personal effects, and dispose of the same, and every part thereof, in the most advantageous manner possible, immediately after my decease. And it is my desire, that the money from the same be vested in the public funds, in the joint names of the said Thomas Dornford and Robert Capper [the executors], in trust, to and for the sole use and benefit of my nephew James William Dornford, the eldest son of my eldest brother James Dornford, of London; the interest arising therefrom to be allowed, discretionally by the above-named Thomas Dornford and Robert Capper as a provision to complete the education of my nephew at Westminster School and in the University of Oxford, until he attains the age of twenty-one years: And it is my request, that the surplus (if any there be) of such interest be vested also in the public funds, with the principal stock, in the joint names of Thomas Dornford and Robert Capper, as soon as the sum will purchase £50; and that as soon as my said nephew shall attain the age of twenty-one years, that the above-mentioned principal sum, together with all the other sums of money arising from the accumulated interest, or otherwise, be laid out in the most advantageous manner, in the county of Kent, etc."

Upon this will, SIR WILLIAM GRANT, M.R., thought the direction to accumulate was as imperative as in *Raphael v. Boehm* (3). The precise order made by the Master of the Rolls does not appear in the report, but I have caused it to be extracted from the Register's Book:

"It is ordered that the said Master do compute interest on the balances which were from time to time in the hands of the defendant Thomas Dornford, the bankrupt, from the end of two months after the death of the testator, Josiah Dornford, to the time of bankruptcy, such interest to be computed in manner following, that is to say, after the rate of £5 per centum per annum, on so much thereof as is equal to the bond debts reported due from the testator's estate, and after the rate of £4 per centum per annum on the residue of such balances."

Compound interest, it is observable, was not directed. This was the first case which followed *Raphael v. Boehm* (3), and the words of the will were as strong, as in that case; but not being, in all the circumstances, exactly the same, His Honour did not adopt universally what was done in *Raphael v. Boehm* (3).

The next case was *Ashburnham v. Thompson* (5). It is reported by Mr. VESEY (13 Ves. 402), and I have been furnished with a manuscript note by one of the counsel [Mr. MADDOCKS] in the cause. There, the executors had kept a balance in their hands for twenty years and had employed the money for their own advantage. It was pressed that compound interest should be given [as] in *Raphael v. Boehm* (3), and it was urged in argument that, if the executors had made compound interest, and only 4 per cent. was charged them in respect of the balances in their hands, they would be benefited nearly as much as the cestui que trust, but SIR WILLIAM GRANT, M.R., said: "I think there is no ground for computing interest upon the balances out of the common way." Thus stand the authorities since *Raphael v. Boehm* (3).

In none of the cases previous to *Raphael v. Boehm* (3) was compound interest given. They are very numerous. In *Adams v. Gale* (6) LORD HARDWICKE said (2 Atk. at p. 106):

"An executor may make use of money which is perpetually coming in by assets of the testator, and turn it to his own advantage; and that it is not improper for an executor to do it upon his own account, where he is a responsible man and ready to answer debts and legacies when called upon."

In a subsequent case—*Child v. Gibson* (7)—he says (2 Atk. at p. 603):

"I will not say but if an executor had placed out assets that were specifically devised, but the court would oblige him to account for the interest he may have made of those assets; but there never was a case in this court where a Master was directed to charge interest upon an executor, who makes use of assets come to his hands, in the way of trade."

More modern cases have entirely overturned this extraordinary doctrine. In *Perkins v. Baynton* (8), where an administrator had kept money five years in his hands and mixed it with his own money, interest at £4 per cent. was charged. In *Newton v. Bennet* (9) the executor had kept money a long time in his hands and used it in his trade, and the court said he must pay interest—what interest does not appear, but probably, the common interest given by the court, or the reporter would have noticed it. In *Forbes v. Ross* (10) trustees under a will directing them to lay out money which should come to their hands "at the best and utmost interest," were charged with £5 per cent. interest. In *Littlehales v. Gascoyne* (11), an executor was charged with interest on balances which had been long in his hands, but the report does not state what interest. In *Browne v. Southouse* (12) an administrator holding moneys in his hands was ordered to pay £4 per cent. interest. In *Franklin v. Frith* (13) an executor keeping money in his hands was charged with interest and costs, LORD THURLOW, L.C., observing that

"he never could permit an executor to keep £400 of his testator's money dead in his hands; and that the keeping an equal sum at his banker's was no proof that he did not make interest of it. With respect to costs, it must depend on the conduct of the executors; if kept to answer the exigencies of the testator's affairs, it would be an excuse for not paying it over; but outstanding demands, even on probable grounds, are no reason why the executors should not lay their testator's money out. If they had laid it out in the 3 per cents. the court would have affirmed their act."

In *Seers v. Hind* (14), executors who had kept moneys in their hands, were charged with interest. In *Picty v. Stace* (15), the will directed the executors to place the money in the public funds, or upon mortgages, or other good and sufficient securities, but, instead of doing that, they kept the money, and the court charged

them with £5 per cent. upon the balances in their hands, and the costs of the suit.

In *Pocock v. Reddington* (16), it was determined, where an executor had sold out stock and dealt with the money, that the cestuis que trust had an option to have the stock replaced or the money produced by the sales with interest at £5 per cent. The last authority, which I shall notice, is *Rocke v. Hart* (17), in which case SIR WILLIAM GRANT, M.R., states the result of all the authorities. The will is not stated in the report, but I have consulted the Register's Book, and it appears that the testator, Edward Ireland, by his will bequeathed the interest of £500 South Sea Annuities to Ann Sampson for life, after her death the interest thereof and the residue of his estate to be laid out and the interest to be paid to and among the child and children of his nephew John Rocke, the plaintiff's father, until twenty-one, and then the whole to be paid to such child or children. The executor, instead of laying out the balances, kept them in his hands. Upon this case the Master of the Rolls directed the executor to pay £4 per cent. interest on the balance in hand from the time he received the same, observing:

"If it is true, that a direction that an executor shall pay interest at £4 per cent. only, would hold out a premium to executors to keep money in their hands, all the decisions directing interest at £4 per cent. only for keeping the money are wrong. Yet a great majority of the cases are of that description; and even where the court holds it altogether unjustifiable; as in *Perkins v. Baynton* (8), and *Browne v. Southouse* (12), before LORD THURLOW; in both which cases the executor was not only held culpable for not laying out the money, but he was supposed to have derived advantage himself."

It appears, therefore, from this view of the authorities, that a distinction has been taken, as in every moral point of view there ought to be, between negligence and corruption, in executors. A special case is necessary to induce the court to charge executors with more than 4 per cent. upon the balances in their hands. The obligation on executors to lay out balances not wanted for the exigency of the testator's affairs is now better understood since it has been settled that they are indemnified against any loss in laying them out in the fund which the court sanctions, the 3 per cents. If the executor has balances which he ought to have laid out, either in compliance with the express directions of the will or from his general duty, even where the will is silent on the subject, yet, if there be nothing more proved in either case, the omission to lay out amounts only to a case of negligence and not of misfeasance.

Is this, then, a case of negligence or of misfeasance? Have these executors made any use of the money to their own profit or advantage? The employment of an agent who alone had possession of the balances, though not any ground of excuse, shows that they did not in fact derive any benefit or profit to themselves, nor act with that view. This, therefore, is a case of negligence, and like *Dornford v. Dornford* (4), *Ashburnham v. Thompson* (5), and *Rocke v. Hart* (17), where, though the will directed the money to be laid out, the executors were charged only with £4 per cent. I think, therefore, no more than the usual interest should be given. Considering that the trust was onerous, the property difficult to manage, and the agent employed was the son-in-law of the testator, named by him as a trustee for another purpose in the will, and a cestui que trust of his property, it would be pressing these executors beyond the precedents cited, if, besides the arrears of rent and the balances in their hands, with interest, they were to be charged either with £5 per cent. or compound interest.

The only remaining question is as to costs, as to which I have looked into all the cases. In *Seers v. Hind* (14), LORD THURLOW, L.C., says (1 Ves. at p. 294):

"When I am obliged to give interest against executors as a remedy for a breach of trust, costs against them must follow of course."

In *Newton v. Bennet* (9), LORD THURLOW, L.C., went no further than not to give the executor his costs. In *Raphael v. Boehm* (3), as strong a case as could

be for costs, the executor received his costs except as to so much of the decree as required the Master to state at what times the several sums came to the hands of the defendant and directed him to make half-yearly rests, and of the order of the court to make good the effect of the inquiries to the legatee, as to which the Lord Chancellor ordered that he should neither pay nor receive costs. In *Ashburnham v. Thompson* (5), SIR WILLIAM GRANT, M.R., does not accede to the general proposition laid down in *Seers v. Hind* (14). It does not, therefore, follow that in all cases where an executor is directed to pay interest, he must also pay costs. If a suit would have been proper and the executor a necessary party, though the executor had not misconducted himself, he ought not to pay all the costs of such suit, though in the course of the suit it appears he has misconducted himself, but if the misconduct of the executor was the sole occasion of the suit, he ought then to pay the costs.

Apply this to the present case. This suit was necessary to determine what construction was to be given to the will—whether the residue was to be divided among the nine, or among the six, claimants. The expense, therefore, of so much of the suit as related to that point, and the costs of the appeal ought not to be charged upon the executors. The decree upon the appeal has provided for the costs of all parties except the executors, and directed them to be taxed as between solicitor and client and paid out of a fund in court, and the costs have been paid. Therefore, no question could have been reserved as to those costs, but only as to the executors' own costs, and those must, I think, be allowed them, but the costs of the subsequent inquiries as to the arrears of rent and balances in their hands, being solely occasioned by their breach of trust, must fall upon them.

Order accordingly.

WELLBELOVED v. JONES

[VICE-CHANCELLOR'S COURT (Sir John Leach, V.-C.), November 8, 1822]

[Reported 1 Sim. & St. 40; 1 L.J.O.S. Ch. 11; 57 E.R. 16]

Charity—Practice—Parties—Attorney-General.

The Attorney-General is a necessary party to all suits for charitable funds, except where a legacy is given to the officer of an established institution as part of its general funds.

Charity—Scheme—Legacy for charitable purposes to persons having no corporate character—Settlement of scheme by court.

Where a legacy is given for permanent charitable purposes to persons having no corporate character the court will not, without a reference to the Master, allow the fund to be paid over to those persons even where they are entrusted by the testator with the management of the fund.

Notes. Considered: *Milligan v. Mitchell* (1835), 4 L.J.Ch. 281.

As to the Attorney-General being a party to actions relating to charities, see 4 HALSBURY'S LAWS (3rd Edn.) 446 et seq.: and for cases see 8 DIGEST (Repl.) 517 et seq. As to effectuation of charitable trusts by receiver of schemes, see 4 HALSBURY'S LAWS (3rd Edn.) 309 et seq.; and for cases see 8 DIGEST (Repl.) 450 et seq.

Case referred to in argument:

Waldo v. Caley (1809), 16 Ves. 206; 33 E.R. 962, L.C.; 8 Digest (Repl.) 455, 1531.

Bill filed by trustees or officers of a dissenting academical institution against the executors of Samuel Jones, for payment to them of a legacy of £5,000 bequeathed to that institution.

Samuel Jones by his will, dated Dec. 19, 1818 (after giving several annuities and legacies), gave and bequeathed the sum of £5,000 to the defendants, his brother William Jones, his nephew, Samuel Jones Lloyd, and James Darbyshire the

younger, their executors, administrators and assigns, on trust to transfer and assign the same sum and the stocks, funds and securities wherein the same should be invested unto the following officers for the time being of an academical institution established at York chiefly for the instruction of dissenting ministers, and commonly called the Manchester New College removed to York, viz., the theological tutor, the visitor, the president, the treasurer, and the vice-president, resident in Manchester; which officers, together with such other persons as they should think proper to choose (in case they should think an additional number of trustees necessary) should stand possessed of the sum of £5,000 and the stocks, etc., in trust to pay and apply the dividends and interest thereof in augmentation of the salaries of such conscientious dissenting ministers as should stand most in need of such assistance, and as the trustee should approve, a preference being given to those who should have been students in the York institution. And in case such institution should cease or be given up, then in trust that the persons in whose names the trust moneys should be then invested should transfer the principal sum to the principal officers for the time being of such other institution as should succeed the same or be established on similar principles, that is to say, for the instruction of young men in the genuine doctrines of christianity, as revealed in the scriptures, without regard to sect or party; and if there should ever come a time when no institution should exist for that purpose, then the principal sum of £5,000 to be paid and transferred to the persons calling themselves the trustees of Lady Hewley's Funds, to be by them applied to the same charitable purposes as that fund then was usually applied to. And the testator thereby empowered and requested the officers of the institution in whom the sum of £5,000 should first become vested, at any time within the space of twelve calendar months next after the trust moneys should come to their hands, to make such further rules and regulations for the distribution of the interest and dividends of that sum, and for preventing any loss of the principal, and for otherwise securing and perpetuating the trusts intended by his will as they should judge necessary or convenient. At the time of the testator's death the plaintiffs held, and still held, the offices of theological tutor, visitor, president, treasurer, and vice-president, of the institution at York, and they prayed that the legacy of £5,000 might be transferred to them by the defendants according to the trusts of the will. The defendants by their answer admitted assets, but submitted to the judgment of the court whether the bequest was not a charity bequest, whether the plaintiffs had any right to institute this or any suit touching the matters alleged in the bill and whether the Attorney-General ought not to be a party.

Hald and Roupell for the defendants.

Agar and S. Smith for the plaintiffs.

SIR JOHN LEACH, V.-C.—The Attorney-General must be made a party. He is to be a party, not for the reason stated at the Bar, but because the King, as *parens patriæ*, superintends the administration of all charities and acts by the Attorney-General who is his proper officer in this respect. It has been held not to be necessary that the Attorney-General should be a party where a legacy is given to the treasurer or other officer of some established charitable institution to become a part of the general funds of that institution; and this exception is reasonable, for the Attorney-General can have no interference with the distribution of their general funds.

The court will never permit this legacy to come into the hands of the plaintiffs who now happen to fill the particular offices in this society, but will take care to secure the objects of this testator by the creation of a proper and permanent trust; and, on the hearing of this cause, will send it to the Master for that purpose, and it will be one of the duties of the Attorney-General to attend the Master on that subject.

[*The cause was ordered to stand over, with leave to amend, by making the Attorney-General a party.*]

JONES v. BOYCE

[COURT OF KING'S BENCH (Lord Ellenborough, C.J.), December 20, 1816]

[Reported 1 Stark. 493]

Negligence—Defence—Novus actus interveniens—Plaintiff compelled to do dangerous act by negligence of defendant—Injury resulting to plaintiff.

If by the negligent act of one person another, to protect himself, reasonably adopts a course of action which results in his suffering injury, the chain of causation is not broken, and the wrongdoer is liable for the injured person's injury. Aliter if the other person's act resulted from a rash apprehension of danger which did not exist.

Notes. Section 1 of the Law Reform (Contributory Negligence) Act, 1945 (17 HALSBURY'S STATUTES (2nd Edn.) 12), provides for the apportionment of liability where the damage suffered was caused partly by the fault of the plaintiff and partly by the fault of the other person, the damages recoverable being reduced accordingly.

Applied: *Wilson v. Newport Dock Co.* (1866), L.R. 1 Exch. 177. Considered: *Adams v. Lancashire and Yorkshire Rail. Co.* (1869), L.R. 4 C.P. 739; *Murphy v. Palgreave* (1869), 21 L.T. 209; *The George and Richard* (1871), L.R. 3 A. & E. 466; *Robson v. North Eastern Rail. Co.* (1875), L.R. 10 Q.B. 271. Approved: *The City of Lincoln* (1889), 15 P.D. 15. Considered: *Dulieu v. White & Sons*, [1900-3] All E.R. Rep. 353. Applied: *Maclean v. Segar*, [1917] 2 K.B. 325; *Brandon v. Osborne Garrett & Co.*, [1924] 1 K.B. 548; *The Paludina*, [1925] P. 40. Referred to: *Wilkinson v. Downton*, [1895-9] All E.R. Rep. 267; *Janvier v. Sweeney*, [1918-19] All E.R. Rep. 1056; *Weld-Blundell v. Stephens*, [1920] All E.R. Rep. 32; *Wilson v. United Counties Bank*, [1920] A.C. 102; *Singleton Abbey (Owners) v. Paludina (Owners)*, *The Paludina*, [1926] All E.R. Rep. 220; *Banco de Portugal v. Waterlow & Sons, Ltd.* (1931), 100 L.J.K.B. 465; *Philco Radio and Television Corp'n. of Great Britain*, [1949] 2 All E.R. 882; *Sayers v. Harlow U.D.C.*, [1958] 2 All E.R. 342:

As to contributory negligence, see 28 HALSBURY'S LAWS (3rd Edn.) 87 et seq.; and for cases see 36 DIGEST (Repl.) 190 et seq.

Action on the case against the defendant, a coach proprietor, for so negligently conducting the coach, that the plaintiff, an outside passenger, was obliged to jump off the coach, in consequence of which his leg was broken.

Soon after the coach had set off from an inn the coupling rein broke, and one of the leaders being ungovernable while the coach was on a descent, the coachman drew the coach to one side of the road, where it came in contact with some piles, one of which it broke, and afterwards the wheel was stopped by a post. Evidence was adduced to show that the coupling rein was defective and that the breaking of the rein had rendered it necessary for the coachman to drive to the side of the road in order to stop the career of the horses.

Some of the witnesses stated that the wheel was forced against the post with great violence. One of the witnesses stated that, at that time, the plaintiff who before had been seated on the back part of the coach, was jerked forwards in consequence of the impact, and that one of the wheels was elevated to the height of eighteen or twenty inches; but he could not say whether the plaintiff jumped off or was jerked off. Another witness said: 'I should have jumped down had I been in his [the plaintiff's] place, as the best means of avoiding the danger.' The coach was not overturned but the plaintiff was immediately afterwards seen lying on the road with his leg broken, the bone having been protruded through the boot.

On this evidence, LORD ELLENBOROUGH, C.J., was of opinion that there was a case to go to the jury, and a considerable mass of evidence was then adduced, tending to show that there was no necessity for the plaintiff to jump off.

A *Garrow and Lawes* for the plaintiff.

Topping, Scarlett and Espinasse for the defendant.

B **LORD ELLENBOROUGH, C.J.**, in his address to the jury, said: This case presents two questions for your consideration: first, whether the proprietor of the coach was guilty of any default in emitting to provide the safe and proper means of conveyance and, if you should be of that opinion, the second question for your consideration will be whether that default was conducive to the injury which the plaintiff has sustained; for if it was not so far conducive as to create such a reasonable degree of alarm and apprehension in the mind of the plaintiff, as rendered it necessary for him to jump down from the coach in order to avoid immediate danger, the action is not maintainable.

C To enable the plaintiff to sustain the action it is not necessary that he should have been thrown off the coach; it is sufficient if he were placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril. If that position were occasioned by the default of the defendant, the action may be supported. On the other hand, if the plaintiff's act resulted from a rash apprehension of danger which did not exist, and the injury which he sustained is to be attributed to rashness and imprudence, he is not entitled to recover. The question is whether he was placed in such a situation as to render what he did a prudent precaution, for the purpose of self-preservation.

D [His LORDSHIP, after recapitulating the facts and commenting on them, and particularly on the circumstance of the rein being defective, added]: If the defect in the rein were not the constituent cause of the injury, the plaintiff will not be entitled to your verdict. Therefore, it is for your consideration whether the plaintiff's act was the measure of an unreasonably alarmed mind, or such as a reasonable and prudent mind would have adopted. If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences. If, therefore, you should be of opinion that the reins were defective, did this circumstance create a necessity for what he did, and did he use proper caution and prudence in extricating himself from the apparently impending peril. If you are of that opinion, then, since the original fault was in the proprietor, he is liable to the plaintiff for the injury which his misconduct has occasioned. This is the first case of the kind which I recollect to have occurred. A coach proprietor certainly is not to be responsible for the rashness and imprudence of a passenger; it must appear that there existed a reasonable cause for alarm.

G *Verdict for plaintiff.*

NELSON v. MACINTOSH

[COURT OF KING'S BENCH (Lord Ellenborough, C.J.), Hilary Term, 1816]

[Reported 1 Stark. 237]

Carriage of Goods—Gratuitous carrier—Duty of care—Liability for negligence—Special duty in case of valuable property.

A gratuitous carrier is bound to take proper and prudent care of that which is committed to him, and is liable for any loss that occurs through his or his servants' negligence. If he ascertains that the property delivered to him is valuable, an enhanced duty of vigilance is imposed on him.

Notes. As to private carriers, see 4 HALSBURY'S LAWS (3rd Edn.) 134, 135; and for cases see 8 DIGEST (Repl.) 10-12.

Action on the case for so negligently carrying the plaintiff's box containing doubloons, dollars and other valuables that the box and its contents were lost.

The plaintiff came on board the *Arundel*, of which the defendant was captain, at Trinidad with intent to work his passage home, but, being casually on shore at the time when the convoy made signal for sailing, was left behind. The plaintiff's box was stowed along with others on the quarter-deck, and soon after the departure of the vessel was opened by the defendant on a suggestion that it might contain contraband goods. The box was fastened with a lock, and the lid was also nailed down; as soon as the contents had been ascertained the lid was replaced and nailed down again with two large nails. Towards the termination of the voyage, the defendant again opened the trunk in the presence of several passengers and, the contents having been put into a canvas bag, were deposited in the defendant's chest in the cabin in which his own valuables were usually kept. When the vessel arrived at Gravesend, a river pilot was taken on board, and the defendant and one mate left the vessel, another mate remaining on board; an excise officer was also on board, and two young men belonging to the vessel were allowed to sleep in the cabin. On the next morning the defendant's trunk containing the valuables was missing; and was not afterwards discovered. The defendant adduced evidence tending to show that the property had been stolen by persons unconnected with the vessel.

Topping and Rose for the plaintiff.

Garrow for the defendant.

LORD ELLENBOROUGH, C.J., in his address to the jury said: Every person who delivers goods to another to be carried for hire has a right to the utmost care. The carrier stands in the situation of an insurer and is liable for all losses except those which are occasioned by the act of God or of the King's enemies, and, where a person does not carry for hire, he is bound to take proper and prudent care of that which is committed to him. Such would have been the situation of the parties if no alteration had been made in the state of the box, but when the defendant from motives of prudence opened the box he was bound to intermeddle so as to replace it in its former state of security, and to restore all the guards with which it had before been protected. In this case, the defendant by his conduct exposed the property to peril and risk, and the value of the property imposed on him an enhanced duty of vigilance that his acts might not operate to the prejudice of the party. When he had ascertained the valuable nature of the property, it was a duty imperative on him to restore it to at least its former degree of security. What was done in this case? As they approached the land, the property was taken out of the box and put into a canvas bag. When the defendant had taken it wholly out of the box, he was bound to make his own trunk in which it was deposited as secure as possible, it being no longer the box of a seaman working his passage home, but ascertained to be an article of great value which the defendant was, therefore,

bound to watch with great care and diligence. [His LORDSHIP, after further commenting on the circumstances of the case, left it to the jury to consider (i) whether the defendant had not, under the circumstances, by the intermeddling and removal imposed on himself the duty of carefully guarding against all perils to which the property was exposed in consequence of the alteration; (ii) whether he had in fact carefully guarded the property, and, that, if they were of opinion that the conduct of the defendant had imposed on him the duty of carefully guarding the goods and that he had been guilty of negligence, they were to find for the plaintiff.]

Verdict for plaintiff.

DIXON v. SMITH

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), March 19, 1818]

[Reported 1 Swan. 457; 36 E.R. 464]

Distress—For rent—Sequestration—Right of landlord to arrears of rent out of proceeds.

A landlord is entitled to be paid arrears of rent out of the proceeds of a sequestration.

Notes. Explained: *Brandling v. Barrington* (1827), 6 B. & C. 467. Referred to: *Russell v. East Anglian Rail. Co.* (1850), 3 Mac. & G. 125; *Potts v. Hickman*, [1940] 4 All E.R. 491.

As to execution against a tenant, see 12 HALSBURY'S LAWS (3rd Edn.) 137 et seq.; and for cases see 18 DIGEST (Repl.) 332 et seq.

Motion for payment to a landlord of arrears of rent under a sequestration.

The defendant, Smith, occupied a farm at Holbeach in Lincolnshire, as tenant to Sir Joseph Banks, and one year's rent, amounting to £55, became due at Lady Day, 1816. A sequestration having been issued at the suit of the plaintiff, the sequestrators, on July 10, 1816, entered on the farm at Holbeach and took possession of the farming stock and other effects of the defendant. On the same day, and a few hours after the sequestration was so executed on the defendant's effects, the agent of Sir Joseph Banks caused a distress to be made on the farm for the arrears of rent amounting to £49 10s. A notice in writing, addressed to the defendant (who was then a prisoner in the Fleet) was affixed on one of the gates of the farm, signifying that such distress had been made, and a notice of the rent due was delivered to the solicitors for the plaintiff. The sequestrators refusing to pay the rent, proceeded to sell the crops and other effects and the agistment of all the pasture of the farm until Lady Day, 1817, and paid into court the money arising from the sale.

A motion was now made on behalf of Sir Joseph Banks that, out of the money so produced and standing in the name of the Accountant-General, the sum of £104 10s. might be paid to him, for two years' rent, due at Lady Day, 1817, or that he might be at liberty to come in before the Master to be examined pro interesse suo, in the sequestered money and premises.

Heald for Banks, supported the motion: Before the removal of the goods under a sequestration, the landlord by the equity of the Landlord and Tenant Act, 1709, is entitled to be paid all arrears, not exceeding one year's rent. His legal remedy by distress he cannot enforce against sequestrators, more than against a receiver.

Wetherel for the plaintiff, and *Owen*, for the defendant, opposed the motion: It has never yet been decided that, under a sequestration, the landlord is entitled

to a year's rent in priority; in other words, that a sequestration is an execution within the Act. On any question of right in property sequestered, the only safe course is an examination of the party before the Master, *pro interesse suo*.

LORD ELDON, L.C.—In a clear case, the court will not send parties into the Master's office, merely that they may return with their rights as plain as when they went. The facts are not disputed, and a question of law is more fitly discussed here than before the Master. The order must be made.

"His LORDSHIP doth order that it be referred to [the taxing-Master], to tax Sir Joseph Banks the costs of this application; and it is ordered that out of the sum of £1,000 cash remaining in the bank on the credit of this cause, such costs, when taken, be paid to [Banks'] solicitor, and thereout also it is ordered, that the sum of £104 10s. be paid to the Right Honorable Sir Joseph Banks, Bart., for two years' rent of the farm and lands in the pleadings mentioned, due at Lady Day, 1817. . . ."

Order accordingly.

COX AND OTHERS v. PRENTICE

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Le Blanc, Bayley and Dampier, JJ.), January 23, 1815]

[Reported 3 M. & S. 344; 105 E.R. 641]

Mistake—Mistake of fact—Avoidance of contract—Sale of goods—Rejection—Recovery of price paid.

Agent—Payment to agent of money for principal—Money not remitted to principal—Rescission of contract—Liability of agent.

The defendant, on behalf of his principal, agreed to sell, and the plaintiffs agreed to buy, a bar of silver containing such weight as should appear by an assay. The price of the quantity fixed by the assay-master was paid by the plaintiffs to the defendant, but the money was not remitted by the defendant to his principal. The plaintiffs ascertained that the bar contained less silver than the quantity fixed by the assay and offered to return the bar, but this offer was refused. In an action for money had and received,

Held: (i) the plaintiffs were entitled to rescind the contract and bring an action for the amount of the price they had paid under a mistake; (ii) since no money had been paid over by the defendant, as agent, to his principal and nothing done to create a change of circumstances, the defendant was liable as principal.

Notes. Distinguished: *Bradbury v. Anderton* (1834), 1 Cr. M. & R. 486. Considered: *McCarthy v. Colvin* (1839), 9 Ad. & El. 607. Distinguished: *Devaux v. Connolly* (1849), 8 C.B. 640; *Holland v. Russell* (1861), 1 B. & S. 424; *Beccor v. Marler* (1898), 14 T.L.R. 289. Referred to: *Aiken v. Short* (1856), 1 H. & N. 210; *Pollard v. Bank of England* (1871), L.R. 6 Q.B. 623; *Continental Caouthouc and Gutta Percha Co. v. Kleinwort* (1904), 90 L.T. 474; *Baylis v. Bishop of London*, [1911-13] All E.R. Rep. 273; *Churchill and Sim v. Goddard*, [1937] 1 K.B. 92; *Nizam of Hyderabad v. Jung*, [1957] 1 All E.R. 257.

As to failure of consideration, see 34 HALSBURY'S LAWS (3rd Edn.) 162, 163; and for cases see 39 DIGEST (Repl.) 824 et seq. As to moneys received as agent, see

1 HALSBURY'S LAWS (3rd Edn.) 233, 234; and for cases see 1 DIGEST (Repl.) 768 et seq.

Cases referred to:

- (1) *Buller v. Harrison* (1777), 2 Cowp. 565; 98 E.R. 1243; 1 Digest (Repl.) 770, 3030.
- (2) *Chandeler v. Lopus* (1603), Cro. Jac. 4; 79 E.R. 3; sub nom. *Lopus v. Chandeler*, Dyer, 75, n., Ex. Ch.; 39 Digest (Repl.) 510, 526.

Rule Nisi obtained by the defendant to enter a nonsuit in an action for breach of contract.

The plaintiffs declared that in consideration that they would buy from the defendant a bar of silver, the defendant undertook that it contained a certain quantity of silver whereas it contained considerably less. There were other special counts, with the money counts. The defendant pleaded non-assumpsit.

At the trial before LORD ELLENBOROUGH, C.J., it appeared that the plaintiffs were gold refiners and the defendant who was a watchmaker had a correspondent at Gibraltar, from whom he was in the habit of receiving broken metal. His correspondent remitted to him a bar of silver which he carried to the plaintiffs' house, and they melted it down in his presence. The plaintiffs afterwards procured a piece of the silver to be assayed by a third person who was paid by the defendant. The plaintiffs paid to the defendant £88 and a fraction for the bar, as for the number of ounces of the silver, which, according to the assay-master's certificate it was calculated to contain. The defendant informed his correspondent of what had been done and credited him in his account with the amount.

The plaintiffs sold the silver to a house at Birmingham, who afterwards returned it, representing that it did not answer the assay, on which the plaintiffs applied to the defendant for a return of the money, offering to return him the silver. The defendant refused to return the money on the ground that he had forwarded his account to his correspondent in which he had credited him with the full sum. It appeared, however, that the account was still unsettled between them. The assay-master proved that he received a small piece of the silver for the purpose of assaying it; that he by his assay made it four ounces whereas 2 oz. 7 dwts. was the true assay.

A verdict was found for the plaintiffs for the difference in value between the supposed and true weight, with liberty to the defendant to move for a nonsuit. A rule nisi was accordingly obtained by the defendant on two grounds: (i) that the action would not lie at all even supposing it to have been brought against the defendant's principal; (ii), supposing it would lie against his principal, yet it would not against the defendant who was merely an agent and whose situation had been altered between the time of the sale and action by his having accounted for the sale money with his principal.

Garrow, Park and Marryat for the plaintiffs, showing cause against the rule: The mistake here, admitting there was no fraud, was caused by the error of the assay-master who, being paid by the seller (the defendant), was to be considered rather as the seller's agent than the agent of the plaintiffs. If so, then it is the same thing as if the seller himself had made the assay, and is like the case of a sale by sample, where there is always an implied warranty from the seller that the whole article shall correspond with the sample. Such an implied warranty will sustain the special counts. But supposing the assay-master to be the common agent of both parties, then it is like the case of money paid under a mistake of the fact and may be recovered under the common counts.

On the second point, the defendant was not at the time of action brought to be considered merely as an agent, there being nothing to show that at that time his principal was disclosed. But admitting that he was, *Buller v. Harrison* (1) shows that if this money has been paid by mistake to the agent, and has not been paid over by him to his principal, it may be recovered back from him in an action for

money had and received, although he may have placed it to the account of his principal. Therefore, the alteration in the defendant's situation by his having accounted for the sale money makes no difference.

Topping and Comyn for the defendant, in support of the rule: The principal himself would not have been liable for there is no pretence for saying that the principal or his agent held out a sample, as an affirmation of the value of the silver. The seller (the defendant) at the time of the sale is ignorant of the value and submits it to the plaintiffs who, in order to ascertain it, have recourse to a third person of their own choice, and by his assay the price is fixed. Even if the seller had affirmed that it was of a particular value, still, according to *Chandelor v. Lopus* (2), that would not have made him liable, unless he knew it not to be of that value or warranted it to be so. This then is the case of a simple sale between parties who are to ascertain, each for himself, the value of the thing sold, to which the maxim, *caveat emptor*, applies. The buyers have fixed the price by the estimate of their own valuer; and there is no authority for allowing parties to recover back money paid through their own mistake and laches. Or supposing him to be the valuer for both parties, if two persons agree to be bound by the judgment of a third, his judgment shall be conclusive between them. In like manner here, there being no fraud, it shall be conclusive. Secondly, granting that the action would have lain against the principal, it would be hard if the agent were to remain liable after he has accounted for the proceeds of the sale with his principal. *Buller v. Harrison* (1) is no authority for any such proposition, for it turned altogether on the fraud. LORD MANSFIELD gives the clue to that decision when he asks (2 Cowp. at p. 568): "Is it conscientious that the defendant should keep money which he has got by their [the principals] misrepresentation?" Though it may be said that the defendant in that case was no party to the fraud, yet when he endeavoured to retain the money which he had gotten through the medium of a fraud, he made himself a party to it. That case, therefore, is as widely different from this, as fraud is from no fraud. Here the question is whether the agent, after having accounted with his principal for the proceeds of the sale, shall be forced by the buyers, in consequence of their own mistake, to litigate, not his own rights, but those of his principal.

LORD ELLENBOROUGH, C.J.—I take it to be clear that an agent who receives money for his principal is liable as a principal so long as he stands in his original situation and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it. Here it is admitted that no money has been paid over by the defendant to his principal, nor has there been any other thing done by him to create a change of circumstances. The only question, then, is whether the action lies against the defendant, considering it as if it were an action against the principal.

This is a case of mutual innocence and equal error which is not an unusual case for money had and received. Much of the argument has been raised by the circumstance of a third person having been introduced into this transaction; but the nature of the commodity made the intervention of some other standard than the parties' own judgment necessary. Whether that be attained by means of a pair of scales, or any other common measure, or whether an assay-master be employed for the purpose, being equally necessary, it can make no difference. Let us then put the case of parties agreeing to abide by the weighing of any article at any particular scales and, in the weighing, an error, unperceived at the time, takes place from an accidental misreckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereon, would not in that case money had and received be sustainable?

It has been argued, however, as if the assay-master's not having the whole bar was imputable to the laches of the plaintiffs. But the assay-master might have chosen his own course; it was for him to determine what he wanted. If, indeed, he is to be considered as the agent only of one party, I rather think he was the

A agent of the defendant; but I take him to have been the agent for both. Our decision will not clash with the rule, caveat emptor, for here both parties were under a mutual error, neither of them being to exercise nor exercising any judgment on the subject. I think this is the proper case for money had and received.

B **LE BLANC, J.**—As to the principal question, as a general proposition, it may be true that when an article is sold which turns out to be of less value than the price given for it, the extra price, if there be no fraud, cannot be recovered back. But that is a rule applicable only to cases where the thing is of an arbitrary value; and the fallacy lies in applying the rule of law to this case when the thing is not of an arbitrary value but depends on the quantity of silver it contains. It is just like the case of a purchase of any commodity by weight, the price of which is to be fixed by the weighing; and if the weight turns out to be less than that paid for, can there be a doubt that the party selling is bound to refund? So here the price was to be fixed by the quantity of silver to be ascertained by the assay of the assay-master.

D **BAYLEY, J.**—I have no doubt that this action for money had and received will lie, and that the defendant is liable. The assay-master was a middleman; or, if he was the agent of either, he was more so of the defendant than of the plaintiff. The rule, caveat emptor, does not apply to this case for neither party exercised his own judgment.

E What did the plaintiffs bargain to buy and the defendant to sell? They both understand that the one agreed to buy and the other to sell a bar containing such a quantity of silver as should appear by the assay; and the quantity is fixed by the assay, and paid for. But through some mistake in the assay the bar turns out not to contain the quantity represented but a smaller quantity. The plaintiff, therefore, may rescind the contract and bring money had and received, having offered to return the bar of silver. On the second point, *Buller v. Harrison* (1) is precisely in point. That case decides that if things remain in the same state, as they did F here, the action will lie against the agent.

G **DAMPIER, J.**—It appears to me that this rule ought to be discharged. As to the objection that the defendant is the agent, as things remained unaltered between the agent and his principal, it seems that the action lies against the agent. As to the principal point, it is clear that neither the one party bargained to buy nor the other to sell anything on their own judgment, or until the bar was melted down and assayed by the assay-master. The bargain was for a bar of silver of the quality ascertained by the assay-master and it is not of that quality. It is a case of mutual error.

Rule discharged.

JAMES AND WIFE v. ALLEN AND OTHERS

[ROLLS COURT (Sir William Grant, M.R.), June 30, 1817]

[Reported 3 Mer. 17; 36 E.R. 7]

Charity—Uncertainty—Gift by will for “such benevolent purposes [as the executors] in their . . . discretion may . . . agree.”

A bequest for “such benevolent purposes” as the executors “in their discretion may unanimously agree on,” which might, consistently with the provisions of the will, be applied to other than strictly charitable purposes, does not constitute a good charitable trust and is too indefinite for the court to execute.

Notes. Followed: *Williams v. Kershaw* (1835), 5 Cl. & Fin. 111, n. Considered: *Re Macduff, Macduff v. Macduff*, [1895-9] All E.R. Rep. 154; *A.-G. for New Zealand v. Brown*, [1916-17] All E.R. Rep. 245; *Re Tetley, National Provincial and Union Bank of England v. Tetley*, [1923] 1 Ch. 258. Referred to: *Ellis v. Selby* (1836), 1 My. & Cr. 286; *Nash v. Morley* (1842), 5 Beav. 177; *Lloyd Greame v. A.-G.* (1893), 10 T.L.R. 66; *Dunne v. Byrne*, [1911-13] All E.R. Rep. 1105; *Bowman v. Secular Society, Ltd.*, [1916-17] All E.R. Rep. 1; *Keren Kayemeth Le Jisroel, Ltd. v. I.R. Comrs.*, [1931] 2 K.B. 465; *Farley v. Westminster Bank, Ltd.*, [1939] 3 All E.R. 491; *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; *I.R. Comrs. v. Baddeley*, [1955] 1 All E.R. 525.

As to non-charitable purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 241, 242; and for cases see 8 DIGEST (Repl.) 342 et seq. As to alternative or subsidiary or cumulative purposes in respect of charitable gifts, see 4 HALSBURY'S LAWS (3rd Edn.) 269-271; and for cases see 8 DIGEST (Repl.) 394 et seq.

Cases referred to:

- (1) *Morice v. Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, 336.
- (2) *Browne v. Yeall* (1791), 7 Ves. 47, 50, n.; 32 E.R. 18, 20, 34, L.C.; 8 Digest (Repl.) 389, 321.
- (3) *Doyley v. Doyley, A.-G. v. Doyley* (1735), 7 Ves. 58, n.; 2 Eq. Cas. Abr. 194; 32 E.R. 35; 8 Digest (Repl.) 404, 952.

Bill for the establishment of a will.

The testator, Elijah Waring, by his will, after making a devise and certain specific bequests to the plaintiff, his niece Hannah James, gave to his executors (the defendants W. Allen, and J. Allen, and W. Matthews deceased) £200 each, in consideration of their taking upon themselves the trusts of his will, which then proceeded as follows:

“Lastly, touching all my personal property whatsoever and wheresoever not before disposed of, subject to whatever expenses may be incurred relative to the execution and fulfilment of this my will, I give and bequeath the same to my friends the aforesaid William Allen, Joseph Allen, and William Matthews (whom I constitute and appoint the executors of this my will) and to their executors and administrators, in trust to be by them applied and disposed of for and to such benevolent purposes as they in their integrity and discretion may unanimously agree on.”

The plaintiffs, by their bill, prayed that the will might be established, except as to the residuary bequest, and that such residuary bequest might be declared void; charging that the disposition was void for uncertainty.

Sir Samuel Romilly, Trower and Phillimore for the plaintiffs, contended that this case was the same in principle with that of *Morice v. Bishop of Durham* (1); and they also referred to *Browne v. Yeall* (2).

A *Hart and Spence* for the defendants (the surviving trustees and executors), distinguished the cases. "Benevolence" is technically a word of charity; but, when coupled with another (as in *Morice v. Bishop of Durham* (1) with the word "liberality"), it loses its technical sense, and is to be judged of by its acceptance in common language, but, when the word stands alone, as in the present case, it is to be construed according to its technical meaning. The Lord Chancellor, in that case, **B** observed that *Browne v. Yeall* (2) did not apply for that was for a particular purpose; here, if a valid devise at all, it is for general purposes.

Lovat for the representatives of the deceased trustee.

Mitford for the Attorney-General.

C **SIR WILLIAM GRANT, M.R.**—I certainly did not conceive that, in *Morice v. Bishop of Durham* (1), it was merely by the addition of the word "liberality" that the trust was rendered uncertain, and, therefore, incapable of being carried into execution. "Liberality" is, no doubt, distinguishable from "benevolence," but benevolence is also distinguishable from "charity." For although many charitable institutions are very properly called "benevolent," it is impossible to say that every **D** object of a man's benevolence is also an object of his charity. Nor do I see how the required concurrence of three persons in the selection of the objects does, by any necessity, exclude the appropriation of the property to purposes very different from any that are specified in the statute of Queen Elizabeth (43 Eliz., c. 4), or that have been held to be within the analogies of that statute. In the case before referred to, it was attempted, in the argument on the appeal, to maintain that, although the bequest should be held to be void so far as it was made for purposes of "liberality," yet it ought to be considered as good, in so far as it was for purposes of "benevolence"; which last word, it was said, was equivalent to "charity." The Lord Chancellor does not say that there could not be a proportional division where a bequest was in part only for a charitable purpose, as in the *A.-G. v. Doyley* (3), **E** but holds generally that no charitable purpose was sufficiently expressed. In that case, as in this, the whole property might, consistently with the words of the will, **F** have been applied to purposes strictly charitable.

But the question is: What authority would this court have to say that the property must not be applied to purposes however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too **G** indefinite for the court to execute. I see no substantial difference between this case and the former, and, therefore, consider the point as already decided, though if it were still open, I should not entertain any doubt on the question.

ROSE AND OTHERS *v.* MILES

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Bayley and Dampier, JJ.), May 2, 1815]

[Reported 4 M. & S. 101; 105 E.R. 773]

Nuisance—Public nuisance—Private action—Action by private person for private injury—Proof of more injury than public at large.

A private individual may bring an action in his own name in respect of a public nuisance where he can show that he has sustained something substantially more injurious than has the public at large.

Notes. Applied: *Greasly v. Codling* (1824), 2 Bing. 263; *Wilkes v. Hungerford Market Co.* (1835), 2 Bing. N.C. 281; *Rose v. Groves* (1843), 1 Dow. & L. 61. Distinguished: *Ricket v. Metropolitan Rail. Co.* (1865), 5 B. & S. 156. Applied: *Lyon v. Fishmongers Co. and Thames Conservators* (1875), 44 L.J.Ch. 408. Considered: *Blundy, Clark & Co. v. London and North Western Rail. Co.* (1931), 100 L.J.K.B. 401. Referred to: *Anglo-Algerian Steamship Co. v. Houlder Line*, [1908] 1 K.B. 659; *Harper v. G. N. Haden & Sons, Ltd.*, [1932] All E.R. Rep. 59; *Dwyer v. Mansfield*, [1946] 2 All E.R. 247.

As to private action on public nuisance, see 28 HALSBURY'S LAWS (3rd Edn.) 159; and for cases see 36 DIGEST (Repl.) 311 et seq. As to access to riparian rights, see 39 HALSBURY'S LAWS (3rd Edn.) 514 et seq.; and for cases see 47 DIGEST (Repl.) 724 et seq.

Cases referred to:

- (1) *Chichester v. Lethbridge* (1738), Willes, 71; 121 E.R. 1061; 26 Digest (Repl.) 522, 1987.
- (2) *Hubert v. Groves* (1794), 1 Esp. 147; 26 Digest (Repl.) 523, 1988.
- (3) *Paine v. Partrich* (1691), Carth. 191; 3 Mod. Rep. 289; 1 Show. 243; Comb. 180; Holt, K.B. 6; 90 E.R. 715; sub nom. *Payne v. Partridge*, 1 Salk. 12; 1 Show. 255; 26 Digest (Repl.) 520, 1967.

Appeal by the defendants from a decision of the Court of Common Pleas in an action for nuisance by obstructing a public navigable river.

By his declaration the plaintiff stated that at the material times he owned barges laden with merchandise; and was navigating them along a navigable creek of a public river; that the defendants wrongfully intending to injure the plaintiff and to prevent him from so navigating his barges, moored and fastened a certain barge across the channel of the public navigable creek and kept it there for a long space of time thereby obstructing the creek and preventing the plaintiff from navigating his barges along it. The plaintiff was as a result obliged to convey all his merchandises a great distance over land and was put to great trouble and inconvenience in carrying on his business and was obliged to spend £500 in the carriage of his merchandises. The defendants denied liability.

A general verdict was found for the plaintiff on the whole declaration, with 20s. damages. The defendants appealed on the grounds that the supposed obstructions in the public navigable river in the declaration mentioned were in the nature of a common nuisance to all the subjects of the realm, and not of a particular or private injury to the plaintiff; it was not shown that the plaintiff had actually incurred or sustained any special damage by reason of such obstructions. Further, that the plaintiff had brought a personal civil action and recovered damages therein for a grievance or nuisance remediable only by criminal prosecution.

Marryat for the defendants: The rule of law is clear that, for a common nuisance in a public highway, the remedy is by indictment and not by action, unless there be some special damage alleged. The reason for the rule is to avoid a multiplicity of suits, for if this plaintiff may have an action, by the same rule every person navigating the creek may have the like action. Therefore, the plaintiff, in order

A to maintain this action, ought to show a particular damage. Thus it was considered in *Chichester v. Lethbridge* (1); and thus according to *Hubert v. Groves* (2) the mere obstruction of the plaintiff's trade, or in *Paine v. Partrich* (3), the delaying him in his journey a little while, by reason whereof he is damnified, or some important affair is neglected, is not such a special damage for which an action on the case will lie. The particular damage ought to be direct and not consequential,
B as for instance, the loss of his horse, or some corporal hurt.

In this case, the plaintiff has not declared for any particular damage but generally that his craft was obstructed, by reason of which he was compelled to take his goods another way, was put to inconvenience and expense, all which is consequential and must be common to everyone who previously used the way. There is no direct damage to his property or person.

C *Heath* for the plaintiff, was not called on to argue.

LORD ELLENBOROUGH, C.J.—In *Hubert v. Groves* (2) the damage might be said to be common to all but this is something different, for the plaintiff was in the occupation, if I may so say, of the navigation. He had commenced his course on it and was in the act of using it when he is obstructed. It did not rest merely
D in contemplation. Surely this goes one step further. This is something substantially more injurious to this person, than to the public at large, who might only have it in contemplation to use it. And he has been impeded in his progress by the defendants' wrongfully mooring their barge across and has been compelled to unload and to carry his goods over land, by which he has incurred expense, and that expense caused by the act of the defendants.

E If a man's time or his money are of any value, it seems to me that this plaintiff has shown a particular damage.

BAYLEY, J.—The defendants, in effect, have locked up the plaintiff's craft while navigating the creek and placed him in a situation that he unavoidably must incur expense in order to convey his goods another way.

F DAMPIER, J.—The present case admits of this distinction from most of the other cases, that here the plaintiff was interrupted in the actual enjoyment of the highway. The expense was incurred by the immediate act of the defendants, for the plaintiff was forced to unload his goods and carry them over land. If this be not a particular damage, I scarcely know what is.

Appeal dismissed.

FARRANT AND ANOTHER v. OLMUIS

[COURT OF KING'S BENCH (Abbott, C.J.), June 16, 1820]

[Reported 3 B. & Ald. 692; 106 E.R. 814]

Landlord and Tenant—Rent—Increase—Breach of covenant by lessee—Measure of damages.

By the terms of a lease an increased rent of £50 per annum was reserved for every acre of certain land converted into tillage. In an action for breach of covenant by the lessee, the jury awarded the lessor damages for the actual damage sustained by him instead of the increased rent. In a rule nisi for a new trial,

Held: the lease contained an express contract for stipulated damages, and, the jury having awarded arbitrary damages, there should be a new trial.

Notes. Distinguished: *Fuller v. Fenwick* (1846), 3 C.B. 705.

As to nature and reservation of rent, see 23 HALSBURY'S LAWS (3rd Edn.) 536 et seq; and for cases see 31 DIGEST (Repl.) 233 et seq.; 17 DIGEST (Repl.) 165 et seq.

Cases referred to in argument:

- (1) *Smith v. Crompton* (1695), 5 Mod. Rep. 87; 87 E.R. 536; sub nom. *Smith v. Brampton*, 2 Salk. 644; sub nom. *Smith v. Frampton*, 1 Ld. Raym. 62; 2 Salk. 644; 36 Digest (Repl.) 139, 731.
- (2) *Farewell v. Chaffey* (1756), 1 Burr. 54.
- (3) *Deerly v. Duchess of Mazarine* (1696), 2 Salk. 646.
- (4) *Cox v. Kitchin* (1798), 1 Bos. & P. 338; 126 E.R. 938; 27 Digest (Repl.) 193, 1517.

Rule Nisi obtained by the plaintiff for a new trial in an action for breach of covenant by lessor against lessee.

The lease, besides a common reservation of a certain fixed annual rent, contained the following *reddendum*:

"yielding and paying the further yearly rent of £50 for every acre of certain fields therein described as, at the time of the lease, being ploughed up, which should not for three years before the expiration or other determination of the demise be laid down for grass, and so kept down during the remainder of the term; and also, for every acre of the lands and hereditaments thereby demised, except the said fields mentioned in the former reservation, which the defendant should plough, dig up, or convert into tillage, the yearly rent of £50 per annum for every acre."

There were also covenants for repairing, and for delivering up the premises in repair.

The breaches assigned were: first, for delivering up the premises out of repair; secondly, that the defendant did not, three years before the expiration of the term, lay down the fields mentioned in the first *reddendum* for grass, nor continue the same so laid down for the remainder of the demise, whereby the defendant became liable to pay at the rate of £50 per annum for every acre of the same; thirdly, that the defendant, in 1816, 1817, 1818, and 1819, converted into tillage fifty acres of the lands, being other and different from the fields mentioned in the former covenant, and kept and continued the same so converted into tillage until the termination of the term, whereby the defendant became liable to pay £50 per annum for every acre of the said last-mentioned lands. The defendant took issue on the several breaches.

At the trial before SIR RICHARD RICHARDS, C.B., at Kent Assizes, the plaintiff proved that the premises were delivered up at the end of the term out of repair, and that the defendant had not, within three years before the termination of the term laid down for grass any of the lands mentioned in the first *reddendum*. His counsel, however, stated that in that respect he would only take a verdict for one half a year's increased rent.

It was then proved that the defendant had converted into tillage, during the last four years of the term, such a quantity of the lands mentioned in the other reddendum as, at the rate of £50 per acre per annum, would entitle him to the increased rent of £1,550; but it appeared that the actual damage to the land did not amount to that sum.

The learned judge directed the jury to find such damages for the breach of the covenant to repair, as in their judgment would be a compensation to him for the actual damage he had thereby sustained. As to the other breaches, he directed the jury that the plaintiff was entitled to recover damages at the rate per annum mentioned in the reddendum, and, therefore, he directed the jury to find half a year's rent for the land not laid into grass, and £1,550 for the land converted into tillage. The jury brought in a verdict for £1,100 damages; and being desired by the judge to specify how much they allowed for the repairs, and how much for the land, they stated that they found £500 damages for the repairs, and £600 in respect of the injury done to the land.

Counsel for the plaintiff obtained a rule nisi for a new trial on the ground that the jury were bound to give the increased rent.

Chitty and *Thesiger* for the defendant, showing cause against the rule: The court will not set aside this verdict if they can see that justice has been done. The plaintiff seeks to recover, not only a compensation for the actual injury he has sustained, but a gross sum reserved as stipulated damages, in the event of certain things being done. The jury have given him a compensation for the actual damage he has sustained and their verdict is, therefore, consistent with the justice of the case.

In *Smith v. Frampton* (1) the court refused to grant a new trial where there had been a verdict for the defendant in an action for negligently keeping his fire, by which plaintiff's house was burnt, on the ground that it was a hard action. In *Farewell v. Chaffey* (2) LORD MANSFIELD said that a new trial ought to be granted to attain justice but not to gratify litigious passions on every point of summum jus: here the plaintiff insists on summum jus. *Deerly v. Duchess of Mazarin* (3), and *Cox v. Kitchin* (4), were also cited as authorities to show that the court will not set aside a verdict against law, if consistent with the justice and conscience of the case.

Marryat and *Barnewall*, for the plaintiff, were not called on to support the rule.

ABBOTT, C.J.—The jury have, by their verdict, given a compensation for what they consider to be the actual damage sustained, when, in point of law, they ought to have given the increased rent. It is said, however, that the court ought not to disturb such a verdict because it is consistent with justice. If that argument, however, were to prevail, it would encourage juries to commit a breach of duty by finding verdicts contrary to law and would enable them to set aside the contracts of mankind. There certainly is nothing unreasonable in a landlord stipulating that particular lands shall not be converted into tillage at all and that, in case that be done, a large sum shall be paid by way of stipulated damages. In this case, there is an express contract for stipulated damages and the jury have given a verdict for arbitrary damages. I am, therefore, of opinion that there should be a new trial.

Rule absolute.

WOOLLEY v. CLARK AND ANOTHER

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.),
May 15, 1822]

[Reported 5 B. & Ald. 744; 1 Dow. & Ry. K.B. 409; 106 E.R. 1363]

Administration of Estates—Vesting of property—Time of vesting in executor and administrator.

The property of a deceased person vests in his executor from the time of his death, and in an administrator from the time of the grant of the letters of administration.

Where, therefore, A. took out letters of administration under a will by which he was appointed executor, and, after notice of a subsequent will, sold the goods of the testator,

Held: the rightful executor, in an action of trover, was entitled to recover the full value of the goods sold, and A. was not entitled, in mitigation of damages, to show that he had administered the assets to that amount.

Notes. Explained: *Welchman v. Sturgis* (1849), 13 Q.B. 552. Explained: *Thompson v. Harding* (1853), 22 L.J.Q.B. 448. Considered: *Boxall v. Boxall* (1884), 27 Ch.D. 220; *Ellis v. Ellis* (1905), 74 L.J.Ch. 296. Explained and Distinguished: *Hewson v. Shelley*, [1914] 2 Ch. 13. Referred to: *Morgan v. Thomas* (1853), 8 Exch. 302; *Meyappa Chetty v. Supramanian Chetty*, [1916] 1 A.C. 603; *Ingall v. Moran*, [1944] 1 All E.R. 97.

As to what may be done by an executor before probate and by an administrator before grant, see 16 HALSBURY'S LAWS (3rd Edn.) 132-135; and for cases see 23 DIGEST (Repl.) 52 et seq., 59 et seq.

Cases referred to in argument:

- (1) *Allen v. Dundas* (1789), 3 Term Rep. 125; 100 E.R. 490; 23 Digest (Repl.) 238, 2887.
- (2) *Parker v. Kett* (1701), 1 Ld. Raym. 658; 12 Mod. Rep. 467; 1 Salk. 95; 91 E.R. 1338; 23 Digest (Repl.) 70, 626.
- (3) *Packman's Case* (1596), 6 Co. Rep. 18 b; 77 E.R. 281; sub nom. *Wilson v. Packman*, Cro. Eliz. (459); sub nom. *Wilson v. Pateman*, Moore, K.B. 396; sub nom. *Anon.*, 3 Salk. 22; 23 Digest (Repl.) 259, 3177.
- (4) *Semine v. Semine* (1673), 2 Lev. 90; 83 E.R. 464; 30 Digest (Repl.) 456, 969.

Rule Nisi obtained by the defendants for a new trial in an action of trover for stock in trade and household goods.

The first count of the declaration stated that the goods were the property of the testator; the second count that they were the property of the plaintiff as executrix of the testator. The defendants denied liability.

At the trial before ABBOTT, C.J., it appeared that the testator died on June 16, 1819, at which time the defendant, Clark, had in his possession a will of the testator, dated April 29, 1819, by which he was appointed executor. This will was proved on June 23, 1819, and administration was granted to Clark. He directed the sale of the several articles mentioned in the declaration, which were sold by the second defendant, an auctioneer, on July 30, 1819.

The testator had made another will dated June 12, 1819, by which he appointed the plaintiff his executrix; and it was proved that the defendants had notice of this second will prior to the sale of the goods. The second will was proved on May 21, 1821 (the probate of the first will, under which the defendants acted, having been revoked on citation), and administration was granted to the plaintiff. It was contended by the defendant that the revocation of the probate of the first will did not avoid all the mesne acts, but that the defendants might show due administration of the assets to the amount of the value of the goods. ABBOTT, C.J., would not

A allow the defendants to give evidence of administration of the assets, and the plaintiff obtained a verdict for the full value of the goods. A rule nisi was obtained by the defendants for a new trial.

B *Brougham* and *Chitty* for the plaintiff, showing cause against the rule: The property vests in the executor from the time of the death of the testator; and, consequently, the defendant in this case had no right, as against the rightful executor, to sell these goods. *Allen v. Dundas* (1) is an authority only to show, that a payment made to an executor acting under an existing probate, by a party ignorant of its being unfairly obtained, is valid; and *Parker v. Kett* (2) only shows that the party will be bound by a legal act done by an executor de son tort; but here the act was illegal.

C *Copley* and *Wightman* for the defendants, in support of the rule: In *Allen v. Dundas* (1) it was held that the payment of money to an executor who had obtained probate of a forged will was a good discharge to the debtor of the intestate; and in *Packman's Case* (3) it was held, that though letters of administration be countermanded and revoked, a gift or sale made by the administrator acting under the probate was not thereby defeated. *Semine v. Semine* (4) is an authority to the same effect.

D **ABBOTT, C.J.**—There is a manifest distinction between the case of an administrator and an executor. An administrator derives his title wholly from the ecclesiastical court. He has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. An executor, on the other hand, derives his title from the will itself and the property vests in him from the moment of the testator's death. That being so, the property vested in the plaintiff, as executrix, from the time of the death of the testator. Consequently, the defendants who had notice of the second will, had no right to sell and, therefore, are liable in this action.

F **BAYLEY** and **HOLROYD, JJ.**, concurred.

G **BEST, J.**—Where a party obtains a judgment irregularly, which is afterwards set aside for irregularity, he is not justified in acting under it; but the sheriff is justified. Here, the first probate was irregularly obtained. The party who obtained that probate, therefore, was not justified in selling the goods; but a creditor, who paid him a debt while the letters of administration were unrepealed, would be protected.

Rule discharged.

POTHONIER AND ANOTHER v. DAWSON

[COURT OF COMMON PLEAS (Gibbs, C.J.), Michaelmas Term, 1816]

[Reported Holt, N.P. 383; 171 E.R. 279]

Conversion—Conversion by agent—General agent—Need to prove special direction by principal to refuse to give up property.

If goods be deposited as a security for a loan of money, the lender's rights are more extensive than such as accrue under the right of lien and the contract between the parties is, that if the borrower does not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the goods deposited.

Wine was deposited with the defendant as security for a loan of money. In an action of trover there was evidence that the defendant's son, who acted as her general agent, refused to give the wine up on request.

Held: in order to prove a conversion by the defendant it was necessary to prove that her general agent had acted, not merely as such agent, but under a special direction in refusing to deliver up the wine.

Notes. Considered: *Smart v. Sanders* (1846), 3 C.B. 380; *Martin v. Reid* (1862), 11 C.B.N.S. 730; *Donald v. Suckling* (1866), L.R. 1 Q.B. 585. Referred to: *Burdick v. Sewell* (1883), 10 Q.B.D. 363.

As to demand and refusal, see 38 HALSBURY'S LAWS (3rd Edn.) 781-783, as to who may be sued, see *ibid.* pp. 789 et seq.; and for cases see 46 DIGEST (Repl.) 477 et seq., 487.

Action of trover to recover some wine which had been deposited in the defendant's cellar.

The plaintiff, Pothonier, being in need of money, applied to the defendant to advance him some and proposed to deposit 200 dozen bottles of wine in her hands. This wine was to remain as a security for the money advanced. It was agreed that the plaintiff should be at no expense for warehouse-room and should have the wine re-delivered on satisfying the loan. The wine having been deposited and bills accepted by the plaintiff for the money advanced, the plaintiff, a few months afterwards, took in the co-plaintiff, Hodgson, as his partner.

The wine remained in the defendant's cellars, and it appeared that the plaintiffs, in two or three instances, had sent for a portion of this wine to the defendant and that some dozens had been delivered out to the joint order of Pothonier and Hodgson. The bills which Pothonier gave were not paid, and he became insolvent. Afterwards Hodgson, in their joint names, applied to the defendant for the wine which she refused to deliver, and sold to reimburse herself. In consequence of this refusal and sale, the plaintiffs brought the present action.

In order to prove conversion, a witness was called who stated that he applied to the defendant for the wine, and that she referred him to her son who had the management of the business. The son refused to deliver it up or to pay over the proceeds.

Serjeant Vaughan for the defendant, contended that this was no evidence of a conversion by the defendant.

Serjeant Best for the plaintiffs: The acts of the defendant's agent and servant are her acts: she entrusted the management of her business to him and she refers to him on an application. What he says and does in such circumstances, must bind her.

GIBBS, C.J.—It is not necessary to discuss how far the son, who is employed as a general agent and servant, may bind the mother by contracts which he makes with third parties. But his refusal to deliver the wine in question does not affect her with a conversion. It might be her conversion; but she cannot be made a wrong-doer by this evidence. The plaintiffs, however, may show that, in the particular fact of the refusal, he acted under her special direction,

A The conversion was afterwards proved by other evidence.

Serjeant Vaughan for the defendant: The defendant had a right to detain the wine. It was deposited with her as a security for the separate debt of Pothonier at a time when Hodgson was no partner. She had a lien on, if not a property in the wine, on the non-payment of the bills. Pothonier, by taking in a partner, could not communicate any right to him which he himself had not.

B *Serjeant Best* for the plaintiffs: Admitting the defendant had a right of lien, she has clearly been guilty of a conversion by selling the wine. The right of lien is collateral to the right of property, and does not entitle the party claiming it to sell.

C **GIBBS, C.J.**—The defendant is entitled to a verdict. Undoubtedly as a general proposition, a right of lien gives no right to sell the goods. But when goods are deposited, by way of security to indemnify a party against a loan of money, it is more than a pledge. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade. These goods were deposited to secure a loan. It may be inferred, therefore, that the contract was this: "If I (the borrower) repay the money, you must re-deliver the goods; but if I fail to repay it, you may use the security I have left to repay yourself." I think, therefore, the defendant had a right to sell.

D There is no fraud practised on Hodgson and the delivery of a few dozen bottles of wine to the joint order of Pothonier and Hodgson cannot be strained into a renunciation of the defendant's property in the wine, and an admission that she held it for both.

Judgment for defendant.

F NORRISH v. MARSHALL AND ANOTHER

[VICE-CHANCELLOR'S COURT (Sir John Leach, V.-C.), February 21, 22, 1821]

[Reported 5 Madd. 475; 56 E.R. 977]

Mortgage—Assignment—Transfer without notice to mortgagor—Payment of mortgage debt by mortgagor—Validity of discharge as against assignee.

G On Jan. 31, 1800, the plaintiff mortgaged certain premises and delivered up the title-deeds to C. as security for a debt of £1,000. On July 18, 1812, C. assigned the mortgage and delivered the deeds to the defendants as security for £700. No notice of the assignment was given to the plaintiff. On Oct. 30, 1818, the plaintiff, having paid off his debt to C. requested the return of the deeds, but was told they were in the defendants' possession. On a bill by the plaintiff for delivery up of the deeds, C. admitted in evidence that the debt due to him had been fully paid by the delivery of goods by the plaintiff. He also stated that at all material times he generally acted as the plaintiff's solicitor.

H **Held:** (i) as against an assignee without notice a mortgagor had the same rights as against the mortgagee, and, therefore, the delivery of goods by the plaintiff was a valid discharge of the mortgage debt and a good payment as against the defendants; (ii) in the assignment of the mortgage C. had acted, not as the plaintiff's solicitor, but in his individual character of mortgagee, and the plaintiff had no constructive notice of the assignment.

I **Notes.** Applied: *Turner v. Smith*, [1901] 1 Ch. 213; *De Lisle v. Union Bank of Scotland*, [1914] 1 Ch. 22. Referred to: *Bickerton v. Walker* (1885), 31 Ch.D. 151; *Dixon v. Winch*, [1900] 1 Ch. 736; *Parker v. Jackson*, [1936] 2 All E.R. 261.

As to transfer of mortgage, see 27 HALSBURY'S LAWS (3rd Edn.) 261 et seq.; and for cases see 35 DIGEST (Repl.) 428 et seq.

Cases referred to in argument :

- (1) *Matthews v. Wallwyn* (1798), 4 Ves. 118; 31 E.R. 62, L.C.; 35 Digest (Repl.) 302, 230.
- (2) *William v. Sorrell* (1799), 4 Ves. 389; 31 E.R. 198, L.C.; 35 Digest (Repl.) 437, 1314.
- (3) *Chambers v. Goldwin* (1804), 9 Ves. 254; 1 Smith, K.B. 252; 32 E.R. 600; 35 Digest (Repl.) 420, 1127.

Bill for the delivery up by the defendants of all title-deeds relating to mortgaged premises and for an injunction restraining them for parting with possession of the deeds.

By indenture dated Jan. 31, 1800, between the plaintiff and Benjamin Roper, his trustee, of the first part and James Collins of the other part, the plaintiff and Roper demised certain premises to Collins, his executors, etc., for the term of one thousand years, with a proviso, that if the plaintiff should replace and transfer at a day since past to Collins, his executors, etc., the sum of £1,000 5 per cents. (which had been sold out by Collins, and the produce paid to the plaintiff), and interest in the meantime at 5 per cent. payable half-yearly, then the term was to cease. On the execution of this deed, the plaintiff, a wine and spirit merchant, delivered to Collins all the title-deeds relating to the mortgaged premises. The stock was not re-transferred at the time appointed but the plaintiff afterwards fully accounted with Collins and paid off the mortgage.

On Oct. 30, 1818, Collins, at the request of the plaintiff and to keep the term on foot, conveyed the same to one Andrew Hewson (a trustee for the plaintiff), to hold to him, his executors, etc., for the residue of the term. At the time of this conveyance, the plaintiff desired to have the title-deeds delivered up but Collins stated they had been delivered by him to one John Marshall, and that they were in the hands of Mary Marshall, his widow and administratrix and of Thomas Marshall the son of John Marshall. On application to Mary and Thomas Marshall for the title-deeds, they claimed a right to them under a deed poll dated July 18, 1812, in which the indenture of mortgage of Jan. 31, 1800, was recited, and that the same remained due and owing. By the deed poll it was declared that Collins should from thenceforth stand possessed of the mortgaged premises, on trust to permit John Marshall (who, together with Mary his wife, had advanced £700 to Collins) to receive and take the interest of £700 during his life, and after his decease to pay the interest to Mary his wife during her life, and after her decease to pay the £700 and all interest due thereon, to Thomas Marshall the son, etc. The bill, further stated that if the last-mentioned deed was really executed and the consideration paid, yet that the greater part of the original mortgage had been satisfied before the deed poll was executed, and that the remainder was paid by the plaintiff before he had any knowledge of the deed poll.

The bill prayed that the defendants might be decreed to deliver up to the plaintiff all the title-deeds relating to the mortgaged premises and that, in the meantime, they might be restrained by injunction from pledging or depositing or parting with them.

The defendant, Thomas Marshall, by his answer admitted the deed poll and stated a bond was also given by Collins as a further security and that Collins at the time of the execution thereof was the attorney and solicitor of the plaintiff; that Collins undertook to inform the plaintiff of the deed poll, and admitted that the title-deeds were delivered up on the execution of the deed poll. He submitted that he was entitled to retain the title-deeds until the £700 and interest were satisfied.

On the part of the plaintiff the original mortgage was proved and Collins on examination stated that the original mortgage had been paid off by the plaintiff in money and wines, the particulars of which were set forth in a schedule annexed to his examination. He stated also that previous to his mortgage being paid off,

A he gave no notice to the plaintiff of the deed poll and that he never undertook to give such notice. The death of Mary Marshall was also proved.

B On the part of the defendant, Collins was cross-examined and stated that, in July 1812, and before and after, he was usually and generally employed by the plaintiff as his attorney and solicitor, and in the management of his affairs; that the last charge made by the plaintiff against the defendant for goods delivered to him was in September, 1818; and that he never informed John Marshall or his wife that the original mortgage was satisfied, as he meant to repay the £700 without making the plaintiff privy to the circumstances, and that for the same reason he had never acquainted the plaintiff with the deed poll.

C Hewson, the partner of Collins, was also cross-examined and stated that before, in and after July, 1812, the plaintiff usually employed Collins and the witness in transacting business for him as attorneys and solicitors, and in the management of his affairs; and he further stated that the original mortgage was paid off by the plaintiff by supplying Collins with wines and spirits, and by receiving a sum of £32 and upwards, as a debt due to the plaintiff; and that to the best of his belief, the last charge for goods delivered to Collins was in September, 1818. He further stated that in September, 1818, he informed the plaintiff that Collins was insolvent and that he was alarmed, and asked what had become of the deeds, and said that by supplying Collins with wines, he had more than satisfied the principal and interest due on the mortgage to Collins.

D On the opening of the case, an objection was taken that Collins ought to have been made a party to the suit, but the vice-chancellor decided that he, Collins, E having sworn that he was fully paid, the case could proceed without him.

F *Horne and Pemberton* for the plaintiffs: The plaintiff having paid off the mortgage, is entitled to have his title-deeds delivered up by the defendant. The subsequent mortgage to Marshall and his wife was not with the privity of the plaintiff; he had no knowledge of it until he had discharged the mortgage. Marshall and his wife should have communicated their mortgage to the plaintiff; if they had done so, payments made by the plaintiff to Collins after such notice, would have been unwarranted; but, a mortgagor, until notice of an assignment by the mortgagee, may deal with the mortgagor as if no such assignment had been made, and the assignee takes subject to all the equities as between the mortgagor and mortgagee: *Matthews v. Wallwyn* (1); *Williams v. Sorrell* (2); *Chambers v. Goldwin* (3). The defendants have no equity entitling them to retain the title-deeds; their loss is G attributable to their neglect in not giving notice of the assignment to them.

H *Wetherell and Wilson* for the defendants: This is a case of novelty; it is certainly too late to contend that an assignee of a mortgagee without notice to the mortgagor does not take subject to the equities between the mortgagor and original mortgagee, but this case is peculiarly circumstanced. Collins was the attorney of the plaintiff before, at and after the period, when the defendant's mortgage was made. A dealing with Collins, therefore, must be considered as a dealing with the plaintiff whose attorney he was, and the plaintiff must be taken to have had notice of the defendant's deed.

I It is not pretended that any account was settled between the plaintiff and Collins, previous to the defendant's mortgage. If the plaintiff had in any way reduced the amount of the mortgage money due to Collins, there was no endorsement to that effect on the mortgage deed. In 1812, when the defendant's mortgage was executed, there was not more than £260 due from Collins in respect of wines sold to him. No case, no principle, establishes that, if a mortgage be made of real estate and the mortgage is assigned, though without notice to the mortgagor, that the mortgagee can, as against the assignee of the mortgage, say: "By collateral dealings I have discharged my mortgage debt." If Collins had filed a bill to foreclose, the plaintiff might have said: "Your mortgage is discharged by the goods I have sold you," but he cannot say so to an assignee of the mortgage.

Is any possible claim a mortgagor may have against a mortgagee, to be set off against an assignee of the mortgage? Suppose an action for damages, and a verdict. Is that to be set off against an assignee of the mortgage? An advance of money might be set off, but a sale of goods, it is apprehended, cannot be set off as against an assignee of the mortgage. Is the assignee of a mortgage not merely to ask the mortgagor whether the mortgage is paid off, but whether there are any outstanding accounts and dealings between them? The account referred to by Collins in his deposition is not satisfactory. If the court should think that goods delivered to Collins operates as against the assignee of the mortgage in reduction of the mortgage debt, an account should be taken of the goods delivered, and it should be ascertained whether the mortgage was really discharged in that manner.

SIR JOHN LEACH, V.-C.—This case is singular in its circumstances. The general principle, that an assignee of a mortgage without notice to the mortgagor is bound by the equities between the mortgagor and the original mortgagee, is not disputed. It is argued, that Collins being the attorney of the plaintiff, it is to be considered that the plaintiff had constructive notice of the assignment of the mortgage to the defendant, but in the assignment of the mortgage, Collins acted, not as the attorney or agent of the plaintiff, but in his own individual character of mortgagee.

It is next said that the mortgage is taken to have been satisfied, not by direct payment made in that respect, but by the balance of a general account, partly composed by the supply of goods, and that, though the assignee of a mortgage may be affected by direct payments made to the assignee on account of the mortgage, he is not to be affected by the balance of a general account so composed. The principle is that, as against an assignee without notice, the mortgagor has the same rights as he has against the mortgagee, and whatever he can claim in the way of set off, or mutual credit, as against the mortgagee, he can claim equally against the assignee.

The remaining question is whether I am to conclude that the defendant by the evidence of Collins as to the fact that the plaintiff has fully satisfied the original mortgage debt. In the circumstances of this case I think I ought not so to conclude. Let it be referred to the Master to inquire whether Collins had fully paid or satisfied the mortgage debt when the plaintiff had first notice of the assignment made by Collins to the defendant, and let the Master be at liberty to state any circumstances specially, at the request of either party; and reserve the consideration of further directions and costs, until after the Master shall have made his report.

Judgment for plaintiff.

CRAWSHAY AND OTHERS v. HOMFRAY AND OTHERS

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.),
November 9, 1820]

[Reported 4 B. & Ald. 50; 106 E.R. 856]

Lien—Wharfinger's lien—Goods landed at defendants' wharf—Lien as against buyers of goods from importers.

Wharfage, etc., due upon goods imported was by the course of trade paid by the importer at the Christmas following the importation, whether the goods were in the meantime removed or not. Before payment of the dues by the importer to the defendants, owners of the wharf, the goods were sold to the plaintiffs. Subsequently the importer became bankrupt.

Held: the wharfingers had no lien on the goods as against the plaintiffs in respect of their charges.

Notes. Considered: *Christie v. Lewis* (1821), 2 Brod. & Bing. 410; *Fisher v. Smith* (1878), 4 App. Cas. 1. Referred to: *Spartali v. Benecke* (1850), 10 C.B. 212.

As to when and over what goods carrier's lien exercisable, see 4 HALSBURY'S LAWS (3rd Edn.) 194; and for cases see 8 DIGEST (Repl.) 160 et seq. As to usages of particular trades, iron trade, see 11 HALSBURY'S LAWS (3rd Edn.) 203 et seq.; and for cases see 17 DIGEST (Repl.) 61 et seq. As to essentials of legal lien, debt must have accrued due, see 24 HALSBURY'S LAWS (3rd Edn.) 148; and for cases see 32 DIGEST (Repl.) 260.

Case referred to:

(1) *Chase v. Westmore* (1816), 5 M. & S. 180; 105 E.R. 1016; 32 Digest (Repl.) 260, 65.

Also referred to in argument:

Stevenson v. Blakelock (1813), 1 M. & S. 535; 105 E.R. 200; 32 Digest (Repl.) 267, 136.

Cowell v. Simpson (1809), 16 Ves. 275; 33 E.R. 989, L.C.; 32 Digest (Repl.) 275, 207.

Brenan v. Currint (1775), Say. 224; 96 E.R. 860; 32 Digest (Repl.) 267, 135.

Hutton v. Bragg (1816), 7 Taunt. 14; 2 Marsh. 339; 129 E.R. 6; 32 Digest (Repl.) 257, 33.

Motion by the defendants for a rule nisi to set aside the verdict and enter a non-suit in an action of trover for iron. The defendants pleaded the general issue.

At the trial before ABBOTT, C.J., it appeared that the iron in question had been imported by Messrs. Tottie & Co., and landed at the defendants' wharf on Oct. 14. On Oct. 15, the plaintiffs purchased the iron from Tottie & Co., and the order for delivery of it was given, and the price paid to Tottie & Co. by the plaintiffs on the following day. A part of the iron was subsequently delivered to the plaintiffs at different times, till March following, when, in consequence of Tottie & Co. having become bankrupt, the remainder of the iron, amounting to about ninety tons, was detained by the defendants, who claimed a lien upon it for their charges in respect of wharfage, etc. These charges amounted to about £126, and the course of dealing proved as to them was that they were usually paid by the merchant importer at the Christmas following the importation, whether the iron had been removed in the meantime or not. Upon the trial, ABBOTT, C.J., was of opinion that the defendants were not entitled to a lien upon the iron for these charges; and the jury, under his direction, found a verdict for the plaintiffs.

Marryat for the defendants, moved for a rule nisi to set aside the verdict and to enter a nonsuit.

ABBOTT, C.J.—I think we ought not to grant any rule in this case. It is distinguishable from the authorities which have been cited. Here it is clear that, at the

time when this iron was originally purchased by the plaintiffs, these defendants had no lien upon it for these charges. Can it be contended that after this a lien upon these goods, the property of the plaintiffs, is to arise from a subsequent default in payment by other persons. I think it cannot; and, therefore, retain my opinion at the trial, that the plaintiffs are entitled to recover. A

BAYLEY, J.—According to the usage of trade, it appears that in this case a specific time is given to the merchant importer for the payment of these dues. The iron in question, which originally belonged to Tottie & Co., was by them sold to the plaintiffs on Oct. 15, and at that time the plaintiffs had clearly a right to the delivery, without any lien being claimed by the defendants. In consequence of this, on their application, a great part of it is delivered. How, then, can the non-delivery of the remainder, till after the debt due from Tottie & Co. has become payable, make any difference? As it is clear that at the time of the sale the defendants had no lien, I am of opinion that the subsequent non-delivery did not give any new right of lien to them. B C

HOLROYD, J.—The principle laid down in *Chase v. Westmore* (1), where all the cases came under the consideration of the court, was this, that a special agreement did not of itself destroy the right to retain; but that it did so only where it contained some term inconsistent with that right. If by such agreement the party is entitled to have the goods immediately, and the payment in respect of them is to take place at a future time, that is inconsistent with the right to retain the goods till payment. That was the case here: the wharfage was not payable till Christmas, and by the sale the plaintiffs had a right to an immediate delivery of the goods. The subsequent default of Tottie & Co., to pay the debt due from them will not alter the case. I think, therefore, that the defendants had in this case no right to retain, and that this verdict is right. D E

BEST, J.—The principle has been truly stated, that unless the special agreement be inconsistent with the right of lien, it will not destroy it. Here, however, it seems to me that it was inconsistent, the wharfage not being, by the usage of the trade, payable till a subsequent period, and the goods being to be delivered immediately. There was, therefore, in this case no original right of lien in respect of these charges; and I am not aware of any case where it has been decided that a subsequent default in payment can give such a right where it did not originally exist. F

Rule refused.

BRITTAIN v. KINNAIRD AND ANOTHER

[COURT OF COMMON PLEAS (Dallas, C.J., Park, Burrough and Richardson, JJ.), November 24, 1819]

[Reported 1 Brod. & Bing. 432; 4 Moore, C.P. 50; 129 E.R. 789]

Magistrates—Protection—Conviction—When conclusive evidence of facts stated in it.

Where a magistrate has jurisdiction, his conviction is conclusive evidence of the facts stated in it if no defect appears on the face of it.

Notes. Distinguished: *Wickes v. Clutterbuck* (1825), 2 Bing. 483. Applied: *Basten v. Carew* (1825), 5 Dow. & Ry. K.B. 588; *Ex parte Clarke* (1842), 2 Gal. & Dav. 780; *R. v. Bolton*, [1835–42] All E.R. Rep. 71; *Re Clarke* (1842), 2 Q.B. 619; *R. v. Buckinghamshire Justices* (1843), 3 Q.B. 800; *Mould v. Williams* (1844), 5 Q.B. 469; *R. v. Hickling* (1845), 7 Q.B. 880; *Allen v. Sharp* (1848), 2 Exch. 352. Distinguished: *Ayrton v. Abbott* (1849), 14 Q.B. 1. Considered: *Re Baker* (1857), 2 H. & N. 219. Applied: *R. v. Brakenbridge* (1884), 48 J.P. 293. Referred to: *Cloud v. Turfery* (1824), 9 Moore, C.P. 595; *Basten v. Carew* (1825), 5 Dow. & Ry. K.B. 558; *Lindsay v. Leigh* (1848), 12 Jur. 286; *Thompson v. Ingham* (1850), 14 Q.B. 710; *R. v. Dickenson* (1857), 21 J.P. Jo. 389; *Foster v. Dodd* (1867), L.R. 3 Q.B. 67; *Usill v. Hales*, *Usill v. Brearley*, *Usill v. Clarke* (1878), 3 C.P.D. 319; *R. v. Farmer*, [1891–4] All E.R. Rep. 921; *Bache v. Billingham* (1893), 63 L.J. M.C. 1; *R. v. Nat Bell Liquors, Ltd.*, [1922] All E.R. Rep. 335; *O'Connor v. Isaacs*, [1956] 1 All E.R. 513.

As to judicial privilege, see 30 HALSBURY'S LAWS (3rd Edn.) 706 et seq.; and for cases see 38 DIGEST (Repl.) 82 et seq.

Cases referred to:

- (1) *Terry v. Huntington* (1668), Hard. 480; 145 E.R. 557; 38 Digest (Repl.) 88, 631.
- (2) *Crepps v. Durden* (1777), 2 Cowp. 640; 98 E.R. 1283; 38 Digest (Repl.) 95, 685.
- (3) *Gray v. Cookson* (1812), 16 East, 13; 104 E.R. 994; 38 Digest (Repl.) 85, 599.
- (4) *Welch v. Nash* (1805), 8 East, 394; 103 E.R. 394; 26 Digest (Repl.) 371, 814.
- (5) *Groenvelt v. Burwell* (1700), 1 Salk. 396; 1 Com. 76; Carth. 491; Holt, K.B. 184; 1 Ld. Raym. 454; 91 E.R. 343; sub nom. *Greenville v. Physicians College*, 12 Mod. Rep. 386; 38 Digest (Repl.) 85, 598.
- (6) *Ackerley v. Parkinson* (1815), 3 M. & S. 411; 105 E.R. 665; 38 Digest (Repl.) 87, 612.
- (7) *Strickland v. Ward* (1767), 7 Term Rep. 633, n.
- (8) *Perkin v. Proctor* (1768), 2 Wils. 382.
- (9) *Henshaw v. Pleasance* (1777), 2 Wm. Bl. 1174; 96 E.R. 692; 39 Digest (Repl.) 245, 41.

Rule Nisi obtained by the plaintiff to set aside a nonsuit and for a new trial in an action for trespass by seizing and taking possession of a vessel called the *Phoenix* and detaining it.

At the trial before DALLAS, C.J., it appeared that the vessel, which was decked and of the burden of thirteen tons, was seized by the defendants, as magistrates, under the Bum-boat Act [2 Geo. 3, c. 28: repealed by Metropolitan Police Act, 1839, s. 24]. The plaintiff was about to offer evidence that the vessel in question was not a boat within the meaning of the Act when it was objected by the counsel for the defendants that the conviction was the only admissible evidence of what the defendants had determined, and was conclusive as to the subject-matter of that determination. DALLAS, C.J., coinciding in that opinion, the conviction was put in, and appeared to be a conviction under the statute 2 Geo. 3, c. 28, that

"the plaintiff unlawfully had in his possession in a certain boat in the river Thames certain stores; to wit, 350 lbs. weight of gunpowder, and 58 lbs. weight of ball cartridges, which had then lately been unlawfully procured from and out of a ship or vessel in the said river Thames."

HIS LORDSHIP being of opinion that the conviction was a conclusive defence to the action, directed a nonsuit reserving the point.

Serjeant Vaughan obtained a rule nisi for a new trial on the ground that the magistrates had, by the Act, no power to take anything but a boat; that they had no right to assume to themselves a jurisdiction by calling that a boat which was in truth a vessel; and that they could not, by the terms of the conviction, exclude a party from raising the question on the subject-matter of it.

Serjeant Lens for the defendant, showed cause against the rule.

Serjeant Vaughan and *Serjeant Lawes* for the plaintiff, supported the rule.

DALLAS, C.J.—The general principle applicable to cases of this description is perfectly clear; it is established by all the ancient, and recognised by all the modern decisions. The principle is that a conviction by a magistrate who has jurisdiction over the subject-matter is, if no defects appear on the face of it, conclusive evidence of the facts stated in it. Such being the principle, what are the facts of the present case? If the subject-matter in the present case were a boat it is agreed that the boat would be forfeited, and the conviction stated it to be a boat. But it is said that, in order to give the magistrate jurisdiction, the subject-matter of his conviction must be a boat and that it is competent to the party to impeach the conviction by showing that this was not a boat. I agree that, if he had no jurisdiction, the conviction signifies nothing. Had he then jurisdiction in this case?

By the Act of Parliament, he is empowered to search for and seize gunpowder in any boat on the river Thames. Allowing, for the sake of argument, that "boat" is a word of technical meaning, and somewhat different from a vessel, still it was matter of fact to be made out before the magistrate and on which he was to draw his own conclusion. But it is said that a jurisdiction limited as to person, place and subject-matter is stinted in its nature, and cannot be lawfully exceeded. I agree; but, on the inquiry before the magistrate, does not the person form a question to be decided by evidence? Does not the place, does not the subject-matter, form such a question? The possession of a boat, therefore, with gunpowder on board, is part of the offence charged, and how could the magistrate decide but by examining evidence in proof of what was alleged? The magistrate, it is urged, could not give himself jurisdiction by finding that to be a fact which did not exist. But he is bound to inquire as to the fact and, when he has inquired, his conviction is conclusive of it. The magistrates have inquired in the present instance, and they find the subject of conviction to be a boat. Much has been said about the danger of magistrates giving themselves jurisdiction, and extreme cases have been put, as of a magistrate seizing a ship of seventy-four guns and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it. It is urged that the party is without remedy, and so he is, without civil remedy. In this and many other cases; his remedy is by proceeding criminally and, if the decision were so gross as to call a ship of seventy-four guns a boat, it would be good ground for a criminal proceeding.

Formerly, the rule was to intend everything against a stinted jurisdiction; now the rule is that nothing is to be intended but what is fair and reasonable, and it is reasonable to intend that magistrates will do what is right. Cases have been cited which, it has been contended, tend to show a different doctrine. First, *Terry v. Huntington* (1). In that case the principle laid down is that an action will lie against an officer for executing the process of a limited jurisdiction in cases to which such

A jurisdiction does not extend. It is admitted, however, in that case that, if the commissioners had had jurisdiction of the cause, though they had given a wrong judgment, as if they had adjudged small-beer to be strong, their judgment could not have been examined in an action. RAINSFORD, B., there said (Hard. at p. 482):

B "That the defendants might well enough have justified by virtue of an authority from the commissioners of excise, who are judges of the fact, and that their authority is not traversable by the plaintiff."

C Apply that to this case. If it had appeared on the face of the conviction here, as it did there on the Special Case, that the magistrates had no jurisdiction, the judgment of the court might have been different. But the magistrates have jurisdiction here; they have jurisdiction over gunpowder found in a boat, as in the other case, the commissioners had over the beer. The decision in *Crepps v. Durden* (2) turned expressly on the ground that the magistrate had no jurisdiction and that the justification set up was illegal on the face of it. That case, therefore, and *Gray v. Cookson* (3) are clear authorities to show that a conviction like this must be conclusive. *Welch v. Nash* (4) was no sooner cited in *Gray v. Cookson* (3), than BAYLEY, J., distinguished it as turning only on an ex parte order of justices; a proceeding in no way resembling a conviction where the matter is investigated on oath in the presence of both parties. I am, therefore, most clearly of opinion that this rule ought to be discharged.

E **PARK, J.**—All the cases from *Terry v. Huntington* (1) downwards concur in one uniform principle that, where a magistrate has jurisdiction, a conviction by him is conclusive evidence of the facts stated in that conviction. In *Groenvelt v. Burwell* (5), HOLT, C.J., expressly says (1 Ld. Raym. at p. 471):

"That if the commissioners had had jurisdiction of the cause, though they had given a wrong judgment, their judgment could not have been examined in an action."

F *Serjcant Lawes*, in support of the rule, has said much about the commissioners of bankrupts; the same topic was urged before HOLT, C.J., but the reply was that they are not judges. In *Gray v. Cookson* (3), LORD ELLENBOROUGH, C.J., says (16 East, at p. 28):

G "The justices had by law the authority, which they in fact exercised in this case, by a commitment under this conviction; and that they were, therefore, entitled to have been acquitted under the general issue pleaded by them."

H *Ackerley v. Parkinson* (6) is a remarkably strong case. There the defendant, a vicar-general of the bishop, had excommunicated the plaintiff for not taking administration of an intestate's effects; and though the citation by which the plaintiff was cited was void, still, the subject-matter of the judgment being a thing within the defendant's jurisdiction, the court held that the action did not lie. In *Strickland v. Ward* (7), YATES, J., says:

"The conviction cannot be contravened in evidence. The justice having a competent jurisdiction of the matter, his judgment is conclusive till reversed or quashed."

I In the present case the whole argument has turned on that which, under the circumstances, it was impossible to give in evidence, namely, that the vessel in question was not a boat; but supposing that this point might have been entered into at the trial, has anything been stated to show that the vessel was not a boat? On such a point as this, dictionaries are certainly good authority and Dr. JOHNSON calls a boat: "A ship of small size, as a passage boat, advice boat, fly boat." FALCONER'S MARINE DICTIONARY says: "A boat is open or decked according to the purpose for which it is intended." On every ground, therefore, the rule for a new trial in this case must be discharged.

BURROUGH, J.—Since I have been in Westminster Hall, it has never been A
doubted that, where a magistrate has jurisdiction, a conviction having no defects
on the face of it is conclusive evidence of the facts which it alleges. In the present
case, by Act of Parliament the magistrate has jurisdiction over bum-boats and other
boats, but, in the very exercise of that jurisdiction, he must make inquiry as to
fact and decide on all the evidence which comes before him; when he has done B
this, the conviction is conclusive as to the facts stated. Two cases have been much
pressed on us, i.e., *Welch v. Nash* (4) and *Perkin v. Proctor* (8). I am astonished
that anyone who has looked into the statute 13 Geo. 3, c. 78 [repealed] should
press on us *Welch v. Nash* (4). That was a case on an order of justices touching
the diverting a way; there was no litigant party, and the order was made on hearing
the evidence of one side only. Besides, the whole proceeding was irregular there
having been no plan of the road which is expressly required by the statute. The C
order was not like a conviction, a proceeding in invitum, and was at all events bad
on the face of it. With respect to *Perkin v. Proctor* (8) (a bankruptcy case), a
commission of bankrupt is, in its commencement, altogether an ex parte proceeding
behind the back of the party and, therefore, has no application to a case where the
party brings forward his evidence and disputes before a magistrate that which is
urged against him. As to the hardship of there being no appeal in this case, if the
legislature takes away appeal and certiorari, how can we interfere? It has often
been said that these summary jurisdictions should not be given without appeal, and
the legislature have answered that an appeal is inconvenient in cases of such
immediate urgency. Of the propriety of that, Parliament is to judge, and not this
court. I have not the least doubt on this case. *Henshaw v. Pleasance* (9) turned E
on the particular ground of a proceeding before the commissioners of excise.

RICHARDSON, J.—I am of the same opinion; whether the vessel in question
were a boat or not was a fact on which the magistrate was to decide, and the fallacy
lies in assuming that the fact which the magistrate has to decide is that which con-
stitutes his jurisdiction. If a fact decided as this has been might be questioned in
a civil suit, the magistrate would never be safe in his jurisdiction. Suppose the F
case of a conviction under the game laws for having partridges in possession; could
the magistrate in an action of trespass be called on to show that the bird in question
was really a partridge? And yet it might as well be urged in that case that the
magistrate had no jurisdiction unless the bird were a partridge, as it may be urged
in the present case that he has none unless the machine be a boat. So, in the case
of a conviction for keeping dogs for the destruction of game without being duly
qualified to do so; after the conviction had found that the offender kept a dog of
that description, could he, in a civil action, be allowed to dispute the truth of the
conviction? In a question like the present, we are not to look to the inconvenience,
but the law. But surely, if the magistrate acts bona fide and comes to his conclu-
sion as to matters of fact according to the best of his judgment, it would be highly
unjust if he were to have to defend himself in a civil action; and the more so, as H
he might have been compelled by a mandamus to proceed on the investigation. On
the general principle, therefore, that, where the magistrate has jurisdiction, his
conviction is conclusive evidence of the facts stated in it, I think that this rule must
be discharged.

Rule discharged.

VULLIAMY AND ANOTHER v. NOBLE AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), November 17, 27, December 8, 9, 12, 1817]

[Reported 3 Mer. 593; 86 E.R. 228]

Partnership—Dissolution—Death of partner—Absence of notice to creditors—Liability of deceased partner for debts of continuing partners—Appropriation of stock to meet debts.

Set-off—Joint debt against separate debt.

V., a customer of the banking-house of D. & Co., transferred to N., a partner in the firm, a sum of stock by way of security for money borrowed from the firm, and gave notes for the amount, payable on the stock being re-transferred to him. He paid off these notes, and afterwards borrowed a further sum on the joint note of himself and his son without calling for a re-transfer. The stock so transferred having been blended with other stock of which N. was in like manner possessed by way of security for other customers, was sold by the partnership, and the produce applied to the use of the partnership, except a small balance still remaining in the name of N. D. (another of the partners) afterwards died, and the partnership was carried on without any alteration of the firm till the surviving partners became bankrupt. In an action by V. against the assignees of the bankrupts and the representatives of D.,

Held: V. was entitled (i) to the stock remaining in the name of N. (the other creditors in respect of stock transferred having been satisfied their demands) as being sufficiently appropriated; (ii) to set off, against the joint note of himself and his son, so much of the money received by the partnership out of the sale of the remainder of the stock as was equal to the amount of such joint note; (iii) to prove the residue as a debt against the estate of the bankrupts and to receive from D.'s estate the amount of the deficiency.

Notes. For the liability of a deceased partner's estate for the debts of the continuing partners, see the Partnership Act, 1890, s. 14 (2): 17 HALSBURY'S STATUTES (2nd Edn.) 588.

Explained: *Middleton v. Pollock, Ex parte Knight and Raymond* (1875), L.R. 20 Eq. 515. Referred to: *Crawshay v. Maule*, ante p. 24; *Braithwaite v. Britain* (1836), 1 Keen, 206; *Chapman v. Beckinton* (1842), 3 Q.B. 703; *Jones v. Mossop* (1844), 3 Hare, 568; *Lodge v. Pritchard* (1863), 1 De G. J. & Sm. 610.

As to set-off of a joint debt and a separate debt, see 14 HALSBURY'S LAWS (3rd Edn.) 634-636, and *ibid.*, vol. 34, p. 400; as to deceased partners, see 28 HALSBURY'S LAWS (3rd Edn.) 493, 494. For cases see 40 DIGEST (Repl.) 420, 421.

Cases referred to:

- (1) *Hoare v. Contencin* (1779), 1 Bro. C.C. 27.
- (2) *Ex parte Stephens* (1805), 11 Ves. 24; 32 E.R. 996, L.C.; 4 Digest (Repl.) 424, 3762.
- (3) *Ex parte Hanson* (1806), 12 Ves. 346; 33 E.R. 131; subsequent proceedings (1811), 18 Ves. 232, L.C.; 4 Digest (Repl.) 424, 3765.

Action by which the plaintiffs Vulliamy (father and son) sought against the assignees of the firm of Devaynes, Dawes, Noble & Co. and against the personal representatives of Devaynes (a deceased partner in the firm) either to have certain stock re-transferred, or its amount specifically replaced; or else to be permitted to set off separate notes of the father, as well as the joint note given by both plaintiffs, against so much of the produce of the stock as should be sufficient to answer them.

In 1793, William Devaynes, Thomas Croft, John Dawes, and the defendant Noble, carried on business as bankers, in partnership, under the firm name of Croft,

Devaynes & Co. During that year and the following year, the plaintiff Benjamin Vulliamy, who kept cash with the said bankers on his own private account, borrowed from them several sums of money to the amount of £8,500, and to secure the payment of the money so borrowed, signed notes drawn by Noble (one of the partners) by which he engaged to pay to the partnership the several sums so borrowed on their re-transferring to him (the plaintiff) or his order certain proportional sums of stock, transferred by the plaintiff into the name of Noble (amounting together to £8,700, £4 per cent. bank annuities, and £1,425 £3 per cent. reduced annuities), as a collateral security for the payment of the notes. The notes were dated respectively May 10, 1793, Nov. 1, 1793, and Jan. 6, 1794, and were for the respective sums of £850, £770 10s., and £6,916 12s. 8d.

In September, 1796, Thomas Croft (one of the partners) retired, and W. Close entered into the partnership from which time the business was carried on by Devaynes, Dawes, Noble, and Close until Michaelmas, 1800, when R. H. Croft was taken into the partnership. At Michaelmas, 1803, Close retired, and Barwick was admitted a partner, after which the business was carried on under the firm name of Devaynes, Dawes, Noble & Co., and continued to be so carried on by the surviving partners without any alteration of name after the death of Devaynes (another of the partners), which happened on Nov. 29, 1809. The bill charged that the name of the deceased partner continued to be used in the firm, as aforesaid, with the permission of his representatives.

The bill further stated, that from the respective times of their several transfers of stock, the first named plaintiff continued to keep a private cash account with the firms of Croft, Devaynes & Co., and Devaynes, Dawes, Noble & Co. as his bankers, down to May 2, 1810, when he closed his private account with the partnership, as after mentioned; and, during all that time, Noble received the dividends of the stock transferred, and carried the same to the plaintiff's account in the partnership books.

The bill then proceeded to state, that in 1806 both the plaintiffs (father and son) borrowed from the banking-house or firm of Devaynes, Dawes, Noble & Co., £300, for which they gave their joint note, dated Oct. 2, 1806; in 1807, the further sum of £990, for which they gave their joint note, dated Sept. 2, 1807; and in 1809, the further sum of £3,000, for which they gave their joint note dated May 2, 1809; amounting together to £4,290, so borrowed by the plaintiffs on their joint account. It was further stated that Vulliamy, the father, paid off all the £8,500 borrowed by him on his private account (except £2,750) on April 5, 1809, and took up his former notes, and gave to the firm of Devaynes, Dawes, Noble & Co. a fresh note for the sum then remaining due, as follows:

“London, April 5, 1809. I promise to pay to the order of Messrs. Devaynes, Dawes & Co. the sum of £2,750, with lawful interest, for value received, they transferring to me, or my order, £8,700 4 per cents., and £1,425 reduced annuities, which they hold as a collateral security. B. Vulliamy.”

This note was written by Noble, and signed by the plaintiff, and by him delivered to Noble for the use of the partnership, and kept by them until the amount was paid off by the plaintiff on May 2, 1810, when the note was re-delivered to him, whereby all the private debt of the plaintiff for securing whereof the stock had been so transferred became satisfied and extinguished, and the stock ought to have been re-transferred; but the stock being considered by the banking-house to remain in Noble's name as a collateral security for the money advanced to both plaintiffs on their joint notes, and the plaintiff Vulliamy, the father, having a high opinion of the honour and solvency of the house, he (the plaintiff) did not require a re-transfer.

On Aug. 1, 1810, a commission of bankrupt issued against the firm of Devaynes, Dawes, Noble & Co., under which the defendants, Wilson, Morris, and Dorian, were appointed assignees; and, upon the failure of the firm, the plaintiff Vulliamy,

A the father, applied to Noble respecting the stock so standing in his name and transferred to him as aforesaid, and demanded a re-transfer, when Noble, to the plaintiff's great surprise, confessed that he had, with the consent and for the use of the banking-house, and during Devaynes's lifetime, sold out the whole stock except £1,444 8s. 10d. 4 per cents. and £1,085 19s. 5d. reduced 3 per cents., which last sums he admitted were then still standing in his name, part of the stock so transferred to him as aforesaid, and which the plaintiff required to have re-transferred to him accordingly.

B The bill then charged, by way of evidence, that the stock transferred to Noble was the property of Vulliamy, the father, and held by the firm only in trust for him, and as a security for payment of the money due from him to them, and that they regularly gave the plaintiff credit in their books for the dividends, down to the time of their bankruptcy. It further charged that the whole of the stock (except the £1,444 8s. 10d. 4 per cents. and £1,083 19s. 5d. 3 per cents.) had been sold out, and the money arising from the sale thereof received by Devaynes in his lifetime, and by the bankrupts, or by Noble by their direction, and the produce applied to the use of the partnership. Such stock it was alleged was clandestinely and fraudulently so sold out and applied, the plaintiff never having been informed or known about it until after the house had stopped payment, when Noble notified the plaintiff's solicitor. The bill insisted that the £4,290, which remained due from the plaintiffs on their joint notes, ought to be set off against the produce of the stock so sold and disposed of, the amount whereof was charged by the elder plaintiff to constitute a debt to him from the firm. It charged, moreover, that the personal estate of Devaynes was and ought to be considered liable to the elder plaintiff for the amount of the stock sold out, or for so much as the said plaintiff could not set off against the demand of the bankrupt in respect of the joint notes of himself and the co-plaintiff.

E The bill consequently prayed that the plaintiff might be declared entitled to have the whole of the stock so transferred by him to Noble for the purposes aforesaid replaced by the assignees by and out of the estate of the bankrupts, in the first instance, or by the defendants Cockerell and Booth (Devaynes's executors) out of the assets of their testator; that accordingly the sums of £1,444 8s. 10d. 4 per cents. and £1,083 19s. 5d. 3 per cents., residue of such stock, might be repaid and re-transferred to the plaintiff; and that an account might be taken of the stock sold out, and so much as should appear to have been sold out upon such account taken might be re-purchased by the assignees or by Devaynes's executors out of his assets, and transferred to the plaintiff; and, in case he could not have the amount thereof so re-purchased, then that he might be declared entitled, and be permitted, to set off so much of the money which had been received by Noble and his partners as should be sufficient to answer and satisfy the amount of the joint notes of the plaintiffs, or so much as was then due in respect thereof, and that the notes might thereupon be decreed to be delivered up, and the plaintiff Vulliamy, the father, declared a creditor upon the estate of the bankrupts for the residue; and, in case the court should be of opinion that the said plaintiff could not be permitted such set-off, then that he might be declared a creditor for, and entitled to prove under the commission, the whole amount of the produce of the stock so sold and disposed of, and entitled to receive satisfaction out of Devaynes's personal assets for so much of the stock as should appear to have been sold and applied to the use of the firm in his lifetime and while he continued a partner, so that he might receive the full amount thereof in manner aforesaid; that the defendants (the executors of Devaynes) might, therefore, either admit assets or account in the usual manner; and that all necessary directions might be given accordingly. The bill likewise prayed an injunction from sale of the stock remaining in the name of Noble, and from all proceedings at law in respect of the joint notes of the plaintiffs.

I The defendants, Noble and the assignees of the bankrupts, by their answer, admitted that from the time of the respective transfers of stock made to Noble as

aforsaid, to the months of April and June, 1803, respectively, the defendant Noble received the dividends, and the same were entered in the books of the partnership to the account of the plaintiff, the father, and carried to his credit. They admitted the borrowing of the three several sums of £300, £990, and £3,000, by both plaintiffs, and that for securing the payment of the last-mentioned sum, they gave their joint note dated May 6, 1809, as aforsaid; but said that, for securing the two first sums, the plaintiff, the father, gave two separate notes signed by himself only; and they admitted that the said plaintiff had since paid off the whole amount of his separate debts to the partnership, as in the bill mentioned, except the amount of the two last-mentioned notes; and that the same, together with the amount of the joint note for £3,000, and interest upon all of them, still remained due and owing from the plaintiffs respectively.

They admitted that no part of the stock transferred by the plaintiff to Noble had ever been re-transferred to the plaintiff; and Noble said that the reason why the same had not been re-transferred during the solvency of the house, was because the plaintiff had always remained indebted to the house during that time. They said, that while the stock remained in Noble's name, no separate or particular account was kept thereof, but the stock was mixed with other stock in the same respective funds standing in the name of Noble, which belonged to the partnership and to various other persons who had accounts with the partnership; and that the whole of such stock was carried to the general accounts of the respective funds. They also said that in June, 1803, there was standing in Noble's name, on such mixed or general account, £24,044 8s. 10d. 4 per cents., and £76,277 13s. 10d. 3 per cents., and the further sum of £12,000 4 per cents., in the name of some one or more of the remaining partners of the firm, and on account thereof; which several sums of £24,044 8s. 10d., and £12,000 4 per cents., and £76,277 13s. 10d. 3 per cents., were then respectively applicable to the payment, as well of the stock transferred by the plaintiff, as of that belonging to the several other persons who had claims thereon respectively. Between the month of June, 1803, and the month of November, 1809, the defendant Noble at times received into his name several other sums of the like respective stocks, both on account of the banking-house and of other persons, which were in like manner carried to, and blended with the two general accounts aforsaid; and that he also, during such last-mentioned period, from time to time sold or transferred out of the said mixed or general funds, various parts thereof, as occasion required, so that the aggregate amount of the said funds was, during all that time, continually varying. They admitted that there were then standing in the name of Noble, the £1,444 13s. 10d. 4 per cents., and £1,083 19s. 5d. 3 per cents., stated in the bill, and that the same had always been standing in his name, ever since the plaintiff's stock had been so transferred to him; but they said that the same were the respective balances of the said two general accounts, and appeared to have arisen from various purchases and sales of such stocks respectively, with which the plaintiff's original stock had no connection.

They admitted that the whole produce arising from the sale of the plaintiff's stock was received by, and applied to the use of the firm, and that the interest and dividends thereof, after the same was sold out, were continued to be carried to the plaintiff's credit on his account with the firm; but they denied that this was done with any fraudulent design towards the plaintiff, and said that the firm was always ready, during its solvency, to have re-transferred the same to the plaintiff at his request, and on payment of what was owing from him; and they submitted whether, under all the circumstances, the plaintiff was entitled to such set-off as was claimed by the bill, and whether the defendants, notwithstanding such sale, ought not to be permitted to sue the plaintiffs respectively on the notes so due as aforsaid, and particularly upon this joint note for £3,000, if they refused to take up and pay the same. They insisted that the plaintiff was not entitled to have the £1,444 8s. 10d. 4 per cents., and £1,083 19s. 5d. 3 per cents., remaining in Noble's name, transferred to him, inasmuch as these sums were not (except as to some very small part

A thereof parcel of his original stock, but had arisen, in the manner before mentioned, from subsequent purchases and sales of stock unconnected therewith; but that they ought to be considered as part of the general estate of the bankrupts, and the plaintiff only entitled to prove under the commission in respect of such demand as he might be able to establish thereon.

B There was evidence in the cause, the material facts of which may be collected from the arguments and the judgment.

Sir A. Pigott, Trower and Roupell for the plaintiffs.

Sir S. Romilly and Palmer for the defendants, the assignees.

Leach, Wetherell and Abercrombie for the defendants (representatives of Devaynes).

C Dec. 9, 1817. **LORD ELDON, L.C.**—This is a bill by creditors seeking relief due to them under every consideration which moral justice can furnish, but whether it is sought consistently with the principles of a court of equity is another question. The object of the bill is either to have the stock re-transferred or its amount specifically replaced; or else to be permitted to set off separate notes of the father, as well as the joint note given by both plaintiffs, against so much of the produce of the stock (sold out under circumstances the most fraudulent) as should be sufficient to answer them. It is insisted that this stock, although the sole property of Vulliamy the father, may be considered as connected, not only with the separate estate of the father, but with the joint debt of the father and son—not indeed at law, for it is not contended that, at law, it can be so considered; but in equity. The bill then goes on to pray that, if this set-off be allowed, the smaller, but if not, the larger sum may be permitted to be proved against the estate; and, in case the sources should altogether be insufficient to make good the entirety of the plaintiff's demand, then that he may be declared entitled to have satisfaction out of Devaynes's assets for the remainder. The relief is prayed in this form because it is admitted that if Devaynes's estate is liable to Vulliamy it will also be entitled to throw the burden, as far as it is possible, on the estate of the bankrupts.

F There is a peculiarity in the circumstances of the present case which distinguishes it from every other in which the liability of a deceased partner has come in question. It is an admitted fact that no notice was given of the dissolution of the partnership by the death of Devaynes. But I conceive that the death of a partner, of itself, works a dissolution of the partnership; and I am not prepared to say, notwithstanding all I have read on the subject, that a deceased partner's estate becomes liable to the debts of the continuing partners for want of notice of such a dissolution. If, however, a surviving partner deals with the customers in the character of executor as well as partner, that circumstance makes it a different question; for as executor, he has a right to bind his testator's estate. The present case is, therefore, to be considered, not only with reference to the general doctrine, but with reference also to this special circumstance.

H The question as to the stock is of very great importance, as it may affect other cases as well as the present. It seems that this partnership house was in the habit of taking stock by way of security from its customers, under an obligation that the stock so taken should remain in their hands as a security, not to be dealt with except by the authority of the person making each several transfer; and that distinct accounts should be kept of the general concerns of the house, and of the trust stock.

I The question in the present case arises through the acts of Noble, which must be taken to be the acts of the house. He sells out £6,000 of the stock so committed to him; and the question is: Who are the particular individuals, parties to the trust account, who are to be prejudiced by this act—an act, which does not destroy the interest of all, but part of the interest of each? After this first operation, he proceeds, however, so far in the sales of stock, as to have reduced the amount in his hands at one time to £444. Between that period and the time of the bankruptcy

the amount of stock remaining frequently varied—it was sometimes more, sometimes less. It turns out, however, in point of fact, that the 4 per cent. stock of all the other persons who had advanced stock to the partnership was ultimately replaced to their account; and, to disembarass the case of this part of the circumstances attending it, we will now suppose that all the stock was so replaced with the exception of Vulliamy's, which still remained in the proportion of £1,420 to £8,700.

This introduces a very peculiar novelty into the case. It has been insisted that the court cannot decree the re-transfer of this stock, or restrain the assignees from applying it, unless the plaintiff is able to show either its identity, or a specific appropriation; and, if there were no particular circumstances in the case, it would certainly be matter of some novelty to say that, if a man has sold stock in breach of trust, and afterwards buys other stock of the like description, any part of the stock so purchased can be considered as specifically the property of the cestuis que trust. I cannot see how, in a case thus generally circumstanced, it could be so considered, unless other cases which have been decided in this court should be taken as having established that proposition. But in the present case, it is impossible that I should take the stock now remaining in the hands of the assignees to be the same identical stock transferred by Vulliamy, for it is palpably not so. With respect to appropriation, though it is difficult to say that the stock re-purchased was specifically appropriated to supply the place of that which had before been sold out, I do not think that I am stretching the principle too far when I say, if the transactions prove that the banking-house intended Noble to be a trustee for the benefit of persons depositing stock by way of security for advances made by them, then the cestuis que trust, have a right to consider the stock re-purchased as being distinguished by a species of earmark in their favour. Upon this part of the case, I am consequently of opinion that Vulliamy has a right to the stock remaining in the hands of the bankrupts at the time of the bankruptcy.

With regard to the question of set-off, I must require the facts of the case to be laid before me more clearly in order to enable me to decide it with satisfaction to myself. But I will now make such observations as have occurred to me respecting it, begging to be set right if I have mistaken any of the circumstances when it comes on again to be argued.

I have no doubt that, with regard to so much stock as was sold out contrary to the trust reposed in Noble, the person who was the owner of the stock is now a creditor of the house for the amount of it. The difficulty throughout this part of the case is that in which Vulliamy has involved himself, owing to the circumstance of his having signed papers (which cannot but be taken against him), stating the particular purposes for which this stock was specifically pledged. Notwithstanding what is represented as matter of fact arising out of the banker's books, it cannot be doubted that, in 1809, there was an engagement to re-transfer the stock upon payment of the £2,750 then remaining due from Vulliamy to the banking-house. Noble's declaration that the stock would have been transferred if the whole of the debt due to the house had been paid, I consider as amounting to nothing. A banker is likely enough to say so; and I take that as no evidence whatever of the fact. There is no doubt that, in point of law, actions might have been brought, and that such actions could not have been met by a set-off, but only by bringing other actions. I apprehend also, supposing Vulliamy had died without assets to pay his debts, that Noble would have been a trustee for Vulliamy and his creditors, and not for the banking-house, and that the stock would have constituted a part of Vulliamy's general assets. It is quite clear, therefore, if the transaction had been then put an end to, that, upon Vulliamy's paying the £2,750 remaining due on the security of the stock, he would have been a creditor for money had and received, to the amount of the money which had been produced by the sale of the stock.

If to that amount, then the question arises how the debts which Vulliamy owed to the house, or which the house owed to Vulliamy, are to be arranged. At law,

A a joint debt cannot be set off against a separate debt. Therefore, the point of law is against his claim, and it is incumbent on him to make out that, with reference to this simple state of facts, there is some principle of equity different from the legal principle. If this can be so maintained, I shall be glad to have it so. On the other hand, there is no doubt that, under particular circumstances, a joint debt may be set off against a separate debt, in equity. If there are such particular circumstances in the present case as would justify the interference of a court of equity in allowing a set-off, I should be glad to have them very clearly and concisely brought before me. If you can show a clear and distinct series of transactions, in which both the Vulliamys, father and son, have had credit given to them, as credit was given to the father only, you have certainly very strong evidence of such a case as would authorise a court of equity in allowing the set-off.

C But there are other points in the case to which it may be expected that I should advert. It has been stated that, because Barwick came into the house at the time when he entered it, that circumstance makes a difference—that he assumed the debts of the house, and is as much bound as the others. I think not; there is no reason to make Close a party. I take it as a fact that there was in his time a conversion, and Barwick must be considered as having taken upon himself all obligations that Close was under.

D The remaining question is: Has the plaintiff a right to go against Devaynes's estate for the deficiency? With regard to that question, I cannot take it that Devaynes was not to be considered as at the time of his death under an obligation to replace the stock which had been sold out in his lifetime. It cannot be disputed that he was subject to such liability. Nor can it any more be made a question that a deceased partner's estate must remain liable in equity, until the debts which affected him at the time of his death have been fully discharged. There are various ways in which the discharge may take place; but discharged they must be before his liability ceases. I remember a time when the point was doubted, as in *Hoare v. Contencin* (1), but it is now completely settled that the representative of a deceased partner may be sued in equity. This, however, cannot take place if the debt has been in any manner discharged; and it was, therefore, very fairly urged that this debt had actually been discharged in May, 1810, when Vulliamy, with the note in his hand, paid the £2,750, but did not call for a re-transfer. It cannot be stated that he was not then in a condition to call for a re-transfer, because he did not know that the stock was no longer where he had placed it. On the contrary, the other parties did know that the stock was not there. Devaynes, at the time of his death, knew that the stock was not there. How can it be said that under such circumstances a new contract is to be inferred from the silence of Vulliamy? If Vulliamy had asked for the stock, Noble must have told him there was none; and that is direct evidence that at the death of Devaynes all the then partners were debtors to Vulliamy for money had and received. Am I to say, then, that the obligation Devaynes was under at his death is cancelled, because Devaynes did not inform Vulliamy of the breach of trust committed in his lifetime? I, therefore, think, that Vulliamy has made good his claim against Devaynes's estate for the amount of the deficiency.

As to the point of set-off, I repeat that I wish it to be referred to again.

I Dec. 12, 1817. The question of set-off now came on to be argued as desired by the LORD CHANCELLOR.

Sir A. Piggot, Trower and Roupell for the plaintiffs, insisted that this case could not be distinguished in principle from that of *Ex parte Stephens* (2), where the decision turned expressly on the fraud which had been committed, and not on the notion of establishing any abstract rule of equity, as differing from the rule of law with regard to set-off in general. They went on to compare the two cases, and cited *Ex parte Hanson* (3) as confirmatory of the same principle, contending that there could be no higher equity in the case of a surety, than of a co-obligor, and

that it would be contrary to every rule of justice to adopt any distinction between them. They also insisted, that being a case of such gross fraud, the plaintiffs were entitled to costs out of the bankrupt's estate. The only point in which this case differed from *Ex parte Stephens* (2) was, that here it was a joint note, in the other joint and several, which made the present case the stronger of the two in favour of set-off. A

Wetherell for Devaynes's executors, argued in favour of the same proposition. B
Sir S. Romilly and *Palmer* for the defendants, the assignees.

LORD ELDON, L.C.—*Ex parte Hanson* (3) does not apply to the present case. There A. and B. gave a joint undertaking in respect of a debt due from A. only. This was quite different from a case of set-off.

But *Ex parte Stephens* (2) went upon this. There the sister of a person who was debtor to the banking-house gave her personal undertaking for the debt of her brother, being at the time ignorant that the bankers had money of hers in their hands, for which they were accountable, and which she prayed by her petition might be set off against that particular debt. That is precisely the present case. The plaintiffs are right, therefore, in this point as to the set-off, and must have their costs, to which the two estates, of the bankrupts, and of Devaynes, must contribute proportionally. C
D

DAUBENY v. COCKBURN

[ROLLS COURT (Sir William Grant, M.R.), July 9-12, 26-29, 1816]

[Reported 1 Mer. 626; 35 E.R. 801]

Power of Appointment—Fraud on power—Appointment to appointee on understanding that appointee would assign part of fund to stranger—Effect of payment of valuable consideration by assignee—Avoidance of fraudulent agreement in toto. E
F

An appointment made by the donee of a power is fraudulent and void if it is made on condition that the appointee assigns part of the fund to a stranger. The payment of a valuable consideration by the assignee cannot validate such a fraudulent appointment, and so cannot make a stranger become the object of a power created in favour of children. Where there is fraud the payment of money cannot make the appointment cease to be fraudulent, although it may make it cease to be voluntary. No part of a fraudulent agreement can be supported except where a consideration has been given that cannot be restored, and it has, consequently, become impossible to rescind the transaction in toto and to replace the parties in their original situation. G
H

The settlor made a voluntary settlement of personal property in trust for such one or more of his children as he should appoint. He appointed part of the fund to one child on a secret understanding that that child would assign part of the fund to or in favour of a stranger.

Held: this appointment was a fraud upon the settlement and void, not only to the extent of the sum assigned back, but in toto. I

Notes. Distinguished: *Rowley v. Rowley* (1854), Kay, 242. Considered: *Beddoes v. Pugh* (1859), 26 Beav. 407. Distinguished: *Topham v. Portland* (1863), 1 De G.J. & Sm. 517. Considered: *Whelan v. Palmer* (1888), 39 Ch.D. 648; *Cloutte v. Storey*, [1911] 1 Ch. 18. Referred to: *Wade v. Cor* (1835), 4 L.J.Ch. 105; *Askham v. Barker* (1853), 17 Beav. 37; *Viant v. Cooper* (1897), 76 L.T. 768; *Re Lawley, Zaiser v. Lawley*, [1902] 2 Ch. 673; *Saunders v. Shafto*, [1905] 1 Ch. 126; *O'Grady v. Wilmot*, [1916] 2 A.C. 231.

A As to fraud on a power, see 30 HALSBURY'S LAWS (3rd Edn.) 275-281; and for cases see 37 DIGEST (Repl.) 375 et seq.

Cases referred to :

- (1) *M'Queen v. Farquhar* (1805), 11 Ves. 467; 32 E.R. 1168, L.C.; 37 Digest (Repl.) 390, 1215.
- B** (2) *Turton v. Benson* (1719), 10 Mod. Rep. 445; 1 P. Wms. 496; Prec. Ch. 522; 1 Stra. 240; 2 Vern. 764; 88 E.R. 803, L.C.; 7 Digest (Repl.) 230, 676.
- (3) *Cator v. Burke* (1785), 1 Bro. C.C. 434; 28 E.R. 1222, L.C.; 7 Digest (Repl.) 230, 680.
- (4) *Walker v. Burrows* (1745), 1 Atk. 93; 26 E.R. 61, L.C.; 25 Digest (Repl.) 210, 279.
- C** (5) *Holloway v. Millard* (1816), 1 Madd. 414; 56 E.R. 152; 25 Digest (Repl.) 203, 237.
- (6) *Lane v. Page* (1754), Amb. 233; 27 E.R. 155; 40 Digest (Repl.) 643, 1352.
- (7) *Aleyn v. Belchier* (1758), 1 Eden, 132; 28 E.R. 634; 40 Digest (Repl.) 641, 1333.
- (8) *George v. Milbanke* (1803), 9 Ves. 190; 32 E.R. 575, L.C.; 25 Digest (Repl.) 174, 31.
- D** (9) *Alexander v. Alexander* (1755), 2 Ves. Sen. 640; 28 E.R. 408; 37 Digest (Repl.) 261, 203.
- (10) *Hamilton v. Royse* (1804), 2 Sch. & Lef. 315; 37 Digest (Repl.) 360, *153.
- (11) *Palmer v. Wheeler* (1811), 2 Ball & B. 27, 29, 30; 37 Digest (Repl.) 391, *198.

E Bill for a declaration and account of trust moneys filed by representatives of a purchaser for value without notice.

James Cockburn, having one son (the defendant, Sir William Cockburn) and two daughters, and being possessed of £10,000 which he had lent on various securities in the names of W. Froggatt and of his daughter Margaret, made a voluntary settlement, dated Mar. 5, 1784, by which it was declared that the said Froggatt and Margaret Cockburn should stand and be possessed of the fund and of the securities whereon it was invested upon trust, as to £2,000 for the said Margaret, and as to the remaining £8,000 to pay the interest to the settlor for life; after his decease as to £2,000 (part thereof) for his daughter Mary, and, as to £1,000 (other part thereof) for his son William, and, as to the residue :

F

"Upon trust for all and every or such one or more of the child and children of the said James Cockburn as he the said James Cockburn should direct or appoint,"

G

in default of appointment, for his said son William, his executors, etc. Margaret Cockburn married Cole, and received her £2,000 portion under the settlement. The £1,000 portion for Sir William Cockburn was also raised and paid to him in the lifetime of his father. Mary died before her portion was paid.

H A deed poll, dated May 19, 1796, under the hand and seal of James Cockburn, recited that Margaret had relinquished her trust to Sir William, who, together with Froggatt, became and then stood possessed of the remaining sum of £7,000 and interest and the securities for the same upon the trusts of the settlement, and that, upon the death of James Cockburn, £2,000, part of the £7,000 would go to the representatives of his deceased daughter Mary, and £5,000 would thereon become payable to or between such one or more of the children of James Cockburn as he should appoint, and further reciting that James Cockburn was desirous of settling and had agreed to appoint the £5,000 absolutely to his daughter Margaret Cole as thereafter mentioned. It was witnessed that, in pursuance of such desire and in consideration of the natural love and affection which he bore towards his daughter, he, James Cockburn (in pursuance and execution of the recited power or authority, and by force and virtue thereof) did thereby absolutely and irrevocably direct, limit, and appoint all that sum of £5,000 as the clear residue or unappointed remainder of the trust moneys and the securities, etc., and the interest dividends,

I

etc., in reversion or remainder expectant on his decease unto his daughter Margaret Cole, her executors, administrators, or assigns, absolutely, but, nevertheless, so that Margaret Cole might, notwithstanding her coverture, by any deed under her hand and seal, attested as therein mentioned, appoint the £5,000 to or in trust for any person or persons in such proportions and for such intents and purposes, etc., as she might think fit. James Cockburn declared that the trustees should thenceforth stand possessed of the £5,000, etc., in reversion, as aforesaid, in trust for Margaret Cole, or such person or persons as she should in manner aforesaid appoint, and, in default of appointment, should pay or assign the same to Margaret Cole, her executors or administrators, absolutely.

By indenture dated May 20, 1796 (the day following that of the deed poll), between Margaret Cole, of the one part, and the defendant Mrs. Ellis, then Judith Land spinster, of the other part, it was recited that Margaret Cole was desirous and had agreed to settle and assure £2,000 (part of the £5,000) to the said Judith for her own use and benefit. It was witnessed that, in pursuance of such desire or agreement, "and in consideration of five shillings and for other good considerations" she, Margaret Cole, did, in pursuance of the power given to her by the deed poll, absolutely and irrevocably appoint the £2,000, together with the full benefit of the securities upon which the £5,000 was or might be invested (so far as related to the security of the £2,000) and all other the produce, etc., thereof, in reversion, unto the said Judith, her executors, etc., so as that she might at any time thereafter appoint or bequeath the same in such manner as she should think proper, and, in default of appointment, absolutely.

By indenture, dated Feb. 7, 1797, between Thomas Cole and Margaret his wife, of the one part, and Andrew Daubeny, of the other part, reciting the settlement of 1784 and the deed poll and that Margaret Cole had then made no appointment of the trust moneys, but, having occasion for money and Andrew Daubeny having agreed to lend her £2,000 on the security of the trust moneys, she, Margaret Cole, and Thomas Cole her husband had agreed to appoint the same to him Andrew Daubeny, it was witnessed that in consideration of £2,000, she Margaret Cole did, in pursuance of the power given her by the deed poll, appoint, and the said Thomas Cole assigned and transferred, the said £5,000 (trust moneys) and the securities, etc., to Andrew Daubeny, his executors, etc., subject to redemption on payment of the £2,000 and interest.

By another indenture, dated Mar. 12, 1799, between Andrew Daubeny, of the first part, Thomas Cole and Margaret his wife, of the second part, and Joseph Pitt, of the third part, Andrew Daubeny, Thomas Cole, and Margaret, in consideration of £2,600, assigned to Pitt the sum of £4,000, part of the £5,000, to hold to Pitt, his executors, etc., as his and their own proper moneys and effects for ever. By a subsequent deed Pitt declared himself to be a trustee for Daubeny of the moneys so assigned.

James Cockburn died in 1809, and the bill, filed by the representatives of Daubeny against Sir William Cockburn (the surviving trustee in the settlement), and against Ellis and his wife, late Judith Land, charging (as against the latter) that the appointment made by Mrs. Cole in favour of Judith was purely voluntary, and void as against the plaintiffs (the representatives of a purchaser for valuable consideration without notice), prayed a declaration accordingly, an account, and payment of the £4,000 with interest by the defendant Sir William Cockburn, or, if the court should be of opinion that any valid appointment had been made as against the plaintiffs of any part of the trust moneys in favour of the defendant Judith, then for an account of the trust moneys come to the hands of the defendant Sir William Cockburn, and that he might be decreed to pay thereout what should appear to be due both to the plaintiffs and the other defendants.

The defendant Sir William Cockburn, by his answer, rested on the absolute invalidity of the appointment by James Cockburn to his daughter Mrs. Cole as connected with the subsequent appointment by the latter in favour of Mrs. Ellis.

A The defendants Ellis and wife contended that the appointment to Mrs. Cole was a valid appointment, subject to an agreement or understanding with the father that she should forthwith execute an appointment of part of the trust moneys to Mrs. Ellis. The last-mentioned defendant lived with James Cockburn for many years before his death, and he, having always intended to make her some provision, gave her a bond for £1,000 which was afterwards delivered up to be cancelled in consequence whereof he subjected the trust moneys to Mrs. Cole for the purpose (among others) of enabling her to make an appointment of a part thereof to or for the benefit of the defendant, and, in pursuance of that intention, she did, with the knowledge and concurrence of James Cockburn, on the next day after the appointment had been executed by him in her favour, execute the indenture of May 20, 1796.

B On behalf of the defendant Sir William Cockburn, Mrs. Cole was examined as to the circumstances under which the transactions of May 19 and 26, 1796, took place. Her evidence was that for several years after her marriage with Cole (who was since deceased) she had kept up no intercourse with her father who, in the course of the same month of May, meeting with Cole in Bristol, invited him to his house, and told him that, being then in immediate want of money, he would make an appointment of the £5,000 in favour of his daughter on condition of her raising thereout the sum of £400 for him, James Cockburn, and assigning or making over the further sum of £1,000 to or in favour of Mrs. Ellis. When this proposal was communicated to her by her husband she was at first very averse from complying with it, but afterwards she consented, and, accordingly, executed the assignment to Mrs. Ellis, which, at the time of the execution, she believed to be an assignment of the sum of £1,000 only, part of the £5,000, according to the terms of the proposal, the deed not having been read over to her previously to her signing it. The subsequent assignment to Daubeny, by way of mortgage, was in further pursuance of the same arrangement, the sum of £400, part of the money thereby raised, having been so raised for and paid over by Cole to James Cockburn for his own use and benefit agreeably to the tenor of the proposal made by him. The two deeds of May 19 and 20, 1796, were intended to be one and the same transaction. James Cockburn was present at the execution of the last-mentioned deed by her (the witness), and, after she had executed it, he took it away. She had no consideration for executing the deed other than such interest as she took under the appointment of May 19.

G *Hart and Spranger* for the plaintiffs: This is the case of a father who, having made a voluntary settlement for his family by which certain portions are provided for each of his children and the residue vested in trustees upon trust for such one or more of his children as the settlor shall appoint, thinks proper, twelve years after the date of the settlement, to execute that power of appointment in favour of one child exclusively of the others. There is no doubt that this would be a valid execution of such a power, and that the son of the settlor in whom the property becomes vested as one of the trustees under the settlement would take the property as a trustee only for the benefit of his sister, the appointee, and her assigns, in which situation are the present plaintiffs. This is a clear equity in their favour, but then the son, the defendant Sir William Cockburn, sets up a secret agreement between the father and daughter by reason of which the appointment in her favour is absolutely invalid. It is clear, however, that, as against the settlor himself, this transaction could not have been set aside, and admitting that where children are purchasers for a valuable consideration no bargain can be made by the parent in prejudice of the settlement, this principle does not apply where the settlement itself is purely voluntary on the parent's part. At all events, a purchaser for valuable consideration without notice cannot be affected by such a bargain, and we are entitled to say on the part of the plaintiffs that there is no evidence of Daubeny, the purchaser, having had any notice of, or any reason whatever to

suspect, the bargain which is set up by way of answer to their claim. No case is to be found precisely similar in all its circumstances to the present, but the circumstance of the transmission of title for a valuable consideration, and without notice, is sufficient to support the title: *M'Queen v. Farquhar* (1); SUGDEN ON POWERS 402. A

Sir Samuel Romilly and Roupell for the defendant, Mrs. Ellis.

Sir Arthur Pigott, Bell and Blake for the defendant, Sir William Cockburn: The evidence of fraud accompanying this transaction does not extend to affect the plaintiffs as representatives of a purchaser for valuable consideration without notice, but in answer to this it must be observed that the assignment was of a chose in action and that whoever takes such an assignment must take it subject to the equities already subsisting: *Turton v. Benson*; *Cator v. Burke* (3). From this it follows that, if a good defence could have been made against Mrs. Cole, the same defence is equally valid against a purchaser of her interest. The argument in favour of the purchaser must suppose that Mr. Cockburn, who made the settlement, was himself the person who afterwards executed the conveyance, and, if it were so and the subject of the conveyance were real estate instead of a personal chose in action, as in the present case, no doubt the statute of Elizabeth [Fraudulent Conveyances Act, 1571, or that of 1584] would have protected the bona fide purchaser. But how does it apply to the present case? A father, not indebted at the time, makes a voluntary settlement of personal property in favour of children. This cannot be affected even in favour of subsequent creditors: see *Walker v. Burrows* (4); *Holloway v. Millard* (5). The purchaser in this case does not, however, claim under the settlor of the property, but under his appointee by virtue of the power which the settlor has himself created. The single question, therefore, in this case is whether the instrument under which the purchaser claims was a fraudulent execution of the power, and it makes no difference whether the settlement was or was not merely voluntary. This purchaser has not the legal estate which is in the trustees of the settlement, and without the legal estate he can have nothing. The money is vested in the hands of these trustees, and it is there for the benefit of that person who shall appear to be entitled to it. The defendant Sir William Cockburn unites in himself the characters of trustee and cestui que trust. He is both the legal and equitable owner. That a man is a purchaser for valuable consideration may be good by way of defence, but it is totally insufficient to support a claim to property in the hands of another who holds by a prior title. Neither is it a question of notice or no notice. The execution of this power of appointment could create no legal interest in the fund, it being personal estate in the hands of trustees. In *M'Queen v. Farquhar* (1), the appointor and the appointee joined in the sale, and LORD ELDON was of opinion that there was not enough in the transaction (which otherwise appeared to be fair) to raise the imputation of fraud, and overruled the objection taken on the part of the purchaser. That case has no application to the present, where neither assignor nor assignee have the legal interest. The paramount title of a purchaser for valuable consideration arises out of the statute. But the Fraudulent Conveyances Act, 1584 [repealed by Law of Property Act, 1925] which was passed in favour of purchasers, only affects real estate; and the Fraudulent Conveyances Act, 1571 [repealed by Law of Property Act, 1925] which affects personal estate, is in favour of creditors, and does not extend to the case of a purchaser. B C D E F G H I

SIR WILLIAM GRANT, M.R.—Upon the two first points in this case I am ready to give my opinion. There is a third, which I wish to be further argued.

In the first place, it is impossible to doubt that the two deeds (of May 19 and 20, 1796) were parts of the same transaction, and that the appointment to Mrs. Cole was made on condition of her subsequent appointment to Mrs. Ellis. It was, therefore, pro tanto an appointment to the father himself or to a perfect stranger, and, as such, clearly void. Secondly, that the original settlement was merely

A voluntary can make no difference. From the moment the deed was executed, he was as much bound by it as if it had originated in reciprocal contract.

The only question that remains is whether the appointment is void in toto or in part only, and, as to this, it is said that fraud vitiates the whole transaction. I thought the argument strong in support of this proposition, but, on looking into the cases, I find two in which fraudulent appointments have been only partially set aside. In *Lane v. Page* (6) (SUGDEN ON POWERS) the second question was whether the execution of the power was void in toto or good to the extent of the annuity of £20 to the wife who was the legitimate object of the appointment, and it was declared to be good to that extent. In that case LORD HARDWICKE says (Amb. at p. 234):

C "I am not clear that, where there is a power of appointment to children, and part is appointed fraudulently, the whole appointment is void. I cannot say it is so."

D *Aleyn v. Belchier* (7) (SUGDEN ON POWERS, App. 677) was very similar in its circumstances, except that the appointment was made after marriage and it was held sustainable to the extent of the provision made for the wife, but set aside so far as the creditors were intended to derive any benefit from it.

I wish to have it considered whether these cases can be at all, and, if so, how far, and in what respects, distinguished in point of principle from the present. If not, and if the appointment is good to any extent, to that extent the plaintiff must be entitled. But this plaintiff contends for much more. He says that the payment of a valuable consideration sets up the appointment quoad himself as a purchaser. E I cannot, however, think that the payment of a consideration to Mrs. Cole could have any such effect. Setting aside the circumstance that Sir William Cockburn has the legal estate, it is enough for the present purpose that it is not in the plaintiff, and was not in Mrs. Cole, that there are only equities to deal with. If the appointment be such that a court of equity will hold it did not vest anything in Mrs. Cole, how could it divest anything out of Sir William Cockburn? The payment of a money consideration cannot make a stranger become the object of a power created in favour of children. He can only claim under a valid appointment executed in favour of some, or one, of the children. An appointment, at first impeachable as voluntary, may ex post facto be turned into an appointment for a valuable consideration, but that is where a valuable consideration was all that was wanting to have made it good ab initio. As in the case of a conveyance of a man's own property or an appointment of property over which he has a power unlimited as to objects, he who pays a consideration to the voluntary appointee may constructively be held to be in the same situation as if he had in the first instance paid it to him by whom the estate has been granted, or the power executed. F

G This was the case in *George v. Milbanke* (8), where there was an absolute unlimited power of appointment well executed in favour of a volunteer and an assignment by way of mortgage from the appointee. The assignee was held to have a valid claim to the extent of the money advanced by him, and he might, by the payment of a valuable consideration, have acquired an absolute and indefeasible interest in the whole. But, where there is fraud, the payment of money cannot make the appointment cease to be fraudulent, although it may make it cease to be voluntary. It is to be observed, too, that, in *George v. Milbanke* (8), the claim of the assignee was allowed to prevail, not against persons who had antecedently any specific estate or interest in the subject of the appointment, but against creditors who had only a general equity to have what is appointed to a volunteer considered as assets, if wanted, for the payment of debts. LORD ELDON, L.C., after stating the question to be

I "whether, being not a volunteer, but a purchaser, creditors having no specific charge on the property have as good an equity,"

adds (9 Ves. at p. 196): "I think they have not." But, here, Sir William Cockburn

has a specific interest under the deed of 1784 which it is endeavoured to take from him by the posterior equity alleged to arise from the payment of money to Mrs. Cole, to whom, for the sake of the argument, I now assume that no interest whatever passed. If, however, it can be made out that the appointment was good to the extent in which Mrs. Cole was benefited by it, so far the purchaser will be entitled to stand in her place. This is the point which I desire to have further argued.

July 26, 1816. The cause came on again upon the point reserved for argument.

Hart and Spranger for the plaintiffs, cited *Alexander v. Alexander* (9); and see *Hamilton v. Royse* (10) and the cases collected by MR. SUGDEN in his treatise on POWERS (2nd Edn.), p. 400; *Lane v. Page* (6); *Aleyn v. Belchier* (7) in which it was stated to be clear that the party executing the power would not have executed it but with a view of reserving to himself a benefit: so also, *Palmer v. Wheeler* (11).

Sir Arthur Piggott, Bell and Blake for the defendant, *Sir William Cockburn*: In the last case cited the appointee was the person who would have taken in default of appointment. The others are cases of jointure and stand altogether on a different principle, the wife being a purchaser for valuable consideration if she brought a fortune to her husband, or, if not, marriage is itself a valuable consideration. The contract to which she was privy was a fraud, therefore, upon herself only, and the appointment was decreed to be set aside only so far as it was in favour of the donee of the power. The cases in which the execution of powers has been held void only as to the excess are also of a distinct description. As where a parent having power to appoint among children only appoints a part to grandchildren: SUGDEN on POWERS, p. 529, et seq.; or annexes a condition that the child to whom he has appointed shall give to grandchildren. This is a fraud only upon the innocent objects of the power, and its execution is, therefore, held void only for the excess. Here the corrupt contract is of the very essence of the transaction. The one would never have taken place without the other, and the only object of the power deriving any benefit from its execution is herself a party to the fraud committed on all the other objects of it. It is impossible not to foresee the consequences of a court of equity allowing such a contract to take effect. It would be to authorise a species of traffic between a parent and his children, the objects of a power of appointment vested in him—which of them will bid highest for an exclusive preference over the others. If *Alexander v. Alexander* (9) (where, the appointment being made to several objects, some of whom were capable, others not, it was decided that those who were capable should take the whole) were to be held as establishing a principle applicable to cases like the present, then *Lane v. Page* (6) would have been improperly determined, for the wife ought, in that case, to have taken the whole. But, on the contrary, it was held that the fraudulent agreement vitiated the appointment except to the extent of the benefit actually intended for the object of the power. Even as to that, a part of the benefit being contingent and uncertain in amount and a part only immediate and explicit, the validity of the execution was restrained to the latter portion. *Palmer v. Wheeler* (11), so far as it is at all applicable to the present case, is an authority in favour of this defendant. For there the son whom it was attempted to charge with the consequences of the fraud practised as particeps criminis had himself been the subject of fraud and imposition on the part of the parent, and it was expressly on this ground that the appointment, so far as it was for his benefit, was established. No case is to be found which comes up to the present case in all its circumstances, and, in which way soever it is decided, it will unquestionably constitute a leading authority on the subject.

SIR WILLIAM GRANT, M.R.—I thought so much respect due to the dicta imputed to LORD HARDWICKE in *Lane v. Page* (6), as to pause upon the decision of a point with regard to which he seemed to entertain an opinion different from that with which I was impressed. It seemed to me that those dicta could hardly be supposed to refer to a fraud in which the child had no concern, as such a case

A would have been irrelevant to that before him where it was the wife's participation in the alleged fraud that could alone create a doubt whether her jointure could be affected. However, upon principle, I do not see how any part of a fraudulent agreement can be supported except where some consideration has been given that cannot be restored, and it has, consequently, become impossible to rescind the transaction in toto and to replace the parties in the same situation.

B In *Lane v. Page* (6) the subsequent marriage formed such a consideration on the part of the wife. In *Aleyn v. Belchier* (7), where the appointment was subsequent to the marriage, it can hardly be said to have been decided that the appointment was good in any part. For it appears by the Register's Book (SUGDEN ON POWERS, App. 677) that the bill contained a submission to pay the annuity to the wife, and only sought relief against the other objects of the appointment.

C In ordinary cases of fraud, the whole transaction is undone, and the parties are restored to their original situation. If a partially valuable consideration has been given, its return is secured as the condition on which equity relieves against the fraud. But, in such a case as the present, the appointment of any particular proportion to any particular child is a purely voluntary act on the part of the parent, and, although as good, if fairly made, as if the consideration were valuable, yet
D what is there that a court can treat as a consideration which must be restored if a fraudulent appointment be set aside or as incapable of restitution, and, therefore, support the appointment so far as it is for the child's benefit? To say that it is to be supported to that extent would be to say that the child shall have the full benefit of the fraudulent agreement. Mrs. Cole would have all she bargained for, and it would be no hardship upon her that the appointment to Mrs. Ellis should be
E set aside. Either, then, you must hold that a child, giving a consideration for an appointment in its favour, is guilty of no fraud on the power, or you must wholly set aside the appointment procured by the fraud. Although the father, in proposing such a bargain, is much more to blame than the child in acceding to it, still it is impossible to say that an appointment, obtained by means of such an agreement,
F is fairly obtained. It is a fraud upon the other objects of the power, who might not, and in all probability would not, have been excluded, but for this agreement. It is, more particularly, a fraud upon those who are entitled in default of appointment, for non constat that the father would have appointed at all if the child had not agreed to the proposed terms.

G This cannot be likened to the case of a condition introduced into an appointment to which the child is not at all privy. How can it be said that the child in such a case has done, or agreed to do, anything in order to obtain an unfair preference over others? In this case, as far as appears, Mrs. Cole owed everything to the agreement. Be it that the father dictated the terms and that the daughter gave a merely passive assent, I see nothing in the evidence from which I can collect that, but for such assent, any appointment whatever would have been executed in her
H favour. There seems, therefore, to be no ground on which the appointment can, to any extent, be supported. The bill must be dismissed but I do not think it a case for costs.

Bill dismissed.

MORPHETT v. JONES AND ANOTHER

[ROLLS COURT (Sir Thomas Plumer, M.R.), February 25, 26, 1818]

[Reported 1 Wils. Ch. 100; 1 Swan. 172; 37 E.R. 45]

Contract—Part performance—Act unequivocally referable to agreement which it is said partly to perform.

Landlord and Tenant—Agreement for lease—Part performance—Admission into possession.

To amount to part performance of a contract an act must be unequivocally referable to the agreement which it is said partly to perform. The ground on which courts of equity have allowed such acts to exclude the application of statutes requiring certain forms to be observed if certain contracts were to be valid is fraud. A party who has permitted another to perform acts on the faith of an agreement is not allowed to insist that the agreement is bad and that he is entitled to treat acts partly performing it as if they never existed. Between landlord and tenant admission into possession, having unequivocal reference to the contract, has always been considered an act of part performance.

Notes. The Statute of Frauds, s. 4, has been considerably amended: see the Law Reform (Enforcement of Contracts) Act, 1954, as to contracts (34 HALSBURY'S STATUTES (2nd Edn.) 97: see also *ibid.*, p. 757 as to sale of goods. As to contracts relating to land see now Law of Property Act, 1925, s. 40 (24 HALSBURY'S STATUTES (2nd Edn.) 427).

Distinguished: *Canning v. Catling* (1864), 4 New Rep. 259. Referred to: *Sutherland v. Briggs* (1841), 1 Hare, 26; *Shepherd v. Walker* (1875), L.R. 20 Eq. 659; *Maddison v. Alderson*, [1881-5] All E.R. Rep. 742; *McManus v. Cooke* (1887), 35 Ch.D. 681; *Rawlinson v. Ames*, [1925] Ch. 96.

As to remedies for breach of a contract to grant a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 462-466. For cases see 30 DIGEST (Repl.) 403-410.

Cases referred to in argument:

- (1) *East India Co. v. Donald* (1804), 9 Ves. 275; 32 E.R. 608, L.C.; 35 Digest (Repl.) 93, 2.
- (2) *Earl of Aylesford's Case* (1727), 2 Stra. 783; 93 E.R. 845; 44 Digest (Repl.) 44, 312.
- (3) *Clinan v. Cooke* (1802), 1 Sch. & Lef. 22; 30 Digest (Repl.) 402, *137.
- (4) *Gregory v. Mighell* (1811), 18 Ves. 328; 34 E.R. 341; 30 Digest (Repl.) 406, 496.
- (5) *Allan v. Bower* (1790), 3 Bro. C.C. 149; 29 E.R. 459, L.C.; 30 Digest (Repl.) 409, 525.

Bill filed by the plaintiff, Robert Morphett, against the defendants, one Jones and John Pepper, for the specific performance of agreements by which the defendant Jones agreed to grant to the plaintiff a lease of certain lands, and for an injunction.

The bill, filed April 10, 1815, stated that in October, 1809, a treaty having been entered into between the defendant Jones and Robert Morphett, the elder, the father of the plaintiff in his behalf, Jones agreed to grant to the plaintiff, and Robert Morphett the elder in behalf of the plaintiff agreed to accept, a lease of certain lands, afterwards described, for a term of twenty-one years, to commence from Old Michaelmas Day, 1809, at a rent of £400. Jones, in part performance of the agreement wrote and signed an authority in writing to the effect following.

"To Robert Morphett, Esq. I hereby authorise you to enter the under-mentioned lands as tenant, on Wednesday the 11th instant, being Old Michaelmas Day."

A	Scotney near Lydd	Brackenbury ... Looker.
	Goose ... New Romney ...	James Chittenden ... Ditto.
	Crooked Elms, Newchurch ...	} John Chittenden ... Looker.
	Pilraggs ... Ditto ...	
	Crump Field, St. Mary's ...	Hoy Ditto.
	Corner Field New-bridge ...	Jacob Wratten ... Ditto."

B The bill further stated that the plaintiff, in pursuance of the agreement and the written authority given in part performance thereof, entered into possession of the premises as tenant to Jones, in October, 1809, and continued in possession of the whole until Old Michaelmas, 1810, paying the rent of £400, allowance being made thereout of such sums as the plaintiff was entitled to have allowed; that in March, 1810, Jones being desirous to sell those parts of the lands which were situated in or near Newchurch, St. Mary's and East Bridge, communicated his desire to the plaintiff or his father in his behalf by a letter, a part of which, after referring to a pressing demand for money, was in the following words:

C "The only way I have of meeting it is by selling part of the land. I know of several persons who would become purchasers, but I wish to give you the first offer of the whole or any part you may choose. I shall be inclined to take of you a fair price, inclining to your advantage. The pieces are, the

	ACRES	
Pilraggs	36	} 70 acres.
Crooked Elms	16	
Crump Field	8	
Corner Field	10	

E You have certainly my promise of a lease, from which I should be ashamed to swerve, but should you not purchase any part of the land, you see to what disadvantage I must sell it. I shall be happy to give you the accommodation in the Goose and Lydd land, so as to make up the term that was to be granted on the whole, or to make a deduction that may appear fair between us; or, if it is more to your interest, I will execute the plan first intended, that of a lease on the whole."

F The bill stated that in consequence of that letter several meetings took place between Jones and Robert Morphett the elder on the subject of the intended sale, and it was at length agreed that the plaintiff should give up the land in and near Newchurch, St. Mary's and East Bridge, being the land specified in the letter, and should continue tenant of the residue of the premises, being the land in and near New Romney and Lydd (in the letter called the Goose and Lydd land) for the residue of the term of twenty-one years to be granted by lease at the reduced yearly rent of £150, to commence from Old Michaelmas Day, 1810; and that after Jones had contracted for the sale of the land specified in the letter he requested the plaintiff to give up eleven acres of the Goose land, retaining in lieu the Corner Field (part of the land previously agreed to be given up for the purpose of sale), and the plaintiff, having complied with his request, surrendered all the land which he had agreed to surrender (namely the Pilraggs, Crooked Elms, Crump Field, and eleven acres of the Goose land) and continued in possession as tenant at the reduced rent of £150, of the residue, consisting of the Corner Field, and the Goose and Lydd land (except eleven acres of the Goose land given up).

I In November, 1810, Jones, being desirous of purchasing the plaintiff's interest in the last-mentioned lands, communicated his desire to the plaintiff's father by a letter dated Nov. 2, 1810, in which, after referring to his having occasion for money to complete the purchase of some estates, he proceeded thus:

"The only resource then left to me is to dispose of such part of my property as I may deem less likely to increase in value, and surely the marsh land is considered in this state. It, therefore, remains for me to offer you a consideration for the term you have in it, and I trust such a one as you will think liberal,

for I wish to make no other than a handsome compensation which I feel I am bound to do, as well for the inconvenience of your son's leaving the land, as for the numerous obligations I lie under to you. I am willing to allow you the rent of the present year and up to Michaelmas, 1811, on condition of your giving me at that time possession of the land, and I also engage to continue it to you after that period in case I do not sell it or that Fenner does not join in the recovery in which case I cannot make a title. I have suspended for the present the draft of the lease until your decision is known. If it should not meet your approbation, you will find me not swerve from what I have ever appeared true to, my word. I must then sell under the greatest disadvantage, which you are well aware of. I am so well convinced of your liberality, and of your wish to serve me, that I think you will allow the compensation equal to the sacrifice."

The plaintiff did not accede to this proposal, but continued in possession of the premises, and paid the rent to Michaelmas, 1814, on the faith of having a lease, expending money in repairs and improvements, and on Mar. 23, 1815, he received from Jones (who had contracted to sell the premises to the other defendant, John Pepper) a notice to quit at Michaelmas next.

The bill, accordingly, prayed that the agreements, so far as the former was not altered by the latter, might be performed; that Jones might be decreed to execute to the plaintiff a lease pursuant to the terms of the agreement; and that the defendants might be restrained from proceeding at law for the recovery of the premises, or conveying or contracting to convey them.

By his answer the defendant Jones admitted that in or about September or October, 1809, he entered into a treaty with Robert Morphett the elder in behalf of the plaintiff, touching the granting a lease of the lands in the bill described as after mentioned, but not otherwise, that is to say, that, the plaintiff wishing to become the tenant of the premises, it was proposed and agreed generally between the defendant and Robert Morphett the elder on the part of the plaintiff that the plaintiff should become such tenant, but nothing was said as to any lease or term of years for which he was to hold the same. The defendant agreed that he promised generally to grant a lease to the plaintiff, he denied that any duration, or the commencement, or termination, or the rent, of any lease, was ever settled and agreed upon, or even mentioned in any way between him and the plaintiff. He denied that he ever agreed or promised to grant to the plaintiff a lease of the premises for a term of twenty-one years or for any other period, or that the rent to be paid should be £400 a year, but he said that it was originally agreed that the plaintiff should become tenant at a rent to be settled by a mutual friend who, having accordingly valued the land at £3 per acre, ascertained the rent to be £450. Admitting the written authority to take possession dated Oct. 7, 1809, he said that it was for the purpose of putting the plaintiff in possession as tenant from year to year without reference to any lease, or agreement for a lease. He also admitted the letter of April, 1810, possession taken by the plaintiff, the transaction for surrendering part of the lands, and the plaintiff's remaining tenant (from year to year as he insisted) of the rest, at a rent of £150, the subsequent exchange of part of the Goose land for the Corner Field, and payment of rent as alleged in the bill. He denied expenditure by the plaintiff on the premises, except in cleansing ditches, to which he was bound as tenant from year to year, and claimed the benefit of the Statute of Frauds.

Bell, Roupel and Sugden for the plaintiff: The plaintiff rests his claim on a parol agreement with part performance by delivery of possession. The agreement is proved by Morphett the elder, and it is now settled that the evidence of one witness, corroborated by circumstances, will prevail against a positive denial in the answer: *East India Co. v. Donald* (1). Here the denial, applying rather to the terms than the existence, of the agreement, is not positive, and the circumstances confirming the testimony are irresistible. First, the letters of Jones himself, his declarations that the plaintiff had his promise of a lease from which he would be ashamed to

A swerve, "and that if required he would execute the plan first intended, that of a lease of the whole," and his offer of "a consideration for the term which the plaintiff had in the land," are unequivocal acknowledgments of an agreement to grant a lease. In addition we have possession taken of the whole lands, and payment of rent, conformably to the agreement, a subsequent surrender of part of the lands, continued occupation of the rest, and payment of the reduced rent. Jones's proposal in the letter of November, 1810, to relinquish a year's rent on condition of obtaining possession at Michaelmas, 1811, is inconsistent with the suggestion of a tenancy from year to year under which he might have compelled the plaintiff to quit at that time. His expression "draft" of a lease is equally inconsistent. The existence of an agreement for a lease, therefore, appears from the declarations of Jones. The terms are ascertained by parol evidence, and an act of part performance is proved in the delivery of possession under a written authority from Jones. From the date of *Earl of Aylesford's Case* (2), it has been established that delivery of possession, as an act of part performance, excludes the application of the Statute of Frauds upon the principle that without referring the possession to the agreement the party admitted into possession would be a trespasser: *Clinan v. Cooke* (3); having no other title, his possession is prima facie to be referred to the agreement and it is not competent to the person by whom he was admitted to take and to retain possession, to represent that possession as a trespass: *Gregory v. Mighell* (4). Possession taken of a farm is a strong act of part performance, the beneficial occupation of such property requiring considerable expenditure. Another act of part performance was the relinquishment of a part of the lands, and the continued occupation of the remainder at a reduced rent. The terms of the agreement are clearly ascertained, but after acts of part performance, according to the doctrine of more than one case, the court will not be prevented from executing an agreement, by a difficulty in ascertaining the terms: 5 VIN. ABR. 522, pl. 38, 523, p. 40. Admitting that all the terms of this agreement are not ascertained in writing, the parol evidence supplies that defect, and it is settled that the terms of an agreement which has been in part performed may be proved partly in writing, and partly by parol: *Allan v. Bower* (5). It would indeed be most inconsistent were the court, which admits parol evidence of the whole agreement, to reject it of a part, because the rest had been reduced into writing.

Hart and Joseph Martin for the defendant: The plaintiff alleges an agreement for a lease of certain lands during twenty-one years at a rent of £150 but the proof by which he endeavours to substantiate that allegation is defective. The written evidence is only of a tenancy, or a promise of a lease, without specification of terms; and he cannot, in violation of established principles, be permitted to introduce supplemental parol testimony. Whatever form the plaintiff's case assumes, whether that of a written agreement, to be aided by parol proof, or a parol agreement to be aided by written proof, it proceeds on a confusion of the rules of evidence. Possession was taken under the written authority, and it is too clear for argument that parol evidence cannot be received to add terms not contained in the writing. The letters afford evidence, not of an agreement, but of a promise. The proposal to abandon a part of the land and the subsequent abandonment by the plaintiff are inconsistent with the existence of a valid agreement. No circumstance confirming the statement of the witness, the positive denial in the answer must prevail. Assuming the existence of a parol agreement, the plaintiff next contends that the possession taken by him was an act of part performance. The court will not accede to a doctrine so unauthorised and so perilous; which would enable every tenant from year to year to give parol evidence of agreements, comprehending even the fee-simple of the lands. The principles on which that doctrine is said to rest have no application to the present case. Possession here incurs no expense; and being justified by the written authority, in the character of tenant from year to year, it could not be treated as a trespass. The dictum of LORD REDESDALE, in

Clinan v. Cooke (3) (1 Sch. & Lef. at p. 41), is adverse to the plaintiff's argument, since it, implicitly at least, limits the effect of possession, as an act of part performance to cases in which the person taking possession might, upon any other construction, be treated as a trespasser. In strictness the act insisted on by the plaintiff is not the taking, but the continuance of possession. The surrender of one portion of lands held under a prior agreement, is not an act of part performance of a new agreement for holding the rest. It would be most dangerous to establish that such partial relinquishment of possession, a transaction common between landlord and tenant, enables the tenant to give parol evidence of any alleged agreement relative to the lands. The court will not extend those doctrines of very doubtful policy, by which the Statute of Frauds is to a great extent repealed.

SIR THOMAS PLUMER, M.R.—The first question is whether by any act of part performance this case is exempted from the operation of the Statute of Frauds, 1677. In order to amount to part performance an act must be unequivocally referable to the agreement, and the ground on which courts of equity have allowed such acts to exclude the application of the statute is fraud. A party who has permitted another to perform acts on the faith of an agreement shall not insist that the agreement is bad and that he is entitled to treat those acts as if it had never existed. That is the principle, but the acts must be referable to the contract. Between landlord and tenant when the tenant is in possession at the date of the agreement and only continues in possession, it is properly observed that in many cases that continuance amounts to nothing, but, admission into possession, having unequivocal reference to the contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms, the court regarding what has been done as a consequence of contract or tenure. The fact of possession here is proved, and proved in writing, by the regular authority transmitted to Morphett the elder to deliver possession to the plaintiff, and it is beyond doubt that possession was taken under some agreement. The existence of a contract is indeed admitted by the defendant, and the single question is: What are its terms?

To a certain extent both parties are agreed as to the fact of a contract, the quantity of land, the agency of Morphett the elder, repeated meetings relative to a treaty, and possession taken under some contract either for a tenancy from year to year or a future lease. The defendant alleges that the contract was not obligatory, the period for which the lease was to be granted not being specified, and that possession was taken on the understanding that the terms would be ascertained when the parties met. On the other hand, it is said, and proved by Morphett the elder who made the agreement, that it was not a mere promise of a lease, but included a specification what that lease was to be, to commence from Michaelmas Day, 1809, at a rent to be fixed by Martin afterwards reduced by the parties to £400, and for a period of twenty-one years. Supposing this representation correct, here are all the parts of a complete contract—the quantity of land, the parties, landlord and tenant, the rent, and the term, but this statement is denied by the defendant, and he swears positively that the term was never fixed. The question is whether the testimony of Morphett the elder is sufficiently corroborated, it being clear that the testimony of one witness supported by collateral circumstances may prevail against the positive oath of a defendant. I think that all that passed strongly confirms his statement of the case. The fact that the parties ascertained the quantum of rent is cogent presumptive evidence that they had ascertained the duration of the lease. In fixing a rent the first question is for what term is it payable, for one year or for many years. Under a promise of a lease it would be premature to fix the rent before the parties were agreed on the term. From the time when the rent was fixed to the year 1815 when notice to

A quit was given, nothing passed further to ascertain the terms of the agreement, and the continual payment of rent during that interval is a circumstance most improbable on the supposition that those terms were still unascertained.

B It is said that the written authority to take possession is an agreement in writing, and that the court is not at liberty to resort to parol evidence of the terms. I cannot so consider that document. It is the consequence of an antecedent agreement, not the agreement itself, and it must not escape attention that it coincides in time with the parol agreement proved. The next act is the letter of March, 1810, written five months after the contract, nothing having intervened to render the situation of the tenant more permanent. I cannot interpret that letter as referring to a mere vague promise. Written in a style the reverse of imperative, expressly mentioning a lease, and evidently supposing in the tenant a title to a term, to me it seems the letter of a landlord bound by an equitable contract. C It is then argued that the relinquishment by the plaintiff of a large portion of the land repels the supposition of a right, but the transaction consisted not only in the surrender of seventy acres out of 150 but in the reduction of rent from £400 to £150. Is that no advantage to the tenant? Of 150 acres, which he held D at a rent of £400, he retains eighty at a rent of £150. That might be a fair inducement to relinquish his right to the rest.

With respect to the quantum of rent, the receipt is strong evidence that it was £400, not £450; no reason can be assigned for giving a receipt for a total of £400 unless that sum was the rent. The letter of November, 1810, is evidence still stronger. After the lapse of near a twelvemonth, nothing having passed to render E the tenancy more fixed, the defendant not only addresses to the plaintiff a request to relinquish possession of the land, but offers a considerable sum, two years' rent, as a satisfaction of some supposed right. It is said that the defendant, being a man of strict honour, might desire to purchase a release from his promise. He might so, but in March, 1815, when the plaintiff had the same claim on his honour, he sold the estate, and gave him notice to quit. Had this obligation of F honour, still remaining unsatisfied, lost in 1815 the authority which it possessed in 1810? At that time his urgent application had received a refusal well calculated to provoke the assertion of whatever right he possessed. The acquiescence of a disappointed man affords strong evidence of a contract. The testimony of Morphet is corroborated by the transaction which Morris proves, and, on the whole, I think the circumstances abundantly sufficient to confirm the statement of the witness, G and that the plaintiff has established a parol agreement in part performed. The first agreement being once fixed, such as equity will enforce, the second only reduces the quantity of land and of rent leaving the original good as to the residue.

Specific performance decreed that the agreements, so far as the former was not altered by the latter, be specifically performed and carried into execution, and that the defendants do execute to the plaintiff a proper lease accordingly.

QUARRELL AND ANOTHER v. BECKFORD

[VICE-CHANCELLOR'S COURT (Sir Thomas Plumer, V.-C.), January 17, February 21, 1816]

[Reported 1 Madd. 269; 56 E.R. 100]

Mortgage—Mortgagee—Interest in mortgaged property—Security for debt—Mortgagee in possession—Duty to account—Position after payment of mortgage debt and interest—Trustee for mortgagor.

A mortgage is a personal contract for repayment of a debt secured by an estate. The estate is no more than a pledge or security for the debt. Whether the mortgagee is or is not in possession of the pledged estate he never has any equitable right to the estate except as a security for the debt. For every other purpose the estate is the estate of the mortgagor, and when the debt is paid all the mortgagee's right and interest in the estate ceases. He has the legal estate only and not a beneficial interest.

If he takes possession of the mortgaged property he becomes a bailiff without salary and is accountable to the mortgagor for the profits which he has received, or with due diligence should have received, and which are applicable in the first instance to pay the principal and interest of his debt and all other allowances. As soon as he is paid his principal and interest he is a mere naked trustee, holding the legal estate for the benefit of the mortgagor as cestui que trust.

Mortgage—Interest—Liability of mortgagee—Interest on fund due to mortgagor retained by mortgagee.

It being found that a mortgagee had retained for a substantial period a fund due to the mortgagor,

Held: the mortgagor was entitled to charge the mortgagee with simple interest at the rate of 4 per cent.

Notes. Followed: *Archdeacon v. Bowes* (1824), M'Cle. 149. Referred to: *Wilson v. Melcalfe* (1826), 1 Russ. 530; *Lewes v. Morgan* (1829), 3 Y. & J. 394; *Wood v. Surr* (1854), 19 Beav. 551; *Smith v. Pilkington* (1859), 1 De G.F. & J. 120; *Charles v. Jones* (1887), 35 Ch.D. 544; *Eley v. Read* (1897), 76 L.T. 39; *Bagot v. Chapman*, [1907] 2 Ch. 222.

As to a mortgagee's estate and interest, see 27 HALSBURY'S LAWS (3rd Edn.) 259 et seq.; and for cases see 35 DIGEST (Repl.) 447 et seq.

Cases referred to:

- (1) *Creuze v. Lowth* (1793), 4 Bro. C.C. 316; 29 E.R. 911; sub nom. *Creuze v. Hunter*, 2 Ves. 157, L.C.; 39 Digest (Repl.) 205, 805.
- (2) *Tebbs v. Carpenter* (1816), 1 Madd. 290; 56 E.R. 107; 24 Digest (Repl.) 747, 7338.

Bill by assignees of the equity of redemption of mortgaged property to recover the property from the mortgagee in possession.

In 1732 Jonathan Barnett (since deceased) mortgaged an estate called Catharine Hall in Jamaica to Peter Beckford, the grandfather of the defendant William Beckford, to secure £1,054 sterling, with interest at 10 per cent. In 1736 a mortgage was made by Jonathan Barnett, of the same estate, for £3,192 9s. 7d. and interest at 8 per cent. to David Thompson as a collateral security for money lent upon the mortgage of another estate to J. Barnett. D. Thompson assigned this mortgage to Peter Beckford. The interest on these mortgages was paid down to Dec. 21, 1762, but discontinued from that period. On June 30, 1769, William Beckford, the son of Peter Beckford, and father of the defendant William Beckford, filed a bill of foreclosure in Jamaica against Barnett and those then interested under him. In 1770 William Beckford died. In 1772 Jonathan Beckford Barnett,

A the grandson of the mortgagor, Jonathan Barnett, who was entitled to the equity of redemption of the mortgaged estate, assigned the same to Edward Wollery, who afterwards assigned it to John Jackson, who took possession, and on May 4, 1782, assigned to the plaintiff Quarrell, Thomas Gray and R. Batty (both since deceased) on certain trusts, and in particular on trust to pay the plaintiff John Jarratt, a sum of money therein mentioned. They took possession of the estates, and under this deed the claims of the plaintiffs arose.

B The suit remained abated from the death of William Beckford in 1770 until Oct. 28, 1781, when it was revived by his son, the defendant William Beckford, who at the death of his father was a minor. The same persons, with the exception of William Beckford the son, were parties to the revived suit as were parties to the original bill. On Oct. 22, 1783, the cause was heard in Jamaica, and an account directed, and on April 21, 1784, a foreclosure was decreed against all the persons who were parties to the suit. The decree was not made absolute, nor were the plaintiffs, or Jackson, parties to it. In consequence of this decree a writ of injunction first, and afterwards a writ of assistance, put the defendant Beckford, in 1784, into possession of the mortgaged premises. In 1796 John Jackson was declared a bankrupt, and William Atkinson, Thomas Wagstaff, and Joseph Timperon, were chosen assignees of his estate and effects.

D In 1796 the original bill in this court was filed by the plaintiff Quarrell, the surviving trustee under the deed of May 4, 1782, and by Jarratt, who was interested under the same deed against William Beckford, Peter Robinson, the surviving assignee of the separate estate of John Serocold, a bankrupt, who was a partner with the before-mentioned Jackson, and against William Atkinson, Thomas Wagstaff, and Joseph Timperon, the assignees of Jackson, and against Jackson himself. This bill, which was afterwards amended, stated the preceding facts, and charged that more land was taken under the writ of assistance than was included in the mortgages, and that the decree of foreclosure in Jamaica did not affect the plaintiffs as neither they nor John Jackson were made parties to the suit, though the deed of May 4, 1782, was recorded in the island, and the plaintiff Quarrell and his then co-trustees, were, at the time of the foreclosure, in possession of the estate. The bill also charged collusion, and that the defendant Beckford had been overpaid the principal and interest of his mortgage, praying, an account and delivery up of the possession of the mortgaged premises.

F The defendant Beckford, by his answer to the original and amended bill, insisted on his absolute right to the mortgaged estates under the decree of foreclosure in Jamaica. He said that the plaintiff Quarrell had notice of the proceedings in Jamaica from the time of filing the bill of foreclosure by the defendant's father, and the reviving of the same after his death, that the conveyance to the plaintiff Quarrell and his co-trustees was made pending the suit to foreclose, and, therefore, they were not necessary parties to that suit, and that no more land was taken possession of under the writ of assistance than was comprised in the mortgages, and he denied collusion in regard to the procurement of the foreclosure. He also insisted that no part of the money certified to be due on his securities of for interest had been satisfied by the yearly income of the mortgaged estate, but that, on the contrary, such yearly income had not been sufficient to keep down the interest of such money, and the contingencies of conducting the business of such plantation.

H I In 1783 the cause came on before SIR R. P. ARDEN, M.R., who directed a reference to the Master to take an account of what was due to the defendant William Beckford for principal and interest on the mortgages in the pleadings mentioned bearing date respectively May 31, and June 1, 1732, and June 28 and 29, 1736, which by indentures of assignment, therein also mentioned, bearing date respectively June 17, 1741, and Sept. 14 and 15, 1743, became vested in William Beckford, the deceased father of the defendant; to tax the defendant his costs of this suit, and also, to take an account of what the defendant had laid out and expended in necessary repairs and lasting improvements upon the estates and

premises in the island of Jamaica, comprised in the aforesaid indentures of mortgage of which he took possession, under and by virtue of the writ of assistance in the pleadings mentioned; to compute interest on what should appear to have been laid out in such lasting improvements after the rate of interest payable in the island of Jamaica; and directing that what should appear to be coming on the said account for lasting improvements and such interest thereof as aforesaid, and also what should be coming on the said account for repairs of the said estates and premises, be added to what should be found due to the defendant for principal, interest and costs as aforesaid. He was also to take an account of the rents, produce and profits of the said estates and premises comprised in the aforesaid mortgages received by the said defendant William Beckford or by any other person or persons by his order or for his use, or which, without his wilful default, might have been received thereout, and in taking the said accounts of rents, produce and profits of the mortgaged estates and premises to make annual rests. His Honour reserved the consideration of interest, and of the costs of this suit not before provided for, and of all further directions until after the Master should have made his report.

On Sept. 1, 1815, the Master made his report. After taking the accounts and making the defendant all the allowances directed by the decree the result of the report, which particularised all the charges and discharges, was, that on Dec. 31, 1808, there was a balance against the defendant Beckford of £24,370 0s. 7d.

Sir Samuel Romilly, Hart, Leach and Heald for the plaintiff.

Sir Arthur Pigott for the defendants, the assignees in the same interest as the plaintiff: Two questions now arise in this cause: (i) as to the interest with which the defendant is to be charged in respect of the balance found to be in his hands belonging to the plaintiffs, and (ii) as to costs. With respect to interest, as Beckford ought to have kept proper accounts and to have delivered up the mortgaged estate when he had been paid his principal and interest out of the rents and profits of the estate, he must now account for what he has been overpaid, with interest. He knew, or ought to have known, that he was overpaid. A mortgagee continuing in possession after his debt has been paid, must be considered as a trustee for the mortgagor, and must pay interest. There is no case on this point. but, on principle, it is clear the mortgagee should pay interest, for otherwise a temptation would be held out to mortgagees to retain possession of mortgaged estates after they were paid. Under the circumstances no more is asked than simple interest on the balances in his hands, at £6 per cent. the present Jamaica interest. With regard to costs, the decree is rather ambiguous, but it seems that costs up to the decree were all that were intended to be given and that subsequent costs were to be in the discretion of the court upon the result of the inquiries directed by the decree. The defendant by his conduct rendered the suit necessary; he must, therefore, pay the costs. The Master in his report has blended the costs up and subsequent to the decree, so that a reference will be necessary to ascertain the amount of the costs incurred subsequent to the decree.

Fonblanque and Trower for the defendant Beckford: Possession was taken in pursuance of the decree of foreclosure in Jamaica, in 1784. Till then the defendant was not in possession. No steps were taken to affect that decree until the present bill was filed in 1796. For twenty-two years previous to the decree of foreclosure the interest of the mortgages was unpaid. After the decree of foreclosure the defendant had good reason to believe the estate was his own. There is no case in which a mortgagee has paid interest on a balance found to be due from him on the result of an account. Such balance is at most but a simple contract debt upon which no interest is allowed (*Creuze v. Hunter* (1)) or like a claim of mesne profits which do not carry interest either at law or in equity. Much less, can Jamaica interest be claimed. This court, unless in a few special cases, charges interest in the same manner as a court of common law does. The question as to costs is decided by the decree of the Master of the Rolls, which gives the defendant

A the costs of the suit and not merely the costs up to the decree. If the latter only had been intended, the court would have made a reservation as to costs incurred subsequent to the decree.

B **SIR THOMAS PLUMER, V.-C.**—The first important question which arises is as to interest. It is admitted on both sides that it is a perfectly new question, and must, therefore, be decided on principle.

C The fact must be taken to be that before this suit was instituted in Trinity Term 1796, the defendant Beckford was a mortgagee in possession; he had been fully paid the whole of what was due to him for principal, interest and expenditure; and he had £1,572 in hand. That is the first fact that I wish to observe as a datum on which I proceed in viewing this case. That sum of £1,572, had the account been then taken, ought to have been paid over to the mortgagor a period of twenty years ago. From that time every subsequent receipt de anno in annum ought to have been paid over (with the deduction of what the current expenditure of each year was) up to the year 1807, had the account been taken. We must recollect that this is the case of a mortgagee who has taken possession of an estate forfeited, and overpaid everything before the bill was filed. We are to strip it of the circumstance of foreclosure, because, the foreclosure being irregular, it was invalid.

D Considering the case on principle, the first question to be asked is: In what light is a mortgagee considered in a court of equity, a mortgagee who is in possession of an estate, after he is paid the principal and interest due on his mortgage? What is a mortgage? Everybody knows that it consists of two things. It is a personal contract for a debt secured by an estate, and in equity the estate is no more than a pledge or security for the debt. The debt is the principal—the estate is the accident. Whether the mortgagee is or is not in possession of the pledge, his right is precisely the same, with this difference, indeed, that he has never any right in equity to the estate, except as a fund to pay him his debt. For every other purpose the estate is the estate of the mortgagor, and when the debt is paid all the mortgagee's right and interest in the estate ceases. He has the legal estate only and not a beneficial interest in it. If the mortgagee has chosen to take possession and help himself, he becomes a bailiff without salary and is accountable for the profits which are applicable in the first instance to pay the principal and interest of his debt and all other allowances, but he is bound to be an accounting party, taking the estate in possession upon the principle and upon the obligation to account with the mortgagor for all the rents he receives. He is bound to keep the account and to be ready with it, to apply it regularly to pay his principal and interest, and to be ready to surrender up the pledge as soon as it has answered its purpose. All the cases treat the mortgagee, as soon as he is paid, as becoming a mere naked trustee, holding the legal estate for the benefit of the *cestui que trust*, the mortgagor.

H In determining the question we have only to keep in view these principles to decide in what character a mortgagee overpaid is to be viewed when all the beneficial interest he ever had in the estate is determined. He is merely a trustee holding a legal estate in the property of another person with whom he is bound, by the nature of his trust, faithfully to account. In this view, the *cestui que trust* who was entitled to the balance of £1,572 in the year 1796, files his bill demanding the estate and the balance which on taking the accounts might appear to be due. What does the trustee say? "I will not part with the estate. I am not paid. What I have received is not sufficient to keep down the expenses, and I insist on the foreclosure in Jamaica as a bar to your being permitted to redeem."

I That Mr. Beckford set up a defence which he knew was not well founded, is not the point. It is enough that he was mistaken. He sets up a mistaken defence—he resists the right to redeem when he is bound to permit a redemption—he insists upon that which is no bar—he insists on the account being in a state which it is not. To say he has unfortunately been put into this situation and involved in

a mistake as to the effect of the suit in Jamaica is, certainly, only to apologise and exonerate the case from any imputation of fraud, or intentional misconduct on his part, but it cannot be received here to say that a party who mistakes the effect of the law and of a suit gains to himself a right to insist on a bar he is not entitled to, a right to insist on a foreclosure against one who is no party to the suit, he having omitted to include such party so as to make it a bar. A person must suffer who mistakes the law on subjects on which he ought to be advised. He ought to have known that the decree could not operate as a bar to the right of the plaintiffs to redeem. He must take the consequence of being mistaken in supposing himself to have a right to an estate when he has only a qualified right. He had a right of possession, undoubtedly, not by that decree, but as mortgagee from the legal estate being in him, but to any other purpose he cannot protect himself, though it may apologise for his not being ready with the account and for having treated the estate as his own.

I must, therefore, consider this as the case of a trustee who resists the right of his cestui que trust and in the result receives *de anno in annum* very considerable sums and overplus, and ultimately in the year 1808 is found in possession of more than £24,000. He had in his possession for the last nine years £24,000, and a fraction due to the mortgagor, some part of which the mortgagor ought to have received in 1795, and in every succeeding year he ought to have received what became due for the purpose of applying it to his general purposes or the purpose of keeping down the interest of the second mortgage. For a period of twenty years back the defendant has been in the receipt of money he was not entitled to, but which was due to the cestui que trust. That money he has employed as he thought fit and it is not now forthcoming. He does not say, I have kept it ready for you; he insists on his right to retain it; he must, therefore, be taken to have enjoyed it for his benefit, and to have employed the whole of it.

Under these circumstances the case is assimilated to a simple contract debt which does not carry interest. It is compared also to the case of *mesne profits*, improperly received by a trespasser, in which cases, it is clear, the courts of law and equity are not in the habit of charging the party with interest. What analogy do those cases bear to the present? The main point here does not exist in those cases, viz., a sum due from a trustee to a cestui que trust. The *mesne profits* are received by an adverse holder, by a trespasser, where there is no privity between the one and the other, but here the profits are received under an implied contract by the mortgagee to account. That is not like the case of a trespasser receiving *mesne profits*. This mortgagee received the rents as trustee—he received them to pay himself first, and afterwards to account to the mortgagor; he has, therefore, made himself liable to account. A relation is established as between trustee and cestui que trust, and the moment the mortgage is paid off he is converted into the situation of a bare naked trustee. All the money received from that time is money received by a trustee having a legal estate in his hands and receiving the rents and profits of such estate which he holds as trustee for another.

Courts of equity give interest in many cases where there is no express contract. In this very case the mortgagee himself is allowed interest which he was not entitled to by contract—I mean, the interest upon lasting improvements, etc. Why is he entitled to it? Because a court of equity considers itself competent in this relation between mortgagor and mortgagee to go beyond the contract to consider what is just and equitable between parties standing in that relation—and because when the trustee in possession has been expending his own money to improve the estate of the cestui que trust, it is not justice to say: "You shall be repaid the very money laid out without any allowance for the same with interest." What interest? Where is there any contract? The interest is 10 per cent. on one mortgage, and 8 per cent. on another. Is he to have that? No; 6 per cent. Why? Because it is equitable, that being an expenditure on the spot by a trustee, he shall have the current interest of the country just the same as if he had lent so

A much money. This, I say, is strong proof to show you are not to restrict a court of equity by the narrow principles applying to simple contract debts, or mesne profits, but that the court looks at the question as applying to mortgagee and mortgagor and gives either party interest as justice requires. Indeed, that was the large view taken of it by the counsel on both sides, who admitted that the court must not be considered as tied down, but must look at the whole case and say: Is it reasonable or not, that the mortgagee should be saddled with interest?

B It is said that Mr. Beckford ought not to be charged with interest because there was a long period of time when he was kept out of the receipt of his interest, viz., from the year 1762 to the year 1790, a period of twenty-eight years, during which he had imperfect and inadequate payments towards satisfying the interest of his mortgage, and prior to that year, 1790, there was a considerable arrear. It is said, C if on the one hand he gets no interest for that arrear, why ought he to pay interest for the arrear which after that period is found to have been in his hands? The answer is that interest does not in any case carry interest. It is contrary to the clear established principle of the court to give it. A mortgagee, it is known, can only enforce payment of simple interest, and he must take the remedies the law gives to enforce it. The defendant might have enforced those remedies in 1762, D and if he chose not to do it he must take the consequence; the law can only give him an account according to the regular course unless a case is made for it, and no case is made for it here. The plaintiffs say in answer to this claim of interest by Mr. Beckford, if you will on both sides permit compound interest to be calculated, you shall have it. If the court were to depart from the strict rule of E the court and adopt a general rule of equity to give compound interest on one side, then it must give it on the other, but if you do not choose to do that, and that the defendant prudently declines, then neither party can expect more than simple interest.

F In this case, the court that framed the decree have decreed annual rests, and have reserved the question of interest. I do not say that that has decided anything on the subject, but it has put it in a course; and in a state, for the determination of the question of charging this mortgagee with interest, if it turned out to be that he was overpaid.

G If there be no fixed rule of the court, if there be no authority in which the point was ever decided, one way or the other, if all the general principles that govern a court between a trustee and cestui que trust lead to one conclusion, if justice and equity lead to the same conclusion, viz., that one party is not to keep another out of possession for twenty years, applying to his benefit large balances, due to the other, that other being embarrassed with debts, without paying interest, what is there of authority, principle, reason, justice, or equity, that should induce a court not to say, that that conclusion must follow?

H Upon these principles I am of opinion with regard to the first question that the mortgagor is in this case, entitled to charge the defendant with interest, and that it must be sent to the Master to compute that interest.

I The next point to be considered is, from what period the interest is to be charged. With respect to that, I am of opinion, it should be from the filing of the bill, for at that period the demand was made and ought to have been complied with according to the justice of the case. The mortgagee was overpaid on Dec. 31, 1795, and in Trinity Term, 1796, when the demand was made, it ought to have been complied with. From that time he had a balance and he annually increased that balance by the receipt of money not due to him which ought to have been paid over. I think, therefore, from that period he must be charged with interest.

The next question is at what rate of interest he ought to be charged. Here we are again to examine it on principle. The rate of interest ascertained by the mortgages, was, in one instance, 10 per cent. in the other, 8 per cent. and the legal rate of interest in Jamaica has since been reduced to 6 per cent. on West India property. The rate of interest is usually settled by contract; here there is no

contract; therefore contract cannot guide us. The decree has directed that 6 per cent. be paid in respect of what was laid out in expenditures, but that, I think, ought not to decide the matter because that was on an expenditure on the spot where the rate of interest is 6 per cent., and advances made there may fairly be considered as money lent at the time. Though, in the absence of contract, the courts have adopted that interest which the law of the country has fixed, yet here the defendant is not called upon to account in the island; he is not called upon to account where he might have been better enabled to have made out all the expenditures, the improvements, the repairs, and other matters; and everybody knows there must be difficulties attending the taking of the account of a person in possession for many years by positive proof such as would be required to entitle him to charge. He may have grievously suffered, and I do not lay any stress on the length of time that has elapsed or the commissions sent out to Jamaica to procure evidence, and, though I think he ought to account for interest, I do not feel warranted by any principle in saying that he should account otherwise than as executors account, who have had balances long in their hands, and who, according to the usual course of the court and without any contract, are made to pay interest at the rate of 4 per cent.: see *Tebbs v. Carpenter* (2). That interest Mr. Beckford must pay. This is, undoubtedly, a considerable indulgence to the defendant, who, if an inquiry took place into what profit he made of these funds in his hands, would no doubt have been found to have made more than 4 per cent. I do not, therefore, charge him vindictively. This disposes of the question of interest.

The other question respects costs. I think I am in great degree relieved from entering into the consideration of that question, whatever might have been said respecting the defendant having created a necessity for the suit and resisting the right of the mortgagor to redeem, and of so much of the costs which had arisen from that. The fair construction of the words of the decree, which I am not at liberty to alter, directing the Master to take the account and to tax the defendant the costs of the suit, must be considered as directing him to tax the costs, without limitation, without stopping at any part of the cause. What are the costs of the suit? Costs up to the decree? Certainly not. If so intended, it would have been said, costs up to the decree. If the decree had reserved the question of subsequent costs up to this time that would have left the court at liberty on further directions to consider what ought to be done with the subsequent costs, but I think as to that part of the case the decree is conclusive and has given the suit to the defendant, and I am not disposed to cut down that and restrain the party from having the costs of the suit in the manner in which they have been taxed. The only observation upon that was that the decree reserved the subsequent costs not provided for by the decree, upon which it was observed that, if all the subsequent costs were intended to be provided for, how could there be any unprovided for? As to which, the observation is that there are other defendants and other parties which may satisfy these words, for the costs of all the other parties were not provided for. I am of opinion, therefore, that the defendant is entitled to the costs of the suit.

LLOYD v. HEATHCOTE

[COURT OF COMMON PLEAS (Dallas, C.J., Park and Burrough, JJ.), November 27, 1820]

[Reported 2 Brod. & Bing. 388; 5 Moore, C.P. 129; 129 E.R. 1017]

Bankruptcy—Act of bankruptcy—Beginning to keep house—Delaying creditor—“Creditor”—Rate collector—Rates due on assessment—Right of collector to enforce payment immediately.

A debtor told his wife he had business to attend to and asked her to say that he was not at home if anyone called. Soon afterwards a collector of rates called, asked the debtor's wife if the debtor was at home, and told her that he had come for highway and church rates, which were in fact due. The debtor's wife told him he must call again as the debtor was not at home.

Held: the debt due for the rates became due at the time of the assessment; consequently, the collector had a right to enforce payment immediately, and was to be considered a creditor; that right had been postponed as a result of the debtor's conduct; and, therefore, there was sufficient evidence of a beginning to keep house so as to constitute an act of bankruptcy.

Notes. The Bankruptcy Act in force at the time of this case was that of 1731 (5 Geo. 2, c. 30), repealed by the Bankrupts Act, 1825. The material provision regarding beginning to keep house as an act of bankruptcy is now in s. 1 of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 321). The matter is dealt with at 2 HALSBURY'S LAWS (3rd Edn.) 270; and for cases see 4 DIGEST (Repl.) 84-87.

Followed: *Harvey v. Ramsbottom* (1822), 1 B. & C. 55. Referred to: *Fisher v. Boucher* (1830), 10 B. & C. 705; *Phillips v. Naylor* (1858), 3 H. & N. 14; *Re McGreavy, Ex parte McGreavey v. Benfleet U.D.C.*, [1950] 1 All E.R. 30; *Ching v. Harrow U.D.C.*, [1953] 2 All E.R. 1296.

Cases referred to:

- (1) *Bayly v. Schofield* (1813), 1 M. & S. 338; 2 Rose, 100; 105 E.R. 127; 4 Digest (Repl.) 85, 763.
- (2) *Dudley v. Vaughan* (1808), 1 Camp. 271; 4 Digest (Repl.) 85, 756.
- (3) *Robertson v. Liddell* (1808), 9 East, 487; 103 E.R. 659; 4 Digest (Repl.) 78, 669.
- (4) *Jefferies v. Smith* (1810), 2 Taunt. 401; 1 Rose, 117; 127 E.R. 1133; 4 Digest (Repl.) 86, 780.
- (5) *Ex parte Levi* (1733), 2 Eq. Cas. Abr. 96; 7 Vin. Abr. 61, pl. 14; 22 E.R. 82; 4 Digest (Repl.) 86, 775.
- (6) *Round v. Hope Hyde* (1779), 1 Cooke's Bankrupt Laws, 7th Edn., p. 105; 4 Digest (Repl.) 85, 762.
- (7) *Garret v. Moule* (1794), 5 Term Rep. 575; 101 E.R. 322; 4 Digest (Repl.) 84, 745.
- (8) *Smith v. Currie* (1813), 3 Camp. 349; 4 Digest (Repl.) 87, 786.
- (9) *Shew v. Thomson* (1816), Holt, N.P. 159; 2 Rose, 468; 4 Digest (Repl.) 86, 765.
- (10) *Fowler v. Padget* (1798), 7 Term Rep. 509; 101 E.R. 1103; 4 Digest (Repl.) 78, 668.
- (11) *R. v. Bebb*, cited in 1 M. & S. at p. 354.

Action for money had and received brought by the plaintiff as assignee of one Warwick, a bankrupt, against the defendant, the sheriff of Hertfordshire, to recover the fruits of an execution levied against the goods of the bankrupt, the produce of which remained in the hands of the defendant.

At the trial of the cause before Wood, B., at Hertford Assizes trading was admitted and a notice given to dispute the commission and act of bankruptcy. With

respect to the latter, it was proved by the bankrupt's servant that on Feb. 9 he told his wife that he had a bill to make up to send to London, and desired her to say that he was not at home if any person called. Shortly afterwards the collector of the highway and church rates called, asked the bankrupt's wife if he was at home, and told her that he came for a church rate amounting to 8s. 9d. and the highway duty to a like amount. To this the wife answered that he must call again as the bankrupt was not at home. Evidence, however, was adduced to show that he was at home at this time, employed in his yard sawing wood. It was also proved that the rates were due, and had regularly been paid before.

It was objected for the defendant that the collector of these rates could not be considered as a creditor within the bankrupt laws as there was no debt due to him in respect of which he might sue out a commission or arrest the party, and, consequently, that a denial to him did not constitute an act of bankruptcy, by beginning to keep house with intent to delay creditors. The learned baron, however, overruled the objection.

To establish the petitioning creditor's debt, it was proved that the bankrupt was indebted to Messrs. Lloyd in the sum of £91 11s. 3d. before the act of bankruptcy was committed, and in the further sum of £80 to one Cooper for linen goods furnished by him, and a question arose whether the credit on which these goods had been sent had expired or not. The learned judge was inclined to think that there was not sufficient evidence to show that the credit was at an end, and observed to the jury that, unless it was clear that the credit had expired, the defendant would be entitled to a verdict.

It was further proposed to prove that the commission was fraudulent as it was issued at the instigation of the bankrupt himself, and it was contended that he was a competent witness, as the object of his testimony would be to defeat and not to uphold the commission, and that declarations made by him before and after the issuing thereof were admissible for this purpose. But the learned judge held that such evidence was not receivable and that the bankrupt could not be examined as to this fact, and he left it to the jury to determine, first, whether there was a denial by the bankrupt's wife to the collector of the rates in question and whether the sums he applied for were due from the bankrupt at the time, so as to constitute a beginning to keep house with intent to delay a creditor, and, secondly, whether there was a debt due from the bankrupt to Cooper before the act of bankruptcy. They found in the affirmative, and, accordingly, gave a verdict for the plaintiff.

Serjeant Lens applied for a rule nisi that this verdict might be set aside and a new trial granted, on the grounds, first, that the act of bankruptcy was not established; secondly, that the verdict as to the petitioning creditor's debt, was contrary to evidence, and the opinion of the learned judge; and, thirdly, that evidence to defeat the commission had been improperly rejected.

Serjeant Taddy showing cause against the rule: The main question is whether the bankrupt began to keep house, with an intent to defraud or delay his creditors. It is quite clear that he caused himself to be denied to the collector who must be considered as a creditor as the assessments demanded by him constituted a debt due from the bankrupt at the time. It is not necessary that there should be a denial to a creditor; if there be a beginning to keep house it is sufficient. In *Bayly v. Schofield* (1), it was held that, if a trader under an arrest for debt escape from the officer and remain in another person's house until dark and then return home and give directions to be denied to anyone that calls, it constituted one or more act or acts of bankruptcy, under the meaning of the words of the statute, "beginning to keep house," or "otherwise absenting himself." LE BLANC, J., there said (1 M. & S. at p. 352):

"A denial is not one of the acts of bankruptcy enumerated in the statute.

It has indeed been received as conclusive evidence, if unexplained, of an act

of bankruptcy, by beginning to keep house; but it is not the only evidence by which an act of bankruptcy may be established. It may be proved also, by evidence of his absenting himself, or of his keeping his house with intent to delay his creditors."

BAYLEY, J., observed (*ibid.* at p. 354) that

"An actual denial to a creditor is not essential to constitute an act of bankruptcy by beginning to keep house."

Here, there can be no doubt as to the intent, and in *Dudley v. Vaughan* (2) it was determined that, if a trader withdraws from one part of his house where he had before usually sat and where there was free access to him to a more retired part of it to avoid personal applications for money by means whereof his creditors were prevented from importuning him, it is a beginning to keep house within the meaning of the statute. So, here, it appeared that the bankrupt went from his house to the yard.

The intent to delay creditors is strengthened by an act of denial, although such denial does not of itself constitute an act of bankruptcy. So, in *Robertson v. Liddell* (3) it was held that an intention to delay creditors, although no delay takes place, is an act of bankruptcy, and a denial is usually given in evidence, not to show the fact of the creditors being delayed, but as evidence to explain the equivocal act of the trader's keeping in his house and to show that he began to keep house with intent to delay his creditors. This case is undistinguishable in principle from *Jefferies v. Smith* (4). Whether or not process could be immediately sued out to recover the arrears of the rates the collector was equally a creditor whatever the nature of his remedy might be, provided the rates were due at the time they were demanded. They constituted a debt from the moment of the assessment. The bankrupt caused himself to be denied to a person who had a legal demand and who was no less a creditor than another, because he had no immediate remedy or mode of enforcing it, and whether he called to collect taxes due to the Crown or rates for the benefit of the public it makes no difference whatever. The statutes relative to bankrupts make no distinction between debts recoverable immediately at law and those which may become payable in future. Here there was not only a manifest intent by the bankrupt to delay his creditors and of his beginning to keep house for that purpose, but a sufficient absenting himself to constitute an act of bankruptcy within the meaning of the statute.

Serjeant Lens in support of the rule: As to whether there was a sufficient absenting himself by the bankrupt to constitute an act of bankruptcy requires further evidence, and that point was not raised at the trial. It has never been decided that a person can be deemed to have absented himself by merely going from one part of his premises to another. The cases cited as to this point, do not prove the position contended for. In *Bayly v. Schofield* (1) the trader had escaped into another person's house, and the judgment of the court was founded expressly on that circumstance. But here, his merely going from his house to his yard was not an absenting himself to delay his creditors. The only point in question, therefore, is whether the collector of the rates, who stands in the situation of an officer having a particular remedy afforded him by the statutes, in case of default of payment of such rates, can be considered as a creditor in the present instance. He had only a power to demand payment and in case of refusal to pay the sums assessed within ten days from the time of demand to levy them by distress, in default of which the party refusing might be committed to prison until the sums assessed were paid. The payment of these sums, therefore, could not be enforced either by distress or otherwise until the expiration of ten days from the time the demand was made and they cannot be said to be due, or constitute a debt, until the provisions of the relevant statutes had been complied with in this respect. It is, therefore, in the nature of an inchoate debt, creating a mere liability to pay in the first instance, and, if the person on whom the demand is made happens

to be from home, no proceedings can be taken against his goods or person, either by distress or otherwise, until the expiration of the time limited by those statutes. A

In *Jeffs v. Smith* (4), it was a debt due to the Crown, and the Crown might have sued immediately, without any interval. In *Ex parte Levi* (5) it is stated that the denial must be to a creditor who has a debt at that time due and a denial to the holder of a security payable at a future day is not sufficient to constitute an act of bankruptcy, although the security be such as may be proved under the commission. B A petitioning creditor must have a debt which can be enforced by law. As, therefore, the collector could not enforce payment of the assessments on the day he called, he could not be deemed a creditor of the bankrupt, for he could not then sue him or have his remedy by distress. The denial to him, therefore, did not afford any evidence of the bankrupt's keeping house with intent to delay a creditor, although it might be otherwise if such an intention had been proved. C

DALLAS, C.J.—A denial to a creditor does not of itself constitute an act of bankruptcy; it is only presumptive evidence of a beginning to keep house which, if coupled with an intent to delay creditors, most clearly amounts to such an act. It has, therefore, been properly admitted in the course of the argument that, if there were a beginning to keep house with such an intent, it would have amounted to an act of bankruptcy. The learned judge thought at the trial that the denial to the collector of the rates in question was equivalent to a denial to a creditor, and the jury found that there was a beginning to keep house so as to constitute a specific act of bankruptcy. The case is, therefore, reduced to this single question, whether the collector was a creditor or not, i.e., whether the sum he demanded from the bankrupt for the assessments in question can be considered as a debt due at the time of making the demand. It must be presumed that there was a debt due unless the contrary were shown. I shall, therefore, confine myself to the act of bankruptcy as left to the jury at the trial as I think a denial to a creditor is evidence of a beginning to keep house although it appears from the facts, as reported by the learned judge, that there was sufficient evidence to constitute an act of bankruptcy by the party's absenting himself for the purpose of delaying his creditors. F I abstain from giving any positive opinion on this point.

The order of denial was general, as it extended to any person that might happen to call. This denial, therefore, must necessarily extend to creditors, as well as those who were not so. In *Round v. Hope Byde* (6), it was decided that a denial to a creditor in consequence of a general order to be denied to every person was sufficient to constitute an act of bankruptcy. But it has been contended that the collector was not a creditor, as he could not immediately sue the bankrupt for his debt. The argument, however, rests on fallacy as it confounds the debt with the remedy, and assumes that the former cannot exist unless the debtor may be sued in the usual and ordinary manner. The sums due for those rates were created by an assessment. The collector was in the nature of an agent duly entitled to demand and receive them, and when the assessment was made the debt was created and might be immediately demanded. It seems to me, therefore, that in this case there was a debt due on the assessment's being made, that the collector had a right to make a demand at the time he called, and that the order of denial by the bankrupt was made with a view of postponing the payment of the rates. At all events, whatever remedy the collector might have was postponed by such denial, because if he thought the bankrupt was at home and had been denied to him, he would have immediately had recourse to those remedies which were afforded him by the statutes. This is not like a debt payable at a future day, for it was in fact due when the demand was made, and the party was then entitled to receive it. G H I

Confining myself, therefore, to this single point, I am of opinion that this must be considered as a calling by a creditor within the intent and meaning of the bankrupt law, and, further, as the bankrupt had given a general denial to all

creditors and other persons, it was sufficient evidence of a beginning to keep house so as to constitute an act of bankruptcy.

PARK, J.—I am of the same opinion. It is not necessary to consider whether an act of bankruptcy was committed by the bankrupt's absenting himself, and I shall, therefore, confine myself to the point whether it may be deemed as a beginning to keep house with an intent to delay his creditors. There appears to be a great confusion in the textbooks on this point, as it is invariably stated that a denial to creditors is an act of bankruptcy, but that is not so, it is merely evidence of a beginning to keep house which constitutes such an act. In *Bayly v. Schofield* (1), **BAYLEY, J.**, said that it seemed to him that where a trader remained in his bedchamber for upwards of three weeks, it amounted to an act of bankruptcy, and **LORD ELLENBOROUGH** has said :

"Suppose a man shut himself up in his bedroom for a fortnight, and gives a general order of denial to all persons that might come, it would be a beginning to keep house with an intent to delay creditors, though no one should call."

Although in *Garret v. Moule* (7) an actual denial was considered necessary and the indispensable evidence of a beginning to keep house, still, such a denial is now usually given in evidence to explain the equivocal act of the trader's keeping in his house and to show that he did so with intent to delay his creditors, for a denial is always open to explanation as in cases of sickness, company, particular business, or the lateness of the hour. In *Smith v. Currie* (8) and *Shew v. Thomson* (9), it was held that a denial to a creditor when a trader is at his dinner is not an act of bankruptcy if the intention was only to avoid interruption at that hour and not to delay the creditor, although the creditor be thereby delayed. This distinction was pointed out by **LORD ELLENBOROUGH, C.J.**, in *Robertson v. Liddell* (3), and his Lordship also observed (9 East, at p. 494) that

"Indeed the fact of delay in the case of a beginning to keep house was usually resorted to in evidence for the mere purpose of explaining an act which might otherwise be equivocal."

So, in *Dudley v. Vaughan* (2), his Lordship said (1 Camp. at pp. 272, 273), that

"though an authorised denial to a creditor, requiring to see his debtor, is the most usual and familiar evidence of a beginning to keep house within the meaning of the statute, still, it is not the only evidence by which this may be proved. If a trader has no servant, the act cannot be evinced through such a medium. . . . And generally, if a trader secludes himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he begins to keep house within the meaning of the legislature, and commits an act of bankruptcy."

Looking at the principle laid down in those cases, which rests on a beginning to keep house with an intent to delay creditors, I am of opinion that there was evidence of such an intent in this case so as to constitute an act of bankruptcy by a beginning to keep house. I am further of opinion that the collector of the rates in question was in a situation to apply for them as a debt due at the time, and concur with the distinction as drawn by the Lord Chief Justice as to the debt being due, and the effect the denial might have, in postponing the remedy of the collector.

BURROUGH, J.—In *Garret v. Moule* (7), I decided as an arbitrator that in order to constitute an act of bankruptcy the debtor must be denied to a creditor with intent to hinder him, and that keeping house with that intent was not alone sufficient on the ground that an actual denial was necessary, and the indispensable evidence of a beginning to keep house. On a motion being made to set aside the award **LORD KENYON** doubted whether this construction should have been put on the statute at first, but that, it having been obtained, he was afraid to disturb it. This, however, was afterwards doubted, and in the subsequent case of *Fowler v.*

Padget (10), his Lordship, on adverting to the statute, was of opinion that by reading the word "and" for "or," as was frequently done in the construction of legal instruments where the sense required it, all difficulty would be removed. That construction was adopted by the Court of King's Bench in *Robertson v. Liddell* (3) where it was held that the departure of a trader from his dwelling-house with an intent to delay his creditors was an act of bankruptcy, though no creditor was thereby in fact delayed. The same rule is applicable to a beginning to keep house, and this was so held as the knowledge of the intent rested entirely with the bankrupt himself and his family with which the creditor could have no possible means of being acquainted.

The beginning to keep house is only put as one instance of an act of bankruptcy in the statute, and a denial to a creditor is strong evidence of the contemplation of such an act. But there are various other ways in which a trader may show an intent to delay his creditors that would eventually amount to an act of bankruptcy, for instance, if he locked himself up in his bedroom, or, as in *Castell's* case [*R. v. Bebb* (11)], where the bankrupt left the place where he usually sat, retired into a back room upstairs, and drew the curtains in order to prevent his being seen.

With respect to the nature of the debt, it is the duty of the inhabitants of a district to repair their highways. The poor contribute their labour, the rich their money, and the assessments levied on the latter are only a composition in lieu of such labour. The rate is in the nature of a debt, and it is immaterial whether it be immediately suable or not, for, if a remedy be given to recover the assessments due, they must stand in the same situation as debts which are usually suable. As soon as the assessment was made, it became a debt due to the collector, and he was empowered to enforce payment immediately. It, therefore, appears to me that he might be considered as a creditor and that a denial to him was sufficient. But it is unnecessary to determine this case on that point alone as there was a beginning to keep house with an intent to delay creditors.

Rule discharged.

WINSTONE AND ANOTHER v. LINN

[COURT OF KING'S BENCH (Bayley, Holroyd and Best, JJ.), Hilary Term, 1823]

[Reported 1 B. & C. 460; 2 Dow. & Ry. K.B. 465; 1 Dow. & Ry. M.C. 327;
1 L.J.O.S.K.B. 126; 107 E.R. 171]

Master and Servant—Apprentice—Dismissal—Right of master—Disobedience to orders and other acts of misconduct.

Disobedience of orders or other acts of misconduct by an apprentice does not, in the absence of express terms in the indenture of apprenticeship, entitle the master to put an end to the contract of apprenticeship.

Notes. Applied: *Phillips v. Clift* (1859), 4 H. & N. 168; *Learoyd v. Brook*, [1891] 1 Q.B. 431. Referred to: *Raymond v. Minton* (1866), 12 Jur. N.S. 435; *Westwick v. Theodor* (1875), L.R. 10 Q.B. 224; *Walterman v. Fryer*, [1921] All E.R. Rep. 582.

As to apprenticeship, see 25 HALSBURY'S LAWS (3rd Edn.) 491-497; and for cases see 34 DIGEST (Repl.) 313 et seq.

Cases referred to in argument:

- (1) *Cuff v. Brown* (1818), 5 Price, 297; 146 E.R. 613; 34 Digest (Repl.) 326, 2468.
- (2) *Anon.* (1703), 6 Mod. Rep. 69; 87 E.R. 828, N.P.; 34 Digest (Repl.) 324, 2441.
- (3) *Anon.* (1773), Lofft, 194; 98 E.R. 606; sub nom. *Kingston v. Preston*, cited in 2 Doug. K.B. at p. 689; 12 Digest (Repl.) 471, 3518.
- (4) *Holcombe v. Hewson* (1810), 2 Camp. 391, N.P.; 12 Digest (Repl.) 704, 5372.
- (5) *Robinson v. Hindman* (1800), 3 Esp. 235, N.P.; 34 Digest (Repl.) 91, 628.
- (6) *Spain v. Arnott* (1817), 2 Stark. 256, N.P.; 34 Digest (Repl.) 78, 503.
- (7) *Williams v. Rice* (1823), unreported.

Demurrer to plea in action for breach of an indenture of apprenticeship.

By an indenture of apprenticeship bearing date April 11, 1820, the defendant in consideration of a premium of £90 covenanted with the plaintiffs, Thomas Winstone the elder and Thomas Winstone the younger, his son, that he would, during four years, instruct Winstone the younger in the trade and business of a tobacconist, and also provide him with sufficient diet and lodging in the dwelling-house of the defendant. The plaintiffs allege that the son entered into the defendant's service, but the defendant did not instruct him in the trade of a tobacconist, and on the contrary, altogether refused so to do, failed to provide him with suitable diet and lodging although he at all times was willing to take his meals with the defendant, and on July 13, 1820, compelled him to quit the defendant's service before the expiration of the time agreed upon. The defendant pleaded that he was ready and willing to instruct the younger Winstone in the business during the term specified in the indenture, but that the younger Winstone refused to obey him in the business and to render him proper accounts of money entrusted to him, and on July 10, 1820, withdrew himself from the defendant's service, saying that he would never return. The plaintiffs replied that on July 13 the younger Winstone returned to the defendant, offered to serve him well and truly as an apprentice during the rest of the term, and requested him to take him back and continue his instruction, but the defendant refused to do so. To this plea the defendant demurred.

E. Lawes for the demurrer: The master of an apprentice is not bound to take him back into his service under the circumstances disclosed: *Cuff v. Brown* (1). So an apprentice is not bound to return, if required so to do, after licence from his master to leave his service: *Anon.* (2). The contract is entire and imports mutual conditions to be performed at the same time, and the plaintiffs, having in every respect violated the contract, cannot sue the defendant upon it: *Kingston*

v. *Preston* (3). The defendant's performance is also prevented by the act of one of the plaintiffs. This is like the case of a brewer who, having repeatedly furnished bad beer, cannot complain of a refusal to deal with him: *Holcombe v. Hewson* (4). In several nisi prius cases between master and servant misconduct on the part of the latter and refusal to obey his master's commands have been held sufficient to justify dismissal and non-payment of wages: *Robinson v. Hindman* (5); *Spain v. Arnott* (6); *Williams v. Rice* (7).

BAYLEY, J.—There is not any pretence for saying that there is a departure in this case. It would have been a departure if the plaintiffs had put their case in the replication upon a different ground from that contained in their declaration; but I am of opinion that they have not done so. The declaration charges generally that the master, from the time of making the indenture, did not instruct and maintain the apprentice, and that he compelled him to leave his service on July 13. The gravamen of the complaint is that the master compelled the apprentice to leave the service. The replication then shows the mode by which the master compelled him to quit his service, viz., by refusing to receive him again after his misconduct. That is not taking a new ground, but supports and fortifies the declaration. It cannot, therefore, be a departure.

I am also of opinion that there is no discontinuance in this case. It is said that the plaintiffs in their declaration claim an entire thing and afterwards in their replication narrow their claim instead of answering the whole of the defendant's second plea, and, therefore, that there is a discontinuance of the action as to that part of the claim which they have so abandoned. The charge in the declaration is that after making the indenture, the defendant would not instruct the apprentice, and that on July 13 he wholly refused then, or at any other time, to instruct him and that he would not provide him meals, etc. It is not one entire claim, but divisible, and covers every part of the time during which the master refused to instruct the apprentice.

I am of opinion that the plaintiffs are entitled to the judgment of the court upon the more important question in the case. That question is whether the master is at liberty to insist that the indenture is no longer binding upon him because the apprentice has unwarrantably refused to obey the commands of his master. By the indenture the master covenants that he will for four years instruct and maintain the apprentice. Upon this record we are not at liberty to assume that there are any other covenants in the indenture than those set out. Such indentures generally contain reciprocal covenants by each party. Those covenants are not dependent, but are mutual and independent, entitling each party to his remedy for a breach of them. The master, therefore, is liable to an action for a breach of the covenant to instruct and maintain the apprentice during the term agreed upon. If the second plea be good in this case, there is a sufficient answer to this action. In that plea the master relies upon a disobedience of orders, and upon the circumstance that the apprentice withdrew himself from his service, and declared his intention never to return. If he had continued to absent himself to the end of the term, there can be no doubt that that would have been an answer to the action, but it appears by the replication that the apprentice did return, and offered to serve the master during the remainder of the term, and that the latter refused to receive him. I have entertained some doubt whether the replication ought not to have averred this offer to have been made within a reasonable time, but I am now satisfied that it lay upon the defendant to have rejoined that an unreasonable time had elapsed before the offer was made.

That being so, the question arises upon these pleadings whether disobedience of orders or other acts of misconduct by the apprentice will entitle the master to put an end to the contract of apprenticeship. I am of opinion that it does not. If the parties had intended that the master should have such a power, they might have provided for it by the express terms of the deed. Not having done so, we

must conclude that it was not intended that he should have any such power. In the case of parish apprentices the legislature expressly provided that the indentures may be discharged upon complaint made by the master to two justices touching the misconduct of the apprentice in his service. The legislature must have thought, therefore, that without such an express provision the master of an apprentice would not at common law have the power of putting an end to the contract in case of the misconduct of the apprentice.

The cases which have been referred to in argument, arising out of the relation of master and servant, do not apply to the present. In the case of apprentices a premium is usually given, in consideration of which the master expressly contracts to instruct and maintain the apprentice during a given term. The premium is a consideration for the instruction and maintenance during the entire term. Where the ordinary relation of master and servant subsists it is a condition implied from the very nature of the contract that the master should only maintain the servant so long as he continues to do his duty as servant, and the contract is to endure for a reasonable time if no specific time be fixed and is determinable by a reasonable notice. For these reasons I am of opinion, that the plaintiff is entitled to the judgment of the court.

HOLROYD, J.—I think that the formal objections to the replication on the ground of departure and discontinuance, have been already fully answered. With respect to the general question I am also of opinion that the plaintiff is entitled to judgment.

The cases which have been referred to in argument and have arisen out of the relation of master and servant do not bear upon the present question. Under that contract the master, in consideration of the servant performing his service, undertakes to maintain him and pay him wages. The moment the latter ceases to do his duty properly as a servant, the consideration for the maintenance and wages fails. The relation that subsists between a master and apprentice is very different. Under that contract all the acts are not to be done by the apprentice. The master agrees to give him instruction, and the great object of the contract is that a young person entering into life should receive instruction and protection from the master. The latter has a greater control over his apprentice than over a mere servant, for he may even correct his apprentice. The master, too, usually receives a premium, which is paid him as a consideration for instructing the apprentice during the term agreed upon. If the argument urged on the part of the defendant were to prevail, the effect would be to deprive the apprentice of that protection which it was the object of the indenture to give him, and to leave him at liberty to go where he pleased.

The statute relative to parish apprentices tends strongly to show that at common law the master had no power to put an end to the contract of apprenticeship. It is true that this is not an indenture within the statute, and it must, therefore, be construed as if the statute had never passed, but the statute nevertheless shows that the understanding of the legislature at that time was that under indentures in the common form the master had no right to put an end to the contract in consequence of the misconduct of the apprentice.

BEST, J.—I entirely concur in the opinions pronounced by my learned brothers. The argument is that, if the apprentice be guilty of a single act of misconduct or be absent from the service of the master for two days, he is to lose the benefit of the instruction to which he was entitled by the indenture and for which the premium of £90 was paid. It has been said, that the act of going away, accompanied with the declaration that he would not return, deprived him of the protection of his master. But it would be most unjust if a single act of misconduct were to deprive a young person of the protection and instruction which he was to receive in virtue of the indentures, and for the continuance of which for a given time a valuable consideration has been paid. The master has at common law a complete

remedy, if the apprentice misconducts himself, by an action for a breach of the covenants. The provisions contained in the statute relative to parish apprentices show that at common law the master could not determine the contract, if the apprentice misconducted himself. I am, therefore, of opinion, that the plaintiffs are entitled to recover.

Judgment for plaintiffs.

QUEEN'S COLLEGE, CAMBRIDGE, CASE

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), January 20, 22, 24, 25, 26, February 15, 17, 20, March 20, 27, 31, 1821]

[Reported Jac. 1; 37 E.R. 750]

Education—University—College—Crown—Power to appoint president and fellows—Dispensation with observance of statutes—Dispensation inferred from long practice.

The Crown, as visitor of a college of royal foundation, has power to appoint the president or fellows of the college, and also to dispense with observance of the provisions of a college statute relating to those appointments and the qualifications of candidates.

While no usage can justify a violation of the statutes of a college of a university proof that a practice has existed for a long period (e.g., 250 years) may be taken as evidence of some original lawful authority, as, for instance, a dispensation by the Crown.

Per LORD ELDON, L.C.: I cannot impute to all the former as well as to the present fellows, and to all the presidents, that, in violation of their oaths to observe the statutes, they have from age to age permitted that to obtain among them which is now proved to be wrong.

Education—University—College—Office—Qualification for appointment—Possession of property—"Real property"—Application of equitable doctrines—Need to produce proof of qualification at election.

Where possession of real property was required as a qualification for appointment to office by college statutes,

Held: the modern doctrines of equity were not to be too rigidly applied in determining what was real property; therefore, an interest in land which in a court of equity would be deemed personal estate, as where a testatrix left land to trustees to be sold, the produce to be divided among certain persons of whom a candidate for appointment was one, might satisfy the statutes.

Where possession of property of a certain amount was required as a qualification for the office of president of a college,

Held: the election of a candidate was not rendered void by his having failed to produce proof of his qualification at the time of his election.

Education—University—College—Office—Requirements of valid admission.

Observations on the requirements of a valid admission to the offices of president or fellow of a Cambridge college.

Notes. As to universities and fellowships, see 13 HALSBURY'S LAWS (3rd Edn.) 707-717; and for cases see 19 DIGEST (Repl.) 656-658.

Petitions to the LORD CHANCELLOR acting on behalf of His Majesty as visitor of Queen's College Cambridge against the election and admission of the Rev. H. Godfrey, B.D., as president of the college.

The college was of royal foundation, and was endowed by the consort of King Henry VI, and by the Lady Elizabeth, consort of King Edward IV, the latter of

whom, about the year 1475, gave a body of statutes for its government. These were afterwards revised by commissioners sent down in the year 1559 by Queen Elizabeth I as visitor. The statute concerning the election of president is as follows:

"Statuimus, quod, vacante officio præsidentis hujus nostri collegii, statim infra quatuor dies immediate sequentes vacationis diem vel saltem quam cito cognoverint socii officium vacare, senior omnium sociorum (si tunc in villa Cantabrigiæ præsens esse possit, alioqui senior socius tunc domi præsens et juxta admissionem in ordine proximus) convocet omnes socios in villa præsentes innotescendo eisdem vacationem officii præsidentis; et idem senior antequam recedat injungat eisdem sociis sic congregatis ut, si fieri possit, octava die post ejusdem officii vacationem, ipsa die vacationis minime computata, singuli socii in villa præsentes interum conveniant in capellâ collegii, certa hora per dictum seniore limitanda, ad providendum eidem collegio de utili et idoneo præsidente.

"Octava vero die, convocatis itrum omnibus sociis tunc in villa præsentibus (absentibus tunc sociis a danda voce in hac electione penitus seclusis), senior prædictus eosdem hortetur ac illis injungat sub hac quæ sequitur forma. 'Injungo vobis, in virtute Jesu Christi et sub periculo animarum vestrarum, ut virum magis idoneum vestro judicio, omni partialitate remota, in præsidem hujus collegii eligatis, secundum Deum: qui sit vir providus, discretus, competentur literatus, in universitate aliqua hujus regni Doctoratus titulo insignitus vel ad minus in Baccalaureorum. Theologiæ ordinem cooptatus, in spiritualibus et temporalibus circumspexit, honestate morum præclarus, conversationis laudabilis, atque famæ redolentis, qui et melius sciverit atque poterit negotia collegii promovere; dum tamen sacerdos fuerit, et expendere poterit annuatim ad minus viginti libras.'

"Peracta injunctione ista, hymnus 'Veni, Creator Spiritus' ab omnibus sociis præsentibus in capellâ, invocando Spiritus Sancti gratiam, solemniter decantetur; cum oratione 'Deus qui corda fidelium, &c.' Quo facto senior socius prædictus associet sibi duos alios socios maxime seniores præsentium juxta admissionem; quibus simul stantibus ad mensam domini præfatæ capellæ, primo senior antedictus coram duobus aliis suffragium suum propria manu scribat; postea vero alii duo scribant singulatim suffragia sua manibus propriis; et deinde omnes alii socii præsentes, singulatim pacifice et sine murmure vel strepitu (sub pœna expulsionis à collegio ipso facto), sua suffragia coram prædictis tribus senioribus deponant et scribant suis propriis manibus, sub hac forma vel consimili, 'Ego N. eligo N. ad officium præsidentis hujus collegii.' Quibus sic conscriptis in una schedula, præfatus senior, vel alius quisquam illorum trium suffragia eadem aperte et distincte legat coram omnibus sociis præsentibus; et in quem major pars sociorum omnium tam præsentium quam absentium consenserit, ille pro electo habeatur absque contradictione cujuscumque: quam electionem dictus senior antequam recedat sub hac forma pronunciare teneatur: 'In nomine Patris et Filii et Spiritus Sancti, ego N. senior socius hujus collegii nomine meo et nomine omnium sociorum meorum, sive majoris partis eorundem, eligo et electum pronuncio N. in præsidem hujus collegii.' Si autem contingat majorem partem sociorum non convenire in unam personam, tunc omnes et singuli socii vota et suffragia sua singulatim rursus et de novo scribant juxta formam præscriptam, et sic faciant ter si toties majori parti sociorum videbitur expedire: et si nequiverint adhuc cōcordare, tandem compromittant omnes et singuli socii præsentes sua suffragia in quinque socios de maxime senioribus omnium præsentium, et in quem major pars ipsorum quinque seniorum consenserit (quos arctamus, sub pœna amissionis suarum societatum ipso facto, ut electionem perficiant ante horam duodecimam ejusdem diei ibidem) pro electo

habeatur, absque hæsitazione vel contradictione quacunq̃ue. Quam electionem præfatus senior, sub pœna incurrendi manifestum perjurium, et sub periculo perpetuæ expulsionis a collegio, teneatur pronunciare, et personam sic electam admittere; faciatque electum præsentem inquiri, et coram communitate collegii, in capellâ ejusdem, ad mensam domini ex collegii sumptu personaliter præsentari: quo præsentē psalmum 'Te Deum laudamus,' omnes socii præsentēs solemniter cantent; et postea electus præsidēs præstabit hoc quod sequitur juramentum, seniore socio id ipsum exigente."

Then followed the oath of the president; after which the statute proceeded thus:

"Quo facto senior socius librum statutorum clavesque cistarum quæ ad officium præsidētis pretinere noscuntur illico tradere non postponat."

On April 1, 1820, the office of president became vacant by the death of the Rev. Isaac Milner, D.D. The senior fellow, J. L. Hubbersty, M.D., appointed nine o'clock on the morning of Sunday, April 9, for the election. All the fellows, sixteen in number, assembled in the chapel at that hour. The candidates proposed were, the Rev. W. Farish, the Rev. George Barnes, B.D., the Rev. H. Godfrey, B.D., and the Rev. W. Mandell, B.D. The two latter were among the five senior fellows of the college. The senior fellow, who proposed Mr. Barnes, stated to the meeting that a benefice of which he was incumbent was of more than sufficient value to qualify him according to the statutes. He also inquired for the qualification of Mr. Mandell, who answered that he had it in his pocket. Mr. Godfrey was silent as to his qualification. It was represented in some of the affidavits that he had been required to produce it, but had refused. He, however, denied that any inquiry was made, or any explanation asked for on the subject, and deposed that he had no reason to believe that any doubt of his being duly qualified was entertained by any of the fellows. His statement was corroborated by some of the other affidavits. The votes being then taken, the numbers appeared to be, eight for Mr. Mandell, four for Mr. Godfrey, three for Mr. Barnes, and one for Mr. Farish. Neither candidate having a majority of the whole number of votes, two more scrutinies took place, both of which being also inconclusive, the right of election devolved upon the five seniors. Four of their votes were given in favour of Mr. Godfrey, upon which the senior fellow pronounced his election in the words directed by the statute, and presented him at the communion table to the fellows as their president, and the *Te Deum* was read.

A difference of opinion then arose among the fellows as to the period at which the declaration of conformity, required by the Act of Uniformity, 1662, s. 10, and the Oaths Act, 1688, ought to be signed by the newly elected president. Some expressed an opinion that the signature ought to precede the oath of admission, others that the latter ceremony should take place first. The result was that Mr. Godfrey took the oath at once, and the senior fellow delivered to him the keys of the college chests and a copy of the statutes. There was a slight variation in the statements made by the affidavits as to this transaction, some representing that it was by Mr. Godfrey's own choice and desire that this course was adopted, while he and some others stated that he acted only in concurrence with what appeared to be the opinion of most of those present. He immediately afterwards went to the door of the president's lodge (with the view, as it was stated, of taking possession) and left the keys there, and on the same day he sat at table in the hall and in the combination room, in the president's seat. The copy of the statutes, which was delivered to Mr. Godfrey, was one that was usually kept in the combination room for the use of the fellows. There was another copy appropriated to the use of the master. At the time of the election it was locked up at the lodge and could not be found. The two copies were considered to be equally authentic. On the morning of the following day, Monday, April 10, Mr. Godfrey attended the vice-chancellor of the university, and there subscribed his name

to the declaration of conformity in the vice-chancellor's book. He then entered upon the exercise of the office of president.

Soon after the election an opinion began to gain ground in the university that it had become void from the signature to the declaration of conformity having been postponed till after the oath of admission. On April 15 Mr. Godfrey went to London for the purpose of consulting counsel on the subject. He returned in a few days, and on April 20 he called a meeting of the fellows then in residence in the chapel, where the following ceremony took place at his request. He was introduced by the senior fellow to the president's seat and installed in it by him. He then knelt down at the altar of the chapel, and the senior fellow pronounced over him the following words :

"Ego, J. L. Hubbersty, senior socius hujus collegii, admitto te in præsidem hujus collegii, in nomine Patris et Filii et Spiritus Sancti."

Mr. Godfrey was desirous of taking the oaths of allegiance, supremacy, and abjuration at the same time, but the senior fellow declined to administer them as being oaths that should be taken in one of His Majesty's courts of record, which Mr. Godfrey afterwards did.

A petition was presented by J. King, one of the fellows of the college, praying a declaration that the office of president was vacant and that a new election ought to take place, or, if it should appear that the right of nominating or appointing to the office had devolved upon His Majesty as visitor, then, that His Majesty would be graciously pleased forthwith to nominate or appoint to the same. The petition alleged that Mr. Godfrey was not possessed of the qualification required by the statute, and submitted that on that account, and from his not having stated his qualification at the time, the election was void, but it chiefly insisted upon the circumstance of Mr. Godfrey having been admitted to the office without having previously subscribed the declaration of conformity. In the affidavits filed in answer to this petition Mr. Godfrey stated himself to be entitled to an interest in real estate exceeding £20 per annum in value, and denied having ever refused to show his qualification. Evidence was also produced for the purpose of proving that the ceremony performed in the chapel on April 20, 1820, was necessary and constituted the admission to the office, and that the subscription was, therefore, made before the act of admission. With reference to the question whether the subscription to the declaration should have been made on a Sunday, it appeared that in the university of Cambridge it was customary to do many public acts on that day. The congregations of the senate of the university, fixed for particular days of the month, were held although those days fell on a Sunday, degrees were conferred, and other university business was transacted. It had often happened that masters and fellows had been elected on Sunday, and had signed the vice-chancellor's book on the same day.

Another petition was presented by the Rev. W. Mandell and some other of the fellows raising a different objection to the election of Mr. Godfrey. At the time of Mr. Godfrey's election as a Middlesex fellow to a fellowship in 1803 there was already one fellow (the Rev. G. Barnes) of the county of Middlesex. Mr. Barnes continued a fellow till 1817. The petition contended that, the college not having property in Middlesex sufficient for the maintenance of a fellow, there could not legally be more than one fellow of that county at the same time, and that Mr. Godfrey's election as fellow was, therefore, void. The consequence of this was that at the election on April 9 there were only fifteen persons, instead of sixteen, entitled to give votes. Out of these, eight, upon the first scrutiny, were given for Mr. Mandell, constituting a majority of the whole number. He contended that he ought, on the result of that scrutiny, to have been declared duly elected, which the petition accordingly prayed. With reference to this question, it appeared that from the year 1568, previous to which the college register was imperfect, down to the present time, it had been usual to have at the same time two fellows from

the county of Middlesex or the city of London. It had sometimes happened that in addition to these a third fellow of that county had been elected by a dispensation from the Crown, and there was found in the president's copy of the statutes a form of a petition to the King for a dispensation to elect a fellow when his county was full, which commenced by stating :

"That whereas the statutes of the said college do permit no more than two persons of the county of Middlesex to be chosen fellows thereof . . ."

No traces were found of the manner in which this custom had originated, but it was suggested that there was reason to believe that some of the documents of the college had been lost during the civil war.

It was insisted in support of Mr. Mandell's claim, that the possession of personal property to the amount of £20 per annum was a sufficient qualification for the office of master to satisfy the statute. On the other hand, in several affidavits it was stated to be the prevailing opinion that real estate only was to be considered as forming a qualification. A difference of opinion also existed as to the requisite amount of the qualification. The sum mentioned in the statute was £20, and the annual income, the possession of which was to disqualify a fellow, was £10. With respect to the clause of the fellows' oath imposing this restriction, an interpretation had been made in the year 1774 by the president and fellows by which it was declared that it was to be understood in the following sense :

"Neminem hodie propter redditum aliquem temporalem pro termino vitæ, a societate sua recedere teneri, nisi talis redditus summam 90 librarum exuperabit."

In the year 1804 another interpretation was made, stating it to be the sense of the master and fellows that the words, "quando poteris expendere annuatim," ought to be interpreted afresh on account of the decrease of the value of money and other changes of the times. Accordingly, the master or president and the major part of the fellows present as well as absent declared that as the interpretations above mentioned

"did proceed on the principle of a diminution in the value of money in the proportion of one to nine, it will in future be equitable that the rule of practice be in proportion of one to twelve at least."

Upon these interpretations, an argument was founded that the £20 mentioned in the statute as the qualification of a president should be increased in the same proportion.

Wetherell and Bligh for the petitioner King.

Hart and Montagu for the petitioner Mandell.

Horne, Shadwell, and Garratt for Godfrey.

Mar. 20, 1821. **LORD ELDON, L.C.**, said that he understood his duty to be to advise His Majesty, as visitor of the college, on the subject before him. He had himself no right to the disposal of the appointment, supposing the office to be vacant. Upon the passage "personam sic electam admittere," the Lord Chancellor remarked that the question arose what the word "admittere" meant in statutes of that sort. He said: There is a passage which I think I remember in **LORD COKE**, where he says that admission is sometimes used as including institution, but that it is really distinct from institution and induction. If you look at the appendix to **GIBSON'S CODEX**, which contains instruments respecting the induction, etc., of bishops, deans, and archdeacons, you will, I think, agree with me in the opinion I have formed, that this word "admittere" has, in the law of England, a peculiar and appropriate signification, belonging to itself, as denoting an act connected with, but distinct from, other acts the whole of which make the complete investiture of persons admitted into offices of this sort. I stop for a moment to say, that admission may have more or less of ceremonial about

it; it may be a mere declaration that the one person admits the other, as a bishop says to a clergyman: "*Admitto te habilem*," etc., or there may be more. With reference to the direction in the statute that the president should be presented "*coram communitate collegii*," HIS LORDSHIP said it had been asked what "*communitas*" meant. If the statutes had been read altogether, he confessed he should have said that the "*communitas collegii*" did not mean merely the assembly of the fellows, but the assembly of the whole corporation of the college. It would be too much, however, to disturb the election on that ground after such a practice, such a *consuetudo*, whether it be *laudabilis* or not, has been acted on at different periods.

HIS LORDSHIP continued: Having taken this notice of the various statutes which bear upon the matter before me, I now come to the first question for decision—whether Mr. Godfrey ought or ought not to have been considered a fellow of this college? I must admit that I have found no authority in the statutes themselves or any written document purporting to alter the ordinance by which there was to be only one fellow for the county of Middlesex. But on looking at the affidavits, particularly that of Mr. Godfrey and Mr. Gorham, showing the practice of having two fellows of that county to have existed for 250 years at least, and observing the passage which states this practice to have been in a sense sanctioned by DR. MILNER, advertent to the paper containing the form of an application for a dispensation to allow a third fellow for the county of Middlesex, and yet admitting, as I fully and entirely do, that no usage can justify a violation of the statutes, I have put these questions to myself: (i) whether this usage may not be taken as evidence of some original lawful authority, whether it may not be evidence of some dispensation not now produced, but that did once exist; and (ii) whether it be necessary, or rather fit for me to say, that all that has been done in this college for so many years has been wrong when it might have been all right, if I take the usage to be evidence of a lawful origin? I own that the conclusion to which I am driven is that I cannot impute to all the former as well as to the present fellows, and to all the presidents, that, in violation of their oaths to observe the statutes, they have from age to age permitted that to obtain among them which is now proved to be wrong. Upon looking at another class of affidavits, I might, I think, be justified in making some further observations, but I abstain. It is sufficient for me to say that whether Mr. Godfrey was or was not entitled to vote at this election as a fellow *de facto*, I conclude from this evidence that he was a fellow *de jure*. Mr. Mandell's claim to be master, therefore, falls to the ground.

Mar. 27, 1821. LORD ELDON, L.C.—I proceeded so far the other day as to state my opinion upon the claim of Mr. Mandell founded on the allegation that Mr. Godfrey ought not to have been considered as a fellow. It appeared to me that, according to the statutes when originally made, there could only be one Middlesex fellow. But on finding by the affidavits that the practice of having two fellows of that county has prevailed for two centuries and a half and that a form of applying for a dispensation to have a third was known in the college, and considering that during that long series of years every fellow must have forgotten his oath if the statutes have been violated, and as I apprehended the Crown could dispense with the statute and by a general dispensation sanction the practice of having two Middlesex fellows, it appeared to me that the usage ought to be referred to a lawful origin.

It remains to consider whether Mr. Godfrey was duly elected, and, if so, whether he continues to be president, or whether, under the operation of any statute of this college, or of the land, the office has become vacant. If there be a vacancy, there will yet remain another question, viz., in whom is the right of appointment?

With respect to the election, it is necessary to refer to the statute declaring the form, and the various qualifications required in the candidates. No objection was made to any of the candidates in point of literary, moral, or religious qualifica-

tions; it was also admitted that each of them answered the description of sacerdos, though neither of them produced or was called upon to produce his letters of orders. I mention this as connected with an observation I shall make with respect to the last qualification required, "et qui expendere poterit annuatim ad minus viginti libras." Mr. Barnes's qualification was pointed out. Mr. Mandell was ready to produce what he represented as his. With respect to Mr. Godfrey, there appears to have been some misunderstanding. It does not distinctly appear whether he was so called upon as to enable anyone to say that he refused to produce it or state what it was. One objection made to the election is that his qualification was not shown. I have no difficulty in saying that it would be extremely convenient, if at these elections the qualifications were shown, but I cannot go the length of saying that the election is void because the qualification was not produced, if it existed.

With respect to the question whether Mr. Godfrey was qualified or not the first point to be disposed of is whether it is made out that with reference to this last election, the person to be elected ought to have had a qualification exceeding the original "viginti libræ" in the same proportion in which the sum which is now represented as forming the disqualification to hold a fellowship exceeds the original "decem libræ." If it be so, I do not make any improper disclosure in saying that neither Mr. Mandell nor Mr. Godfrey were qualified. The last interpretation of the statutes is dated in 1804. By it the master and fellows (no doubt acting on their honest apprehension of the statute "de interpretatione statutorum") have stated that by reason of the change in the value of money, the disqualification of the fellows being "decem libræ" of the time of Queen Elizabeth I should be at least £20 of the present day, to keep up the proportion between the stipend of the fellows and the sum forming the disqualification; and without entering into an inquiry whether there was a due authority for the interpretation which has thus augmented the disqualification, recollecting that it is a different question what a visitor may do as a reasonable and fair interpretation of college statutes, and what he may permit with respect to points on which the law of the land attaches, I do not apprehend that what has been done on this head by the master and fellows would be likely to be disturbed by any visitor. But none of these interpretations touch the qualification of the master. And though no one can read the statutes without seeing that it was the intention of the foundress to keep up a proportion between the incomes of the master and the fellows so that the master might have more ample means than they, yet, in point of fact, nothing has been done either by the college or by any visitor to alter the amount of his qualification. I, therefore, come to the conclusion that, whatever may be fit to be done to keep up the ratio that originally subsisted, it cannot be applied to destroy an election that has taken place before any construction was put upon the statute. Whatever may be proper with reference to future elections, we cannot look back for that purpose.

The next question is one of great importance to the universities--whether a real or personal qualification is intended by the words "expendere annuatim viginti libras?" I have been much misinformed and misled if it be not the habit, the "consuetudo" of both universities to consider the acquisition of personal property as not disqualifying from holding a fellowship. The consequence would naturally seem to be that you would construe property required as a qualification in the same way, and, accordingly, there is, I think, a great deal of evidence here to show that it has always been the understanding in this college that both the qualification and disqualification must be of a real nature. But I do not think it necessary to decide the general question, and it has always been my practice, if possible, to avoid so doing. Such a decision might involve the interests of all the colleges in both the universities. For if the question be whether Mr. Godfrey's qualification be real or personal, I think that for the purposes of this day it is

A real. It is not, therefore, necessary to say what would be the effect of its being personal, and I should not be acting right if I decided that question.

Mr. Godfrey's qualification is of this nature. A testatrix leaves a real estate to trustees to be sold, the produce to be divided among four persons of whom Mr. Godfrey is one. If the trustees had executed the will and we were now discussing the effect of it in a court of equity, it would be difficult according to our modern notions to say that it was real estate, but I have no conception that the modern doctrines of equity are to be too rigidly applied in determining what is to be considered as real property with reference to statutes framed in the time of Queen Elizabeth I. If nothing more had been done under this will than taking possession, the court would say that the trustees should sell it, and the legatees take the produce as personalty, each having an interest in the produce of the whole. Each had a right to say that the whole should be sold. But we must consider what has been done. As to one of the parties, he has accepted for his share a portion of the estate as land, and we know that where real estate is to be converted into personal, the slightest circumstance is sufficient to reconvert it into land. The other tenants in common have agreed that there shall be a sale of the remainder of the property if they can obtain a specified price for it, otherwise it is not to be sold. It remains now realty, not to be converted except upon an occasion that may never happen. There is nothing in the statutes to prevent the master, if he be qualified at the time of the election, from selling his property the next day, though certainly he ought not to think of it. However, this property is now real, it may always be so, and I am, therefore, of opinion that there is a real qualification vested in Mr. Godfrey.

With respect to the election, there seems to be no doubt: the next point is whether Mr. Godfrey still continues master, regard being had to his admission and to the subscription required by the act of uniformity. The first important question here is, what is the meaning of the word "admittere," used in college statutes in the time of Queen Elizabeth I? It is beyond doubt that it means something more than to elect for the senior fellow is bound not only to pronounce the president elected, but to admit him. In the title of the oath to be taken by the fellows we find "*juramentum sociorum, quo præstito admittantur*," etc.; not "*admittuntur*." I should have found it difficult to lay much stress on the difference between "*admittantur*" and "*admittuntur*" if I had not perceived from the evidence that it is quite substantial, for it is a fact beyond all controversy that after the fellow has taken the oath he is admitted in a mode showing that the taking the oath cannot be the admission. They present themselves on their knees before the president, who says: "*Ego admitto te*," etc.; and this form constantly follows the oath. There is another remarkable expression in the title of an oath to be taken by certain scholars on the foundation of Dr. Stokes, a former president: "*Jusjurandum electorum scholarum antequam admittantur*," which shows that some form of admission was required after taking the oath.

We must inquire, then, what the form of admission of the master is subsequent to his oath. After the form of the oath, the statute proceeds thus:

"*Quo facto senior socius librum statutorum clavesque cistarum quæ ad officium præsentis pertinere noscuntur illico tradere non postponat.*"

It has been contended that, if the book of the statutes (it being in controversy which is that book) and the keys of the chests are delivered to the person elected, he, having taken the oath, becomes thereby the admitted president. For that purpose it would first be necessary to make out the fact that the true book of the statutes belonging to the president and the identical keys were delivered. It is argued, on the one hand, that in the passage I have just quoted, the word "*quæ*" refers only to "*claves cistarum*"; on the other hand, it is contended that it refers also to the *librum statutorum*. I take it to be clear from the statutes themselves that there is a book of the statutes, and that there are also keys

which in a peculiar and strict sense belong to the master, and I take it to be equally clear that that book was not delivered. No blame on that account attaches on anyone, for the statute as to the manner of keeping these books does not seem to have been much observed. But, speaking on the authority of the statutes, it is clear that the book in the combination-room was not the book of the master, and not the book intended to be delivered. If I were the new master I should be very sorry that my admission should depend on having that copy put into my hands. However, I should not wish to decide the case upon a circumstance of that kind. A B

Mr. Godfrey, being present at the election, takes the oath at the time, and receives a book of the statutes. In the affidavits there is much difference of statement as to what passed, whether his taking the oath and going through the other ceremonies at once was his own wilful act, or whether it was insisted on by some of the fellows. On the whole, however, I think that in doing it he acted in compliance with what he thought the general wish. If that constituted admission, the question arises whether he signed the declaration "at or before" his admission to be incumbent or to have possession. It is clear that he did not do it "before" taking the oath and receiving the book and keys. He had not only taken the oath, but he had also gone to the lodge and had done acts that were said to be possessory, having presided in hall as master, and, if he was not master, yet acting as such. Then did he subscribe it "at" the performance of the ceremonies, and what is the meaning of the word "at" in the statute of uniformity? It is clear that it does mean "before"; that "at" cannot mean "after" in certain senses of the word is likewise clear, and yet that it cannot mean, in many cases that may be put, what is strictly contemporaneous or simultaneous appears to me to be likewise clear, for, if he has not subscribed before admission and neither the vice-chancellor nor his deputy are present, he cannot do it "at" admission in the sense of simultaneously. Then the question is, if he went eo instanti to the vice-chancellor or his deputy to subscribe, whether that would not be fairly within the meaning of the word "at," it being sometimes interpreted as "on the occasion of," according to our great lexicographer? C D E F

It was then argued that it was incumbent on Mr. Godfrey to go immediately to the vice-chancellor for the purpose of subscribing and that the circumstance of its having been a Sunday did not relieve him from that obligation, many such acts being usually done at Cambridge on Sunday. The question, however, if it were to be determined upon this point, would be not what may, but what must be done on a Sunday, not what is permissive, but what is obligatory on that day. And, if the question were not prejudiced by the general usage, I should think it more wholesome to say that this act ought not to be done on a Sunday than that it was necessary. But this is not the point on which I mean to decide the case, and, therefore, I desire it to be understood that my decision leaves it open to the university of Cambridge to do as it may think fit on this subject. I give no opinion upon it. G H

I shall now state my view of the case, and if there be much of novelty in it, or if it be unsatisfactory, I shall not object to hear anything further that may be suggested. The true point I apprehend is: What is, according to the true construction of the statutes, the act that is called admission? With respect to the fellows, there is no doubt that their admission is not complete till the president pronounces over them the words "admitto te," etc. The word "admittere" in statutes framed in the time of Queen Elizabeth I must have a construction put upon it according to the usage arising under the statutes in which it is made use of. There is nothing in the statutes prescribing this ceremony as to the fellows except the word "admittere," and that practice must construe the word. Therefore, when it is contended that the statutes do not require this form, I say it is a fallacy, if they require admission. If the word "admittere" requires something that act must be performed, though the author of these statutes has not said precisely what is the exact form to be observed. This seems to me to be an I

answer to a communication I have received from Cambridge in which I am told that the head of a college, at the time of his admission, did not like to go down upon his knees before a person of inferior rank. In the first place, I should say that I doubt the good sense of this for till he is admitted it may be asked whether he is the superior in rank. In the next place if the statutes require it, they furnish an answer to that sort of punctilio. If the word "admittere" requires anything to be done, till that thing is done the admission is not complete.

As to what the usage has been with respect to the master, the evidence is very defective. What was done when Dr. Milner was elected is not known. It appears, indeed, that he was led to the president's seat and installed in it by the senior fellow. As to the rest of what passed, the affidavits are silent, but this circumstance of his being installed in the seat amounts to rather more than the others not recollecting what took place. We must then look for information further back than the late master, and I now come to that remarkable memorandum of a Mr. Thwaites which is to be found in the affidavit of Mr. Gorham and appears in a sense to have been sanctioned by Dr. Plumtre, a former master. As I have before observed, if you look at the ancient instruments, and particularly those in the appendix to GIBSON'S CODEX, you will find what is the legal interpretation of the word "admittere" in documents of this kind. I do not find there that there is any difficulty about being admitted by persons of inferior rank; the bishop and the dean do not scruple to be admitted by their inferiors, nor, on the other hand, does the prebendary scruple to be admitted by his superior in rank, but they all have a certain form. So it is with clergymen, the law requires the bishop to admit them by an act distinct from institution and induction, pronouncing the words "admitto te habilem," etc. Taking this along with us, connecting it with the form of admission of fellows and scholars, and remembering that it must mean something more than election, and that, though an oath is administered to the master, yet the construction of the word "admittere" is not satisfied by anything of that kind, as to the fellows and scholars, let us look to this affidavit. [His LORDSHIP read the affidavit relating to the memorandum of Mr. Thwaites, purporting to be an account of the forms for the admission of a president.] I agree that this particular form is not in terms mentioned in the statutes, but, if it be admission, then I conceive that this form is in substance prescribed by the statutes.

This memorandum may, I think, fairly be taken to be a statement of what passed at the time of Dr. Plumtre's election. It does appear that in many colleges these forms are not observed. This, however, does not bear upon the argument, for if they have been observed as completing admission in this college where admission is required, that circumstance must give the construction to that which is required. I am, therefore, disposed to think that the admission of Mr. Godfrey was not complete when he subscribed before the vice-chancellor, and that his real admission was that which was made by the ceremonies of April 20. I state this as my present opinion, subject to observations which I shall be happy to hear from those who may have the disposition to make them.

If I am right in this opinion, it is unnecessary to consider what would have been the effect of an admission on the Sunday and a subscription on the following day. I should be unwilling to risk exciting mischievous disturbances with regard to this question in a university, where I hope there will be a perfect quiet on such subjects for the future. If the admission was not complete on the Sunday, the next question is whether it was too long delayed. I cannot bring myself to think that it was, for everybody appeared to be to a considerable degree ignorant of what was to be done, and the admission took place as soon afterwards as professional advice could be obtained.

It is not now necessary to consider two other points: namely, the meaning of the word "at" in the statute of uniformity, and whether on the supposition of this headship being vacant by the penal enactment of that statute, the nomination

would be in the Crown or in the fellows. It does seem to me, I own, on looking into the Act of Uniformity, 1662, and also the Act of Uniformity Explanation Act, 1663, that, if there was not a subscription within the Act of Uniformity, the office was ipso facto void, without any necessity for a judicial sentence. I am the rather inclined to think so, because the statute of 1663, speaking of those cases where it had been impossible to comply with the enactment of the Act of Uniformity, says that if the parties subscribe within a given time they shall "be restored into and preserved in their respective deaneries, canonries, prebendaries, masterships," etc., unless such offices should have been filled up in the meantime. The object was to restore to the offices in certain circumstances, and restoration must be to something that has been lost.

With reference to the question whether the Crown or the college would have the right to fill this vacancy, it is to be observed that there are subsequent statutes which, in order to give effect to the Acts that vacate the office, have given the right of nominating to the Crown if those who have the right have not made a new election in a certain time. But that would not decide this, for the question would be whether, if there was not a due election made by the fellows within eight days, the fellows have by their statutes any power of electing afterwards. It was not the fault of the fellows that he did not subscribe, but they must be taken to be conusant of the law of the land, and, therefore, to have known that his office was vacant as if he were naturally dead. Having such knowledge, ought they not to have proceeded within the prescribed period to a new election, or being so conusant, are they to be exempted from the consequences of the infraction of their own statutes, as well as of the law of the land? However it is not necessary for me now to decide this if I am right in the construction of the word "admission" as received by other bodies, as recognised in this college, and as confirmed by immemorial usage. I believe I have put it in a light somewhat new, and I have, therefore, entered largely into the reasons of my opinion.

Declaration that Henry Godfrey was entitled to hold and enjoy the office of president of the college and all the emoluments and rights thereunto appertaining; petitions dismissed; costs of petitioners, Godfrey, and the Attorney-General to be paid by the college.

OLIVER AND WIFE v. COURT AND OTHERS

[COURT OF EXCHEQUER (Sir Richard Richards, C.B.), January 11, 12, February 3, 1820]

[Reported 8 Price, 127; Dan. 301; 146 E.R. 1152]

Auction—Auctioneer—Duty—Sale of property to best advantage of vendor—Purchase of goods auctioneer employed to sell—Transaction invalid so long as employment as auctioneer continues.

It is the duty of an auctioneer to sell property which he is employed to sell to the best advantage of the vendor. So long as his employment as auctioneer continues he cannot purchase the estate which he is engaged to sell, for, under the well-known and established rule of equity, any person who is invested with a trust or an employment to be performed by him to the advantage of his cestui que trust or principal is disqualified from placing himself in a situation incompatible with the honest discharge of his duty.

Trustee—Duty of trustee—Faithful execution of trust—Negligence a gross breach of duty—Sale of trust property below fair price.

When trustees accept a trust they take on themselves a duty from which naturally results an implied undertaking faithfully and without negligence to execute the trust. They are bound to see that they obtain a fair price for trust property which they sell. Where no culpable acts are expressly charged against them, but the circumstances of the case disclose to the court that they have neglected their duty by remaining passive and supine and not protecting the interest of the cestui que trust the court will reprobate their want of attention and inactivity as a gross breach of duty, and refuse to give them (although necessarily made defendants to an action by the cestui que trust against a third party) their costs of suit.

Trustee—Duty of trustee—Performance delegated to one trustee—Liability of other trustees.

Where several trustees leave the entire performance of the duties of the trust to one co-trustee all are equally responsible for the faithful and diligent discharge of their joint and several duty towards the cestui que trust by that one to whom they have delegated its exercise.

Notes. Referred to: *Armstrong v. Jackson*, [1916-17] All E.R. Rep. 1117.

As to an auctioneer's duty, see 2 HALSBURY'S LAWS (3rd Edn.) 83-86; and as to a trustee's duty, see *ibid.*, vol. 38, pp. 966-978. For cases see 3 DIGEST (Repl.) 29 et seq.; 47 DIGEST (Repl.) 346 et seq.

Cases referred to:

- (1) *Ex parte James* (1803), 8 Ves. 337; 32 E.R. 385, L.C.; 47 Digest (Repl.) 258, 2269.
- (2) *Campbell v. Walker* (1800), 5 Ves. 678; 31 E.R. 801; 47 Digest (Repl.) 260, 2285.
- (3) *Morse v. Royal* (1806), 12 Ves. 355; 33 E.R. 135, L.C.; 47 Digest (Repl.) 259, 2275.
- (4) *Lowther v. Lowther* (1806), 13 Ves. 95; 33 E.R. 230; 1 Digest (Repl.) 534, 1630.
- (5) *Coles v. Trecothick* (1804), 9 Ves. 234; 1 Smith, K.B. 233; 32 E.R. 592, L.C.; 47 Digest (Repl.) 259, 2272.
- (6) *Andrews v. Mowbray and Castle* (1807), Wils. Ex. 71; 159 E.R. 835; 1 Digest (Repl.) 535, 1639.
- (7) *Bonney v. Ridgard* (1784), 1 Cox, Eq. Cas. 145; 29 E.R. 1101; 47 Digest (Repl.) 186, 1549.

- (8) *Gregory v. Gregory* (1815), Coop. G. 201; 35 E.R. 530; affirmed (1821), A Jac. 631, L.C.; 47 Digest (Repl.) 263, 2310.
- (9) *Ex parte Bennett* (1805), 10 Ves. 381; 32 E.R. 893, L.C.; 47 Digest (Repl.) 258, 2270.

Bill for a declaration that the purchase by the defendant Court of the plaintiff Oliver's life interest in an estate was fraudulent and should be set aside. The other defendants were the trustees of the plaintiff appointed under a conveyance of the estate, executed by him for the benefit of his creditors, and certain encumbrancers on the estate since the defendant Court had been in possession. The bill also prayed that in taking the account the defendant Court might be charged with a full and fair rent for the premises and the full value of all the timber cut by him, and be decreed to pay to the plaintiff what should be found to be due to him on taking such accounts, and also that he might be decreed to account for all waste committed by him. The plaintiffs also claimed an injunction restraining him from committing further waste on the premises. B C

The bill stated as follows: The plaintiff, by articles of settlement dated 1787, before his marriage, covenanted to convey to trustees a freehold estate in the county of Worcester, of the yearly value of £183, to the use of himself for life without impeachment of waste, except voluntary waste in buildings, remainder to his wife for her life, with power to lease, remainder to their children, in such shares as the plaintiff should appoint, and in default to the trustees for a term of 200 years, for raising portions for younger children, and after and subject thereto to the sons and daughters in strict settlement with remainder to the use of the right heirs of the plaintiff. In March, 1799, the plaintiff having become embarrassed in his circumstances, conveyed other real estates of which he was then seised to two of the defendants in trust for the benefit of such creditors as should execute the deed. The trustees caused these estates to be advertised for sale by public auction and offered them for sale by private contract without being able to procure anything near the price at which they had been valued by the surveyor employed for that purpose. The plaintiff owed at that time considerable sums to persons not parties to the deed of March, 1799. D E F

The plaintiff being by virtue of his marriage settlement entitled to a life interest in the settled estates, with reversion in fee to himself on failure of issue of the marriage, conveyed all his estate, right, title, and interest in the same, by indenture of May 16, 1801, to trustees (the same persons as had been appointed by the deed of 1799) in trust to sell for his creditors, reciting, as part of the consideration of such deed, that he was to be paid or allowed an annuity of £150 during his life, and subject thereto upon trust to sell the plaintiff's interest in the property and to pay the proceeds to the unsatisfied creditors and the surplus, if any, to himself. G

Previous to 1799 the father of the defendant Court carried on the business of land surveyor and agent in partnership with his son, and in 1801 they were employed in that character by the trustees mentioned in the deeds to survey, measure, and value all the estates so conveyed by the deeds. During the year 1801 they surveyed and measured the property, and the entire management of it for the purpose of sale was committed to them by the trustees, as their confidential agents. The defendant Court afterwards took another person into partnership. but he still continued to conduct the management of the property for the purpose of selling it by means of which employment he acquired an intimate knowledge of the trust property and its value. H I

In February, 1802, the property which was the subject-matter of the deed of 1787 was put up for sale by public auction on which occasion the defendant Court acted as the auctioneer, having been so employed by the trustees. The plaintiff alleged that the defendant, having formed an intention of purchasing the property himself, by contrivance prevented any sale from taking place, and

A on the next day, or the day after that, himself made proposals to the trustees to become the purchaser of the property, and afterwards entered into a contract with them for the sale thereof to him, at a very small and inadequate price, namely, £500 for the whole, including a large quantity of fine and valuable trees growing upon the land to an amount in value of £700. The plaintiff further said B that in April, 1802, the trustees let the defendant Court into possession of all the trust estates comprised in the deed of 1787, which he had held ever since, and that he had committed great waste thereon by cutting down trees calculated for ornament and shelter, pulling down walls and part of the mansion-house, ploughing up pasture, and by other means, damaging the estate to an extent in value of £500.

C It was also alleged that the defendant Court soon afterwards borrowed £800 from the defendant Waldron on security of the life interest of the plaintiff by way of mortgage, and that the deed was executed by the trustees, whereby he had become an encumbrancer at the time of filing the bill to that extent, and that he (Court) had also entered into an agreement for a lease of the premises with the defendant Stokes, and had received from him £400 as a consideration for such agreement. The plaintiff said that they had both had notice and applica- D tion had been made to all the defendants to deliver up possession on re-payment of the money paid by Court to the trustees which they had refused to do.

E The bill then charged various acts, letters, bills of charges for business done (in surveying, valuing, and superintending alterations and preparations, and arrangements for selling the property, etc.) and conversations in support of the foregoing statements and explanation of the relative situation of the parties and the nature and extent of the transactions between them, making out a case of means of knowledge of the property and its value on one side and of submission and confidence on the other. It charged also that the property was worth very F considerably more than the money paid by Court, and that recently before the sale it was valued by himself at £235 per annum, and was worth about £1,400 or £1,500. The plaintiff said that he did in fact execute some deed purporting to be a conveyance of his interest in the premises, but that he was at that time, and had been for a long time before, residing in the Isle of Man, for the purpose of avoiding his creditors in consequence of being greatly involved and embarrassed in his pecuniary circumstances and executed that deed at the desire and G instance of the trustees who had threatened him by letter written by defendant Hill (one of the trustees) that, unless he executed it, the annuity of £150 would be no longer paid to him. The plaintiff said that the deed was executed under the influence and control of the trustees, that at the time of executing it he did not know that the defendant Court was the purchaser of the estate, and that the whole was the effect of duress, fraud, and confederacy. Ever since the year H 1802 the plaintiff had been in indigent and distressed circumstances and in want of the means of commencing a suit, and but for utter inability, the consequence of such distress, he would have proceeded long before to have set on foot a legal inquiry as to the merits of the transaction. All the creditors had been paid the full amount of their composition of 17s. 6d. in the pound.

I The answer of the defendant Court stated that he had paid the full value of the premises bought by him of the trustees; that during the years 1801 and 1802, his (the defendant's) father was employed on his sole and separate account by the trustees in surveying and valuing the trust premises, that he (the defendant) had nothing to do with anything concerning them but the measuring, mapping, and planning, and that William Roberts (the defendant's then clerk, afterwards his partner) also occasionally assisted the defendant's father in the measuring, mapping, and planning. In his answer he stated that he had dissolved partnership with his father in 1797, and that during all the transactions in the bill stated he was not a partner with his father and only occasionally assisted him in his business as his agent. He denied that he or his father were directed to endeavour to sell

the estate so purchased, except in his (the defendant's) capacity of auctioneer, and that only because his father was not qualified to act as an auctioneer, and he also denied that he was the confidential agent of the trustees or had the management of the estate, which, he alleged, had been wholly confided to the solicitor of the trustees, in that respect or that he or his father had acquired any full or complete knowledge of the property beyond what they obtained in their employment as measurers and valuers, all of which information, at any time so acquired, had been by them communicated fully to the trustees. No advantage was taken of such knowledge in making the purchase.

The defendant denied any intention to become a purchaser at the time when the estate was put up by him to auction on Feb. 6, 1802. He admitted being desirous of purchasing it about the next day, and stated that he then proposed to purchase it for £500, if no higher price could be got by the trustees before the estate should be conveyed to him. He also admitted his subsequent purchase, insisting, however, that the consideration paid by him was the full value and not an inadequate price. He alleged that it was not till twelve months after the time when he entered into such a verbal and conditional contract that the estate was conveyed to him, and that he believed that no better offer had, in the meantime, been made to the trustees. The consideration money (£500) was paid on the execution of the conveyance by the trustees in April, 1803, it being executed a short time afterwards by the plaintiff. He admitted that the annual value was £232, according to his father's valuation, but alleged that it was subject to heavy charges and outgoings, e.g., the annuity of £150, £10 5s. 7d. per annum for land tax, £10 per annum for repairs, and £1 3s. 8d. for chief rent. He had since his purchase laid out £300 in improvements, and had paid a large premium on insuring the plaintiff's life, which, with other matters stated in the answer, had left him (the defendant), as he calculated, only £23 10s. 9d. clear annual income for the risk of his purchase-money, the then gross rent of the settled estates being not more than £235. The land was very foul and out of condition, the buildings dilapidated, and the rates and taxes high at the time when he made the purchase.

The defendant Court, therefore, submitted that the plaintiff had not made out a case for relief, and he relied on the length of time which had elapsed before this suit was instituted and on the intermediate acquiescence of the plaintiff. He denied waste, but admitted cutting down trees worth £6 for repairs and that Stokes had become his tenant of the premises and that he also had cut down some small trees, neither ornamental nor affording shelter, for the sake of enlarging the garden, and worth about £5. He admitted that Stokes had ploughed up grass lands, and he also admitted making alterations in the buildings, but denied having done any injury, alleging on the contrary, that he had thereby greatly improved the property. As to the timber, he contended that he had purchased all the interest of the tenant for life in the premises, but he admitted it to be worth £300 or £400 and stated that he did not consider it as belonging to him under the purchase of the estate except so far as the same should be necessary for repairs and improvements, for the timber had not been estimated by him in his calculation of the value of the estate when he had estimated it at £500, and he did not consider that he had any right thereto save as aforesaid, submitting in that respect to the judgment of the court.

The defendant also alleged, that the trustees were informed of the valuation of the property as made by his father, that the creditors were also apprised thereof, and that they had subsequently had several meetings with the trustees upon the subject during the course of arrangement of the plaintiff's affairs. He denied that the plaintiff was as embarrassed in his circumstances as he had represented himself to be. He admitted the mortgage to the defendant Waldron for £800, which, he stated, was secured by assignment of the interest of plaintiff and the policy of insurance on the plaintiff's life for that sum.

The trustees, by their answer, denied that they had directed the defendant

Court or his father to sell the said trust estates, or that they had employed the father in any other way than as a surveyor or the son than as his assistant and as an auctioneer, having in all other respects committed the confidential management of the estates to their solicitors. They admitted that the Courts had obtained full information of the trust estates and of their value by means of their duty in the course of such employment, and also the agreement with the defendant Court for the sale of the estate for the sum of £500, which they stated they considered a fair and adequate price. It was not worth £1,500, regard being had to its being subject to the annuity of £150. They denied that the plaintiff had paid or satisfied the creditors. They also denied using any undue influence to procure the execution of the conveyance to Court by the plaintiff.

Jervis, Martin and Simpinson for the plaintiff, rested their case, in substance, on three grounds: (i) that the defendant Court had been, whether directly or indirectly, confidentially employed, or at least employed, not only originally and long before the purchase was made, in a character capable of furnishing him with full and accurate knowledge of the true value of the property purchased, but subsequently, and immediately before the purchase as an agent in a new character, namely, that of auctioneer, whose duty it was to dispose of the premises to the best advantage in favour of the vendor, and who, in that character, could not for that reason, be permitted to become himself the purchaser for the obvious reasons on which that principle had been established as a rule of equity, by the authority of numerous decisions: *Ex parte James* (1); *Campbell v. Walker* (2); *Morse v. Royal* (3); *Lowther v. Lowther* (4); (ii) that this was a case of inadequate consideration, bottomed on the very fraud which was the foundation of the first objection, of which fraud it was strong evidence, the purchase having been made between parties meeting on unequal terms, for a consideration very far below the value set upon it by the purchaser, who had been employed jointly with another person to measure and value the premises in which valuation the timber had not been accounted for, although it had been proved to be alone worth more than the amount of the purchase-money [*Lowther v. Lowther* (4) was referred to]; (iii) that in the embarrassed state of the plaintiff's circumstances the united conduct of the defendant Court and his own trustees towards him, had operated to place him in a state of absolute duress throughout the whole of the transaction.

Martin and Phillimore for the defendant Court, denied, that under the circumstances of this case, he had at any time either in relation to the plaintiff or the trustees, been shown to have acted in a confidential or fiduciary situation, or that he had at any time acquired any knowledge which he did not fully communicate. In *Lowther v. Lower* (4) the Lord Chancellor so qualified the proposition there stated by him "that an agent to sell shall not convert himself into a purchaser," by adding:

"unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed."

[They referred to *Coles v. Trecothick* (5).] Court (the defendant) had never been employed by the plaintiff or the trustees; he had merely assisted his father in measuring and surveying the premises, never having himself had anything to do with the valuing. His partnership with his father had been dissolved in 1797. Counsel protested against the attempt in the bill in a case of a party seeking to set aside a contract to bring forward matters which took place subsequently to the completion of it. On the evidence adduced there was nothing in the employment of Court by the trustees that disqualified him from purchasing. There was no principle or authority on which such a proposition could be built, as that an auctioneer might not, after an ineffectual attempt to sell by auction, purchase by private contract. In this case Court was only known to or connected with the trustees as an auctioneer, whom it was groundless to charge with confidential agency or superior and hidden knowledge, particularly in a case where the most

efficient knowledge appeared to have been the quantity of interest of a person who was tenant for life under a settlement without impeachment of waste, a knowledge more within the province of a solicitor than of a surveyor. If an auctioneer were to continue incapable of buying when his duty was at an end, the same reason would entitle him to commission upon the purchase of the estate by any other person. A

The characters said in *Ex parte James* (1), to be excluded by the policy of the law from making purchases, were trustees, solicitors, and assignees under a commission of bankruptcy; to such relative persons only was the doctrine of disability cautiously confined. In such cases the reason was obvious; such persons had either positive possession over the estate or uncontrollable power to make any disposal of the property beneficial to themselves. Yet, even there it was said that an assignee, when he put off the character, might purchase. In all the cases the principle upon which the jurisdiction of equity was founded was that there must either have been actual fraud or the parties must stand together in such a relative connection and the conduct of the purchaser must be so gross that fraud must be necessarily implied. Clearly this was not a case of fraud, and fraud and undue advantage must be shown in all cases where a contract was sought to be set aside on the ground of inadequacy of price. Inadequacy of price, it had always been held, should be in so glaring a disproportion as, in the words of LORD KENYON, to excite an exclamation of surprise. In this case inadequacy of price had not been proved in any way, and if the timber were no part of the bargain, the purchase-money would be considerably beyond rather than beneath the value. D

On the point of the personal disqualification of the defendant Court to become a purchaser by reason of his employment under the trustees, counsel submitted that the decisions of SIR WILLIAM GRANT, M.R., and LORD ELDON, L.C., in *Andrews v. Mowbray and Castle* (6), had completely determined that question in a very solemn manner, entirely overwhelming the very slender authority on that point, which had been attempted to be gleaned from dicta and analogy with decided cases. *Andrews v. Mowbray and Castle* (6) was completely decisive of the question which had been raised by the pleadings. There the connection between the parties contracting was infinitely more of that species which has been termed confidential than that in which a surveyor or auctioneer could be placed under any circumstances. In that case the purchaser had been most confidentially employed and entrusted as the land-steward of the vendor for the express purpose of managing and nursing the estate to prepare it for sale to the best advantage; he was constituted the sole agent, to whom the conduct of the sale was committed. He was a skilful man of business, very conversant with such matters and particularly having a perfect knowledge of all the information that related to the estate which he purchased, and the vendors were ladies. In that case, too, the purchase-money was palpably greatly below the value, there was no room for anything like mistake or misapprehension in the subject-matter of the purchase, and there were many strong and specific charges of fraud and confederacy in the bringing about so advantageous a purchase, yet, notwithstanding so strong a case, the Master of the Rolls dismissed the bill with costs, and that on the express grounds that, although the purchaser had been an agent for such purposes, he had relinquished that agency, that, although he had, during such agency, competent means of acquiring information, he had communicated it to the plaintiffs, and E F G H I

"because, from the moment he had discharged all the obligations attached to the character of an agent, he stood just in the same situation as any other purchaser, and was entitled to all the advantage that he might eventually derive from the bargain,"

although the estate were proved to be worth more than he contracted to give for it, provided the vendor had a fair opportunity of exercising his own judgment, upon full information with regard to all the particulars of the estate. On appeal

A to the Lord Chancellor, his Lordship, affirming that decree, concludes with adding this reason :

“that he did not see, from the circumstances alleged, that there was sufficient to show that the defendant had been systematically acting with fraud, with regard to that property.”

B If the concluding words of those judgments were applied to the present case, they would be precisely applicable to the facts and would furnish the true principles of equity on which this case ought to be decided.

C An insuperable objection to sustaining the present suit was the fact of the plaintiff having by his own deed, confirmed the contract between the trustees and the defendant Court, followed by his long acquiescence in the bargain which had been made and his laches in not having objected to it before, or at least protested against being considered as assenting to it. Length of time had ever been held in courts of law and equity on principles of convenience and security, to be a bar to claims which have been so long suffered to lie dormant, as to turn even an usurpation into a right. Thus, in *Bonney v. Ridgard* (7), a well-founded claim was held by the Master of the Rolls to be barred by length of time, and in a more recent case, *Gregory v. Gregory* (8), SIR WILLIAM GRANT, M.R., also held that the length of time which had elapsed in that case was a sufficient bar to a bill filed to set aside a purchase in a case where the plaintiff would otherwise have been held entitled to a decree. His Honour, therefore, dismissed the bill, but without costs.

E *Clarke and Wrottesley* for the trustees, submitted that as to them the bill must be dismissed, with costs, as there had been no imputation thrown on their conduct, and, therefore, they were entitled to the usual indulgence. It had appeared that they had done nothing to incur any blame in the course of the transaction, and that they had acted with impartiality and good faith between all the parties.

Buck for the defendants, Waldron and Stokes.

Cur. adv. vult.

F Feb. 3, 1820. **SIR RICHARD RICHARDS, C.B.**—The plaintiff was clearly entitled under his marriage settlement to an estate for life in the premises in question, without impeachment of waste. Having become involved in insurmountable difficulties previous to March, 1799, he conveyed certain of his real estates to trustees for the benefit of his creditors in order that they might be sold and the produce applied in discharge of his debts and in extricating him from his embarrassments. Continuing, however, to be still pressed by creditors who were not included in that arrangement and his difficulties increasing, in May, 1801, he conveyed the estates which had been settled on his marriage to the same trustees and for the same purpose, that of sale for the benefit of this second class of creditors, the residue, if any, to be paid to himself. The plaintiff being tenant for life without impeachment of waste, had certainly a right to cut timber, and, therefore, provided he did not commit equitable waste, he was entitled, as part of his interest, to commit what is called legal waste subject to the restriction of a court of equity. That right was, of course, an incident to his estate in the premises, transferred by him when he conveyed his interest in the property to the defendants (the trustees) in trust, as I have stated, for the benefit of his unsatisfied creditors. The conveyance proves sufficiently that the plaintiff was, at the time when he executed it, in very embarrassed circumstances. He reserved to himself by that deed a rentcharge of £150 per annum. Subject thereto he conveyed his whole interest in the estate to these trustees for the purposes which I have mentioned.

I It appears that afterwards, when the plaintiff had withdrawn to the Isle of Man (where embarrassed persons found, at that time, a greater protection as to their persons on such occasions than at present) for the avowed purpose of avoiding his creditors, the trustees took measures for effecting a sale of the conveyed estates.

With that view, and as a preparatory step, an admeasurement and valuation of all the trust estates took place during the year 1801 by the direction of the trustees. The admeasurement and valuation was undoubtedly made by the Courts, father and son, in conjunction. It certainly does not appear distinctly what precise part the defendant Court himself bore in that matter, but he admits his concurrence and co-operation with his father who (he states) took upon himself the valuation in performing that service. He then tries to distinguish the nature of his part of the undertaking from that of his father, who, he says, took upon himself entirely and exclusively the valuing, leaving to the defendant the measuring, mapping, and planning. It appears, however, quite manifestly, from the papers relating to that transaction and even from the pleadings on the record, that beyond all doubt, the defendant knew what had been done in every stage of that business, and, of course, the result of the survey, for, although he might not, perhaps, have been actually in co-partnership with his father during the whole time—it really is not of much moment whether he was or not—he must have had the same opportunities as his father, whom he assisted throughout, had of observing and noticing all those matters which were best capable of furnishing him with information on the subject of the real value of the estate during the progress of the admeasurement and the estimate. A B C D

It is a most important fact in this case that in the valuation which was then made no notice was taken of the timber, and in that respect great negligence is imputable to the trustees in not having required that omission to be supplied by the defendant and his father, or in not having apprised the plaintiff of the circumstance, or not advertng to it themselves when they sold his interest in the premises. It is, however, quite clear that the timber was not valued, and that was beyond all doubt, in this case, a necessary subject-matter of consideration in forming a true valuation of the plaintiff's interest in this estate such as it was. So very material a subject-matter of calculation was it that without an estimate of it the real value of his interest could not be ascertained. In point of fact, the value of the timber is not, at this moment, known exactly, but from all the evidence, and even from the pleadings, it is clear that it was, with reference to the sum given for the purchase of this estate, very considerable, amounting to at least something between £700 and £300. E F

It does not appear either to what extent the valuation which had been made of the average annual produce of the estate, such as it was, is correct or true, for the statement in that respect is not supported by any evidence, or, at least, by any that satisfies me, and the allegations on the record and the witnesses who speak to that point differ much in the estimation put upon it. One of them in particular, who appears to have been well qualified to give an opinion, states it at much higher, and there is no witness examined on the part of the defendant as to the correctness of the valuation made and reported by the surveyor employed for that purpose whoever he was, although, considering the other circumstances of this case, that may not, perhaps, be now very material to the plaintiff, but it is very much so as affecting the defendant Court. He, however, does not even in his answer, offer anything to support that valuation. Much, indeed, is stated of expenses incurred by him, but there is nothing which approaches the real question of the fairness of the alleged estimate, which is, as I have observed, a matter of great importance to the defendant in this case, for the onus lies on him to show that the valuation on which he proceeded is correct and fair, and to satisfy the court in that respect. G H I

How has that been done? In the first place it is a material and prominent fact that one of the incidents to the interest of the plaintiff, of no small magnitude in point of value, was certainly not taken into consideration in making the valuation, and that was the timber. The statement furnished by the pleadings is that the annual value was estimated at £232 3s. 5d. which, deducting the rentcharge of £150, would leave £82 3s. 5d. and at eight years purchase would be worth

£657 7s. 4d. If a further deduction be made of £10 a year for repairs, which the defendant has stated in his answer to be the average expenditure by him on that account, the value of the purchase will amount to £577 7s. 4d. That calculation is, of course, exclusive of the timber, and, if I also take a general average of what has been stated to be the value of the timber, I must put it as high as £300 or £400 at the least—and indeed the defendant Court himself, in his answer to the amended bill admits, or rather states, the timber to be worth £300 or £400—a sum which, if added to the total amount of the consideration money paid by the defendant for the purchase would alone make a very considerable addition to the true value of the plaintiff's interest in the estate.

We find, therefore, that the facts are that there was a conveyance of all the plaintiff's interest in these premises made to trustees in trust to sell for the benefit of creditors, and that by a person in the very embarrassed state in which the plaintiff then manifestly was. Although the conveyance was executed in the month of May, 1801, no valuation was made till the end of that year, December. The sale was then immediately fixed for Feb. 6, 1802, a bad time of the year most clearly for appointing the sale of an estate by auction, and, therefore, unwisely adopted. It is admitted that the defendant Court was the person who was employed as auctioneer upon that occasion, and it was, therefore, his business and duty to sell the estate to the best advantage for the vendor. It turns out, however, that although many persons were present attending the sale, there was no bidding offered for this property. Why that happened we do not know, for there is no information furnished by the party most capable of giving it. The defendant merely says that the estate was put up to auction, that he acted as auctioneer, and that no one bid a sufficient price. But in fact no one appears to have bid at all.

Then he is asked, with propriety, as to the time when he first formed an intention to become the purchaser, and to that he does not think proper to give any satisfactory answer. Indeed, the defendant states his case throughout in his answers in a way which necessarily requires that I should observe upon it. As to most of the particular facts respecting which he is interrogated, he says he knows nothing. As to the time when he first intended to become the purchaser, he says he does not know whether it was on the day when he put up the estate to sale by auction or not. In answer to the question of what passed at the auction, he only says that there was no bidding to the best of his recollection and belief. One thing, however, is quite clear, and that is that he himself offered to become the purchaser of the estate the very next day. Under all the circumstances, then, standing so entirely unexplained, the defendant giving no sort of account of what passed at the time of the auction, not stating anything that was done by himself as auctioneer towards attempting to put up the estate for sale, nor bringing forward a single witness to give any evidence or explanation of any part of his conduct or of the business of the day, surely I may appeal to anyone who hears me, or to any man of understanding and plain common sense, whether strong suspicion must not necessarily attach to the conduct of an auctioneer who buys an estate under such dubious circumstances. At the auction by which he was employed to sell the property there was no bidding for the particular lot, and for that one only, and when called upon for an explanation he gives no account whatever of anything which took place upon the occasion as to any effort made by him towards selling at the public sale the estate which he himself proposed to buy, and actually agreed to purchase the very next day by private contract.

Under such circumstances as these, I cannot but consider myself judicially bound to believe that the defendant Court had determined within himself, when he mounted the chair, to become the purchaser of the estate which he was engaged as an auctioneer to sell, and I am quite sure that, if I were to allow this to be done in the present case, I should hold out encouragement to every auctioneer in the kingdom to take a similar advantage of his own culpable neglect of duty.

It was said that there is no legal objection to an auctioneer, although he may have been employed to sell, becoming himself a purchaser afterwards of the very same estate, and that when he has once retired from his duty he becomes an indifferent person and is then capable of treating with the owner for the purchase on his own account. I do not deny that in general and ordinary cases, he may do so, as where a person, in all other respects a stranger, is merely employed for the time as the auctioneer, but I deny that in such a case as this, and under the circumstances disclosed to the court by this proceeding, he could purchase, because in this case I consider that the person who acted as auctioneer was so connected with the parties that his agency must be considered to have continued after he had descended from the rostrum, for where I see so intimate a connection so long subsisting between parties so situated as these unfortunately were, and find a purchase made of the employer's estate so immediately following an ineffectual attempt to sell, I am bound to say that the party purchased as auctioneer, or at least while his general duty continued. I am clearly of opinion, that an auctioneer, while his employment continues, cannot purchase the estate which he is engaged to sell, and that opinion is founded on the well-known and established rule of equity that persons who are in any way invested with a trust or an employment to be performed by them to the advantage of their cestui que trust or principal are, *prima facie*, virtually disqualified from placing themselves in a situation incompatible with the honest discharge of their duty.

The present defendant, however, made the purchase now brought before the court under circumstances which are sufficient to disable him from retaining it on many other grounds of objection, each of which would be singly sufficient to authorise a court of equity to set it aside. There are, indeed, so many features of fraud in this case, and they so characterise the transaction of this purchase as to make it impossible for the court to withhold its interference in setting it aside.

HIS LORDSHIP referred to the circumstances attending the original admeasurement and valuation, and continued: I cannot but suspect that that pretended valuation by the defendant and his father was, in many respects, actually and in truth the valuation by the defendant himself, but, even if it were not, it was the valuation of his father whom he admits he assisted in the means of making it and that he was at that time intimately associated with him in the business of a surveyor in which he had been a very short time before in actual partnership with him. Soon after, when his father gave up business, he succeeded him, as was natural, upon his retirement, taking the very same employment wholly upon himself, and continuing to act (in consequence, no doubt, of the former connection) in whatever could be done by him in the way of his business in the concerns of this very property.

HIS LORDSHIP adverted to the circumstances under which the offer to purchase had been made, and which was instantly accepted and concluded, and he continued: By that contract the trustees gave the purchaser an interest far beyond in quantity the ostensible and stipulated consideration of the purchase-money, for (independently of the inadequacy of price of the estate itself) they conveyed to him the plaintiff's right to the timber. If the contract was a good one in any respect, in buying the plaintiff's interest without reserve, the defendant clearly bought the right to the timber as much as to any other part of the estate, for all the interest, right, and title of the tenant for life were conveyed by the trustees to the purchaser. It is a prominent trait in this case, that the timber was overlooked in the bargain. The value of this property which had been estimated at £577 7s. 4d., is pretty clearly shown by what took place after the purchase [the mortgage to Waldron, the lease to Stokes, etc.].

It was said at the Bar that the including the timber in the purchase (if it were included) was a mistake, for it was not in fact sold because it was not included in the valuation. A mistake I agree it undoubtedly was in the mildest way of considering it, but, if it were no more, it is precisely that kind of mistake which

operates in equity to prevent the person employed as auctioneer to sell the estate from being himself entitled to be considered a fair purchaser. If the timber was not sold in point of fact, by the contract it was in point of law, and the purchaser, if he had a right to anything under it, would also have a right to the timber by the terms of the conveyance.

I think I may rest my judgment in this case altogether on the facts in evidence, showing that the defendant as auctioneer, on Feb. 6 undertook the performance of a stipulated duty towards his employers (the trustees), that of selling the estate by auction, of the inefficacy of which he does not pretend to give any account, and his own immediate purchase from them of the trust estate, and I may appeal to the Bar whether there would not be found in that alone amply sufficient ground to authorise and require a court of equity to set aside a purchase so made, if application had been made recently afterwards for that purpose by the tenant for life. *Andrews v. Mowbray and Castle* (6), which has been relied on for the defendants, is nothing at all like this case in its circumstances, nor can the principle of that decision be applied to a case of this kind. That case is very accurately reported, and whatever I may have thought, or still think of that decree, pronounced by two such learned judges, I feel myself bound to abide by the doctrine which it called forth, as applicable to the particular facts and circumstances of that case. There are, on the other hand, very many authorities which support, on principle, the power of courts of equity to take cognisance of such frauds as these (which constantly come before the Lord Chancellor in cases of bankruptcy) and establish that agents, auctioneers, and other persons so situated are not capable of purchasing, by reason of the duties which they have to fulfil: *Ex parte Bennett* (9); *Ex parte James* (1). On principles of public policy alone, however, I think I might be justified in entertaining the opinion that a court of equity ought not, upon proof of the facts which have been revealed in this cause, to suffer this bargain to stand.

Then arises the question whether the length of time which has been allowed to pass before the purchase was sought to be set aside or complained of necessarily operates as a bar to a party claiming relief through the medium of a court of equity in such a case as this.

Before, however, I enter upon the opinion which I hold as to that part of the case, I think it necessary to make an observation upon the conduct of the trustees who are defendants in this case. The circumstances which have been brought before the court in the course of this investigation very considerably implicate the trustees in the guilt (I do not mean morally) of a total neglect, at least, of the duty which they took upon themselves in accepting the trust from which naturally resulted an implied undertaking to execute it faithfully. That duty they have not in any one respect performed, for—not to repeat what I have already strongly urged on the topic of their having given up the estate in the manner which they did, for an inadequate consideration so very considerably below the fair value, disregarding the palpable omission in the alleged valuation of any account or estimate of the timber—they sold for £500 the property which this distressed man had entrusted to them and which they knew to be worth £577. They did not even then take the common measures to secure to their cestui que trust the inadequate fruits of that improvident bargain. Nor can I give them even the advantage of a conjecture that they might have been ignorant of the real value of the property or of what they were doing throughout, for, without insisting, as I might do, on its being their duty to inform themselves on matters of so great importance and moment, so gross are the circumstances of this case on the part of the principal defendant and so negligent have they (the trustees) been in passively suffering them, that I am absolutely compelled judicially on the evidence to impute to them knowledge of all the circumstances which aggravate the conduct of the defendant Court. They let him into possession, almost immediately, without his paying a shilling of the purchase-money, when they ought to have withheld the

possession until it had been paid. They do not require him to pay the purchase-money for nearly a year after he took possession, nor do they then demand any interest for the intermediate time during which he retained it in his hands. A

Throughout all the transactions, therefore, I must say, that I consider the supine conduct of the trustees exceedingly culpable, and, however respectable these persons may be in life (and I think that aggravates their conduct), they have in this case been proved guilty of gross negligence and breach of duty. They have in some measure identified themselves with the principal defendant, the auctioneer, having by their neglect held out a temptation to entice him into a trap, and he has in turn caught them in his. Nor is it any excuse for the trustee who has not taken an active part on himself in the course of these transactions that he had nothing to do with the conduct of the other to whom he left the management of the matter, for where several trustees leave the entire performance of the duties of the trust to one, all are equally responsible for the faithful and diligent discharge of their joint and several duty by that one to whom they have delegated it. B C

Even on the facts which are stated and admitted upon the record can any man of plain understanding for a moment doubt the gross impropriety of the conduct of the auctioneer, bound as he was by the duties of his situation to take care of the interest of his employers, and, if he has misconducted himself, it is clear that the delinquency of his misconduct must in part attach to the trustees by whose neglect he has been enabled to do so much mischief. They, therefore, must participate, in some degree, in the consequences. Under the circumstances of this case, I venture to ask, if this contract, so entered into and completed, had been at the time, or within any reasonable period afterwards, brought under the consideration of a court of equity, it could have been suffered to stand for a moment. D E

The defendants say that this transaction took place as long ago as twelve years before the filing of the bill, during all which time there has been a perfect acquiescence on the part of all persons interested and no complaint has ever been made. Giving every credit to such an argument, to which generally and in ordinary cases it would be entitled, on the solid ground that there may be mischief in disturbing titles sanctioned by long acquiescence of parties interested who were not ignorant of their rights, as well as on the principle (which experience has for ages justified and which is, therefore, recognised and adopted by the courts of law and equity in this kingdom) that it is frequently better—where transactions of long standing, originally not well founded, have been suffered to lie dormant—to endure the old injustice than induce a new injury, I cannot but consider that in the present case there is a very satisfactory answer to be given to that argument, well founded as it is and entitled to great attention. That is that during all the intermediate time which has elapsed between the impeached transaction and the filing of this bill the plaintiff has been, in consequence of his debts and his poverty, completely non compos sui. They say, however, that he came over from the Isle of Man for the purpose of executing the deed, and that he did execute it without making any objection. On that I will state what has occurred to me. The execution of the deed by him was either a necessary or an unnecessary act. If it was an unnecessary act, why should he be brought over to execute it unless, indeed, it were for the purpose of giving some colour to a transaction which required so much and which without it would not bear investigation. Still if it were unnecessary, it would be nugatory in effect. If it were necessary that the plaintiff should join in the conveyance in order to complete and perfect the defendant Court's title by such an act, then let us see under what circumstances and by what means it was brought about in this case. The trustees wrote to the plaintiff, circumstanced as he was, a letter requiring him to come over for the purpose of signing the deed, and in that letter they threaten him that, if he do not, the annuity of £150 will be withheld from him. Such a mode of proceeding towards a man situated as the plaintiff at that time was, in such very distressed circumstances, living abroad whither he had retired with his family from a fear of his creditors, with F G H I

A nothing, most probably, but that annuity to subsist upon, must have had most assuredly the effect of placing him in complete and absolute duress. If, therefore, the conveyance by the plaintiff was not necessary, it can have no effect, and, if it were necessary, it is rendered null and void by the circumstance of undoubted duress under which it was executed. I, therefore, put the execution of that deed
B by the plaintiff altogether out of the question, for I cannot treat it as anything like an effectual confirmation of the contract for sale of these premises which had been so made by the trustees. I am bound judicially to regard it as wholly nugatory, both against the defendant and the trustees.

C The only substantial objection is the length of time which elapsed before any step was taken by the plaintiff. The bill was filed in 1815, and the transaction was certainly entirely concluded in February, 1803. Even if this were a case of a claim of legal estate the right would not have been barred at law by the Statute of Limitations [i.e., the Limitation Act, 1623, s. 1, which stated the limitation in actions for the recovery of land to be 20 years; see now the Limitation Act, 1939, s. 4 (3) (13 HALSBURY'S STATUTES (2nd Edn.) 1164), which provides that such actions must now be brought within 12 years from the date when the right accrued];
D but, if it had, a court of equity would not be precluded in such a case as this from affording the party relief. Although courts of equity, for the sake of convenience, have usually adopted on the principle of that statute, and as it were by analogy to it, a restrictive rule which has been found to be of considerable practical utility, as to a limitation of time for the commencement of suits, generally, yet those courts have always exercised a discretionary power of relaxing that rule wherever
E circumstances have required it, and it has been found not adapted to meet the justice of any particular case [a discretion terminated by the Real Property Limitation Act, 1833, s. 24]. Surely this of all others is peculiarly such a case as demands a relaxation of that rule of practice. Having regard to the utterly impotent situation of the party during the whole of the intermediate time, how can he be considered to have lost his right to redress? He continued to reside in the Isle
F of Man, where he had sought refuge, under the same insuperable embarrassments as had originally driven him there. I do not know the extent of his means while he remained there beyond the annuity of £150, or whether any of his debts had then been paid during his retreat, but we find that he was so circumstanced during the whole time as that he was not able to return to England till the year 1813, and I would ask what lawyer in the kingdom will say that—where a party has laboured
G under a fraud practised upon him in 1802 when he was living out of the kingdom in consequence of the embarrassed state of his affairs, which obliged him to remain abroad till 1813—he, therefore, loses all right to have justice dealt out to him by a court of equity on his return at that time, when he claims to be restored to his property of which he has been in the meanwhile deprived by the effect of that fraud? I, for one, certainly think that he does not, and that, therefore, there
H is not in the present case any sort of ground for maintaining that objection.

I I am clearly of opinion that the plaintiff has fully made out his case, for there have been disclosed such facts in the course of this investigation as on principles of public policy render it impossible that this transaction can be permitted to stand. I will add that the circumstances of this case afford ample ground for granting the relief which is prayed by the bill, for not only do they authorise the interference of the court on behalf of the plaintiff, but they also plainly evince the wisdom of adopting in judicial proceedings those principles of public policy which have since been constantly recognised and acted upon by courts of equity in administering relief in all cases of this nature.

HIS LORDSHIP then declared the purchase by the defendant Court of the plaintiff Oliver's life interest in the estate and premises in the pleadings mentioned to have been improperly made by the defendant, and ought to be set aside.

Order accordingly.

R v. HARVEY AND ANOTHER

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), November 8, 1823]

[Reported 2 B. & C. 257; 2 State Tr. N.S. 1; 3 Dow. & Ry. K.B. 464; 2 L.J.O.S.K.B. 4; 107 E.R. 379]

Libel—Malice—Presumption from publication of defamatory matter—Assertion of fact known not to be true or without knowledge whether true or false.

A person must be considered to intend that which is the necessary or natural consequence of that which he does, the effect which naturally grows out of the act done. If, therefore, a person publishes defamatory words of another it will be inferred from the publication that he did so with malice, which in law does not mean, as in ordinary speech, an expression of hatred or ill-will to the other person, but means a wicked or mischievous intention of the mind. Malice is presumed if a person knowing a fact not to be true or not having the means of knowing whether it be true or not takes upon himself to assert that it is so.

Notes. Considered: *R. v. Munslow*, [1895] 1 Q.B. 758. Referred to: *R. v. Grant, Ranken and Hamilton* (1848), 7 State Tr. N.S. 507; *White v. Tyrrell* (1856), 27 L.T.O.S. 334; *Nevill v. Fine Art and General Insurance Co.*, [1895] 2 Q.B. 156.

As to malice and criminal libel, see 24 HALSBURY'S LAWS (3rd Edn.) 8, 133-139; and for cases see 32 DIGEST (Repl.) 185 et seq., 226 et seq.

Cases referred to :

- (1) *Haycraft v. Creasy* (1801), 2 East, 92; 102 E.R. 303; 35 Digest (Repl.) 8, 26.
- (2) *R. v. Farrington* (1811), Russ. & Ry. 207, C.C.R.; 14 Digest (Repl.) 501, 4831.
- (3) *R. v. Mazagora* (1815), Russ. & Ry. 291, C.C.R.; 14 Digest (Repl.) 500, 4823.
- (4) *Eldridge v. Knott* (1774), 1 Cowp. 214; 98 E.R. 1050; 20 Digest (Repl.) 564, 2659.
- (5) *Doe d. Fenwick v. Reed* (1821), 5 B. & Ald. 232; 106 E.R. 1177; 38 Digest (Repl.) 870, 831.
- (6) *R. v. Creevey* (1813), 1 M. & S. 273; 105 E.R. 1484; 32 Digest (Repl.) 126, 1484.

Motion for a rule for a new trial of an information filed by the Attorney-General against the defendants for a libel, contained in a newspaper of which the defendant Harvey was the proprietor and the other defendant, Chapman, was the printer and publisher.

The alleged libel was the leading article in the paper, and was headed "LATEST INTELLIGENCE—THE KING." It began in the following words :

"Attached as we sincerely and lawfully are to every interest connected with the Sovereign, or any of his illustrious relatives, it is with the deepest concern we have to state that the malady under which His Majesty labours is of an alarming description. It is from authority we speak."

The libel then stated several facts relating to the King's illness, and concluded by alleging that his disorder was of an hereditary description. At the trial before ABBOTT, C.J., the publication of the libel was proved in the usual manner, and it was admitted by counsel for the defendants that the libel imported that the King laboured under insanity and that that assertion was untrue, but it was urged to the jury that the defendants believed the fact to be true and that they were warranted in so doing by rumours which had been very prevalent on the subject. The Lord Chief Justice, in his address to the jury, after stating the import of the publication, proceeded as follows :

"To assert falsely of His Majesty, or of any other person, that he labours under the affliction of mental derangement is a criminal act. It is an offence of a more aggravated nature to make such an assertion concerning His Majesty than concerning a subject by reason of the greater mischief that may thence

arise. It is distinctly admitted by counsel for the defendants that the statement in the libel was false in fact, although they assert that rumours to the same effect had been previously circulated in other newspapers. Here the writer of this article does not seem to found himself upon existing rumours, but purports to speak from authority; and inasmuch as it is now admitted that the fact did not exist, there could be no authority for the statement. In my opinion, the publication is a libel calculated to vilify and scandalise His Majesty, and to bring him into contempt among his subjects. But you have a right to exercise your own judgment upon the publication, and I invite you so to do."

After the jury had retired about two hours they returned into court, and the foreman said that the jury wished to have the opinion of the Lord Chief Justice, whether it was or was not necessary that there should be a malicious intention to constitute a libel. To this question the Lord Chief Justice returned the following answer:

"The man who publishes slanderous matter, in its nature calculated to defame and vilify another must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary, and it is for him to show the contrary. There may indeed be innocent publications of that which, in its own nature, is injurious to another, as, for instance, the delivery of a book containing libellous matter to a magistrate, but the general rule is that a person must be taken to have intended to do that which his act is calculated to effect."

The jury again retired for about three hours, and then returned a verdict of Guilty, but recommended the defendants to mercy.

Denman and *Brougham* for the defendants, moved for a new trial upon the ground of misdirection, and they made three points: (i) that the Lord Chief Justice had stated to the jury that the defendants' counsel had admitted the statement in the libel to be false in fact, using that word to denote a criminal untruth; (ii) that the question put by the jury, on their return into court, had not been distinctly answered; and (iii) that the observations made by the Lord Chief Justice by way of answer to that question were calculated to mislead the jury. As to the first point, the fact imputed by the libel was admitted to be untrue, but not to be false or untrue in the knowledge of the defendants, for it was urged to the jury that the defendants believed the fact and that they were warranted in so doing from the rumours which had prevailed very generally. The fact of such rumours having existed might be within the knowledge of the jury themselves, and might, at all events, be collected from the terms of the publication itself. The mere untrue assertion of a fact was not in all cases criminal. The impression conveyed to the minds of the jury was that the defendants had admitted that they had asserted a fact which they knew to be false. In *Haycraft v. Creasy* (1), where the plaintiff, a person in trade, made an inquiry concerning the credit of another, and the answer was, that he might safely be credited, and that he (the person giving the information) spoke this from his own knowledge and not from hearsay; it was held that the assertion of knowledge meant no more than a strong belief, grounded upon what appeared to the party to be reasonable and certain grounds. The words used in this case are not stronger than those in the case cited. [BEST, J.: There fraud was the gist of the action; and, therefore, it was necessary to show, not only that the statement was untrue, but that it was made *malo animo*.]

Secondly, the abstract question put by the jury was not distinctly answered. They were not told whether a malicious intention were or were not necessary to constitute a libel. They appear to have thought correctly in the first instance that although the fact asserted in the libel was untrue, yet it was not criminal, unless it were malicious as well as untrue, and the question ought to have been answered distinctly in the affirmative or the negative, for in consequence of the answer which was given,

they may have been induced to think that it was wholly immaterial whether the intention was malicious or not. They may have founded their verdict upon the circumstance of the assertion being untrue, although they may have been of opinion from facts within their own knowledge and from the import of the publication itself that the defendants had only repeated that which had been publicly rumoured, believing it to be true at the time when they published it. It was laid down to the jury as a presumption of law that malice was to be inferred from the mere fact of publication, whereas that is only one of the circumstances from which they may be warranted in drawing a conclusion of fact. The question of malice is in all cases a question of fact, to be collected from the evidence before the jury. [BAYLEY, J. : I take the law to be, that where a particular consequence necessarily results from any act, the party doing the act is to be considered as *prima facie* intending the necessary consequence of that act. In *R. v. Farrington* (2), the indictment was for setting fire to a mill, with intent to injure the occupiers thereof. The indictment was not preferred until above eighteen months after the offence was committed, so that it could not be supported on the Malicious Injury Act, 1769 [repealed by Statute Law Revision Act, 1887]. The prisoner was of weak intellect, but not in such a state as to be entitled to an acquittal for want of reason. A point reserved was whether it was not necessary to give some evidence of an intent to injure beyond the mere act of setting fire, but the judges were unanimous that the prisoner must be taken to have intended that which was the necessary consequence of his act, and the conviction was held right. In *R. v. Mazagora* (3), the indictment was for disposing of forged bank-notes, the intent was charged to be to defraud the bank. The jury found the prisoner guilty, but that the intent was to defraud any person who might take the notes, and that the intention of defrauding the bank in particular did not enter into the prisoner's contemplation. On case, the judges thought the matter too clear for discussion, and that the prisoner must be taken to have intended to defraud the bank, and that the conviction was right.] *Eldridge v. Knott* (4), and *Doe d. Fenwick v. Reed* (5), are authorities to show that the presumption of title from length of possession is a question of fact for the jury. Besides here, too, it was laid down, that the malicious intention was to be inferred unless the contrary was proved; and that the onus of proving the contrary lay upon the defendant. The jury may have been led to believe that it was necessary for the defendant to produce oral or documentary proof to rebut the presumption of malice; and if they so understood it, they might thereby be induced to convict the defendants, although from facts within their own knowledge, and from the publication itself, they may have been of opinion that the defendants published it *bona fide*, believing the facts stated to be true.

BAYLEY, J.—It appears to me that this case was properly presented to the consideration of the jury in the first instance, and that the answer given by my Lord Chief Justice to the question put to him by the jury was perfectly correct. Assuming it to be a question of fact whether the jury were to infer malice or not, the evidence upon that point was all one way, and, that being so, it was the duty of the jury to act upon that evidence and find the defendants guilty. It is impossible to form an accurate judgment of the direction to the jury without advertent to the terms of the libel itself. It contains not merely an assertion of a fact which a party may suppose to be true and with respect to which he assumes to have had only ordinary means of knowledge, but it is such an assertion that, if it were a *bona fide* assertion, the means of proving it to be so must be within the writer's own power. He does not merely say that such a fact exists, but he assumes to speak from authority. It is conceded that to state falsely of His Majesty that which is stated in this publication is a libel. If it be not so, the objection will be upon the record, and may be taken advantage of either upon writ of error or by a motion in arrest of judgment. But, as at present advised, I am of opinion that falsely making that assertion was evidence that the party made it maliciously.

A distinction has been made between an untrue and a false assertion, and it has been argued that, if a party assert a particular fact, believing that the fact exists when it does not, although that be an untrue assertion, yet there is no criminality in it, but that, if he assert that which he knows to be untrue, that is a criminal untruth or a falsehood. Assuming that that is a well-founded distinction I think that, if a party knowing a fact not to be true, or not having the means of knowing whether it be true or not, takes upon himself to assert that it is so, then he makes a false assertion or is guilty of a criminal untruth if it turns out that his assertion is unfounded. In the one case the criminality consists in asserting that which he knows not to be true; in the other he is making an assertion unwarrantably when he does not know whether it be true or not. There are authorities to show that, if a man will take upon himself to swear to a thing when he does not know whether it be true or false, he is liable to be indicted for perjury if his testimony prove to be false.

Is the assertion in this case to be considered false or not, in the latter sense of the word? A party making such an assertion may or may not have the means of knowing the state of His Majesty's health, but here the writer takes upon himself to state that he has authority for stating such and such facts. If he had such authority, he had the means of proving it to the jury and of showing that the character of untruth belonged to it only, and not that of falsehood or criminal untruth, but inasmuch as he has not shown that he had any authority for stating the fact it must be taken that he had none and that it was a false assertion, which disposes of one ground upon which this motion was made.

The other question arises whether the defendant is to be considered as having published the libel with a malicious intention. Assuming malice to be necessary in all cases to constitute a libel, I take it to be established by many authorities that a party must be considered, in point of law, to intend that which is the necessary or natural consequence of that which he does. If I utter defamatory language of a particular person, the presumption is that I mean I do him a mischief. My assertion of a fact defamatory with regard to him will materially prejudice him in the eyes of all the persons who hear or read what is said of him.

R. v. Creevey (6), is a strong authority to show that the answer given by my Lord Chief Justice to the question put by the jury was perfectly correct. That was an indictment against the defendant for publishing a libel of one Kirkpatrick, an inspector of taxes. The libel purported to be an account of a speech delivered by the defendant in the House of Commons, and it was published by him as a correct report of such speech. It was objected at the trial that there was not any proof of malice so as to make the publication libellous. The case was tried before LE BLANC, J., a man of great talent, accuracy, and firmness, and he was of opinion that it was not necessary to prove malice, but that it might be inferred from the publication itself, and he told the jury that they were to look both to the matter and the manner of the publication in order to decide whether it was libellous or not. The defendant having been found guilty, a motion was made for a new trial. The rule was refused, and LORD ELLENBOROUGH said (1 M. & S. at p. 278):

"The only question is whether the occasion of the publication rebuts the inference of malice arising from it."

and LE BLANC, J., stated (*ibid.* at p. 282):

"that he had told the jury to consider whether the publication tended to defame the prosecutor, giving his opinion that it did, but still leaving the question to them; and he further stated to them that where the publication is defamatory the law infers malice, unless anything can be drawn from the circumstances of the publication to rebut that inference."

I cannot distinguish that case from the present. Here, the publication was of a matter which, if false, it is now conceded was libellous. This decision says that malice ought to be inferred from the publication of defamatory matter unless some

excuse for the publication be shown. The onus, therefore, of negating malice is properly cast upon the defendant, for where the natural inference from the publication is that it is malicious, the party seeking to exempt himself from such natural inference must do it by showing something to rebut the inference otherwise arising from his act. Here, the defendant might have adduced evidence for that purpose; he might have shown what his authority was. In the absence of any such evidence, I think the intention was naturally and properly to be drawn from the libel itself, and, consequently, that there is no foundation whatever for disturbing the verdict.

HOLROYD, J.—I am of the same opinion. This is a charge for a publication of a libellous nature and of a description not only injurious to the individual to whom it relates, but mischievous to the public inasmuch as it was calculated to excite great alarm in the minds of the people, as to the state of His Majesty's health. If a thing in itself mischievous to the public be wrongfully done, that is an indictable offence. It is not necessary to aver in such an indictment any direct malice, because the doing of such an act without any excuse is indictable. In some cases, as in that of murder, malice is the very gist of the offence, but in larceny malice is not an ingredient. In this case, the act done was mischievous to the public. It appears, therefore, that it was not absolutely essential to aver malice in this indictment or to prove it at the trial, but it is unnecessary to discuss that point because I think that, upon the rules and principles of the common law, malice was to be inferred from the evidence laid before the jury, and the jury were bound, in the discharge of their duty, to act upon those rules and principles and to apply the law to the facts before them. The publication in this case assumes the knowledge of the fact which it alleges. It states that the writer had it from authority, and, whatever may be the import of that word, if there was any authority to justify or excuse the publication, it ought to have been shown by the defendant.

If the matter published was in itself mischievous to the public, the very act of publishing is *prima facie* evidence to show that it was done *malo animo*, for when a publication having such an injurious tendency is proved, it is assumed to have been intended to be done with a malicious intention, because the principle of law is that a party must always be taken to intend those things and those effects which naturally grow out of the act done. If, therefore, the effects naturally flowing from the act of publishing the libellous matter in this case were mischievous to the public, it follows that the judge was bound to tell the jury that malice was, by law, to be inferred, and, that having been proved which, according to the principles of law, made the inference of malice necessary, the onus of rebutting that inference was cast upon the defendant. It is said that my Lord Chief Justice was bound to answer the abstract question put by the jury, but I am of opinion that a judge is not bound to answer any question except so far as it is material to the matter which the jury have to decide, and in this case, if the jury were satisfied from the answer given that it was to be presumed that the defendant intended the consequences which would naturally follow from his act, they must at the same time have been satisfied there was sufficient proof of malice, and, therefore, there can be no ground for disturbing the verdict.

BEST, J.—The paper set forth in this information is most correctly called by it a false, scandalous, and malicious libel. We have been told by the defendants' counsel, that malice is the gist of this prosecution. I accede to this, but we must settle what is meant by the term malice. The legal import of this term differs from its acceptance in common conversation. It is not, as in ordinary speech, only an expression of hatred or ill-will to an individual, but it means any wicked or mischievous intention of the mind. Thus, in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary, in support of such an indictment, to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused

with any defence when it is proved that the act of killing was intentional, and done without any justifiable or excusable cause. Malice in the law relative to libels, means legal malice. The only question which the jury had to decide was whether a paper which falsely represented that the Sovereign of the country was insane and, so, incapable of discharging the duties of his office, was a mischievous paper. No men whose minds were not disordered could hesitate how to decide such a question. It is not possible to imagine any publication more calculated to produce irritation and disorder throughout the country, and the publishers must be taken, according to legal reasons, to have intended to produce those consequences which it was calculated to produce. The defendants were not charged with a libel published from motives of personal hatred to the King, but with a false report of the state of His Majesty's mind, made with a view to disturb the peace of the country.

It was admitted at the trial that the libel was false, but it was at the same time insisted that the defendants, at the time when they published it, did not know that it was false. They say they publish from authority, and thereby undertake to be responsible for its truth. Whether a publication be true or false is not the subject of inquiry in the trial of an information for a libel; the question is whether it be a mischievous or innocent paper. In the position in which this case now stands it is not necessary to decide whether the defendants would have been justified had the statement been true. But it must not be taken for granted that if such a dreadful affliction had happened to the country as the insanity of the King, the editor of a newspaper would be justified in publishing an account of it at any time and in any manner that he thought proper. It is fit that the time and mode of such a communication should be determined on by those who are best able to provide against the effects of the agitation of public feeling which it is likely to produce. A reasonable time should be left to the constituted authorities to give the nation such afflicting intelligence. During that time decency requires that all other persons should be silent. If such a communication should be improperly delayed, the fair liberty of the press would allow any person to call the attention of the nation to the circumstance. But such a communication, rashly made, although true, might raise an inference of mischievous intention, for truth may be published maliciously.

ABBOTT, C.J.—My learned brothers having delivered their opinion that nothing which fell from me in my address to the jury furnishes sufficient ground for granting a new trial, it is, perhaps, unnecessary for me to say anything. I cannot, however, forbear making one or two observations. If it be true that a malicious intention be necessary to render amenable to the law a person who publishes defamatory matter, I say that, unless that malicious intent may be inferred from the publication of the slander itself in a case where no evidence is given to rebut that inference, the reputation of all His Majesty's subjects, high and low, would be left without that protection which the law ought to extend to them. I will say, further, with regard to the particular expression contained in this publication, that if any writer thinks proper to say that he speaks from authority when he informs his readers of a particular fact, and it shall turn out that the fact so asserted is untrue, I am of opinion, that he who makes the assertion in such a form may be justly said to make a false assertion. I am not a sufficient casuist to say that to call it an untrue assertion would be a more proper mode of expression.

Rule refused.

WILLIAMSON v. GOOLD

[COURT OF COMMON PLEAS (Dallas, C.J., Park and Burrough, JJ.), February 10, 1823]

[Reported 1 Bing. 171; 7 Moore, C.P. 579; 1 L.J.O.S.C.P. 38; 130 E.R. 70]

Guarantee—Discharge—Partial discharge—Voluntary payment on account of debt made to creditor by third party.

Payment of an annuity granted in consideration of an advance made by the grantee fell into arrear, and third persons, who had negotiated the transaction between grantor and grantee, voluntarily paid to the grantee a sum on account of the arrears.

Held: the surety for the payment of the annuity was entitled to the benefit of this payment, and was liable to discharge only the balance after the payment had been taken into account.

Notes. Approved and followed: *Carroll v. Goold* (1823), 7 Moore, C.P. 621. Referred to: *Chappell v. Silverschildt* (1826), 12 Moore, C.P. 113; *Eastern Counties Building Society v. Russell*, [1947] 1 All E.R. 500.

As to the discharge of a guarantee, see 18 HALSBURY'S LAWS (3rd Edn.) 492 et seq.; and for cases see 26 DIGEST (Repl.) 155 et seq.

Cases referred to:

- (1) *Butt v. Conant* (1821), 6 Moore, C.P. 65; 3 Brod. & Bing. 3.
- (2) *Godsall v. Boldero* (1807), 9 East, 72; 103 E.R. 500; 29 Digest (Repl.) 367, 2805.

Rule Nisi calling on the plaintiff to show cause why a writ of execution should not be set aside.

By an indenture dated Dec. 22, 1813, between Henry Michael Goold, of the first part, Thomas Williamson (the plaintiff) of the second part, several other persons named in the schedule of the indenture of the third part, Edward Howard of the fourth part, and Richard Cooke of the fifth part, Henry Michael Goold, in consideration of £4,130 granted to Williamson on behalf of himself and in trust for the persons named in the schedule of the indenture an annuity of £590, secured on estates in Ireland, which, subject to prior annuities, were conveyed to Howard in trust, Cooke being appointed receiver. By indenture of covenant of the same date Sir George Goold (the defendant), then George Goold, Esq., entered into a covenant binding himself and his heirs for the payment of the annuity to Thomas Williamson from and immediately after default should be made in payment thereof by Henry Michael Goold. He also executed a warrant of attorney to confess a judgment as a further security for the annuity, and the judgment was to be put in force as often as any default should be made by Henry Michael Goold in the payment of the annuity.

The estates proving insufficient to discharge even the prior annuities, no part of this annuity was paid by Henry Michael Goold, or Sir George Goold after December, 1814. In 1815 Sir George Goold went abroad and continued out of England till November, 1822. Williamson and the other annuitants becoming exceedingly distressed and urgent for payment, Howard and his partner, Gibbs, out of their own funds, advanced them various sums of money in anticipation and on the security of the annuity and in reliance on Sir George Goold's guarantee. At the times of these advances Howard and Gibbs deducted and retained a commission of 2½ per cent. thereon as they were accustomed to do upon payments of annuities passing through their hands. In June, 1817, and May, 1818, Henry Michael Goold was discharged from prison under the Insolvent Debtors Relief

Act, 1728 [repealed by Statute Law Revision Act, 1867] and the arrears of the annuity from December, 1814, formed one of the debts mentioned in his schedules. When Sir George Goold returned to England in November, 1822, he was taken in execution under the judgment confessed to the plaintiff Williamson for £4,497 10s. 9d., the arrears of the annuity since 1814, besides sheriff's poundage, etc. But the plaintiff had received from Howard and Gibbs since 1814, by way of advance as stated above, £3,213. Howard and Gibbs having become bankrupt, their assignees gave Sir George notice that the bankrupts had advanced this latter sum to the plaintiff Williamson on the credit or security of the annuity, and, therefore, they required Sir George not to pay any part of the £3,213 to the plaintiff or to any person other than the bankrupt's assignees.

Serjeant Lens obtained a rule calling on the plaintiff to show cause why the writ of execution should not be set aside on payment of the balance due to the plaintiff and the costs incidental to that balance only.

Serjeant Vaughan and *Serjeant Pell* for the plaintiff, and *Serjeant Taddy* and *Serjeant Hullock* for the assignees, showing cause against the rule: The defendant is liable for any default made by his brother, Henry Michael Goold, in the payment of the annuity, and this rule cannot be made absolute unless it be shown that the sum of which the defendant seeks to be discharged has been paid either by himself or his brother or the estate on which the annuity is secured. It is not pretended that the payment has been made either by one or the other, or that Howard and Gibbs ever received any rent towards such payment. If neither the defendant nor his brother have paid, where is the hardship or illegality of his being now charged? He could only claim to be discharged in case the same sum had been required of him or his brother a second time. It is true that a sum has been advanced by Howard and Gibbs to the annuitants, but this is an arrangement between those parties to which the defendant and his brother are altogether strangers and as little entitled to profit by it as by any other loan which might be made by Howard and Gibbs. If the money paid by Howard and Gibbs had been a payment on account of the defendant or his brother, Howard and Gibbs might sue them in debt for money paid to their use; but it is quite clear that Howard and Gibbs can bring no such action.

In order to sustain debt, there must be a contract express or implied between the parties. An express contract is out of the question here, for the money was advanced by Howard and Gibbs without the knowledge or consent of the defendant or his brother, and it is equally impossible to imply a contract where the money was advanced without authority and the person sought to be charged might, if he pleased, repudiate the advance. Indeed, as his estate had been made a security for the annuity, he would naturally expect that no such advance could be called for. Neither could Howard and Gibbs, after receiving from the annuitants a commission of 2½ per cent. on the advance recover the money advanced back from them as money paid without consideration in the event of the defendant's brother's estates proving an inadequate security, so that Howard and Gibbs and their creditors are entirely without remedy, unless they can stand in the shoes of the plaintiff, and it is clear that they are entitled to do so. By the transaction between himself and Howard and Gibbs the plaintiff does in effect assign to Howard and Gibbs the defendant's debt, and there is no authority to show that such an assignment may not take place as well by parol as by deed. If the plaintiff so assigns, he also empowers Howard and Gibbs to employ his name in legal process in case such a step should be necessary, for it is an undisputed principle that where property is transferred all means to render the property available are also transferred with it so that Howard and Gibbs are in the same condition as the assignees of a bond who cannot sue the obligor in their own name, but with whom it is the universal and recognised practice to sue in the name of the obligee.

Here, therefore, a regular judgment has been entered up, and execution has

issued in respect of a sum which has never been paid by the defendant or his brother, and the court cannot exercise an equitable jurisdiction merely because the creditor may have received his debt from a party, and by means to which the debtor is an entire stranger. In *Butt v. Conant* (1), the plaintiff was in execution for costs due from him to the defendant, but this court would not discharge him because the defendant had received the amount of the costs from the Treasury. In the present case, Howard and Gibbs were not agents to the defendant or his brother, but, in the matter of the advance to the plaintiff, as much a stranger as the Treasury was with respect to Butt. It is clear that this was so in the estimation of the principal, Henry Michael Goold, for when he was discharged under the Act of 1728 the sum now in dispute was enumerated in his schedule as a debt due to Wiliamson.

Serjeant Lens and *Serjeant Cross* supporting the rule: The defendant is only liable in case of default in the payment of the annuity, and with respect to the sum in dispute there has been no default, because, though it was not actually paid by the defendant or his brother, it was paid on account of the annuity, and, therefore, on their behalf. That it was paid on account of the annuity, and was not a mere advance or substantive loan by Howard and Gibbs, is clear from the circumstances that Henry Michael Goold's estates were vested in Howard and he was in effect the receiver of the rents and so agent for all parties, but particularly from the circumstance that on paying the plaintiff he charged and received on the money paid a commission of $2\frac{1}{2}$ per cent., the commission he was in the habit of receiving on annuity payments. If this had been a loan or an advance to the plaintiff and not a payment on account of the annuity, Howard and Gibbs, instead of the commission, could only have taken a discount at the rate of 5 per cent. per annum. But Howard being the receiver of Henry Michael Goold's rents and having confidence in the security, advances this money on account of the annuity in anticipation of the forthcoming rents and as agent of the grantor, for the advantage of receiving $2\frac{1}{2}$ per cent. commission, and in the expectation of being reimbursed by the rents, when they should become due; and though he cannot sue for the money so advanced, yet his security is in his own hands, and he may deduct the amount upon his account of the proceeds of the estate.

The plaintiff, therefore, having received the sum in question clearly in discharge of his annuity, cannot now imprison the defendant for the amount. From the foregoing argument, it appears that there has been no assignment by the plaintiff to Howard of the debt due to the plaintiff, for, the annuity being regularly paid by Howard as agent of the grantor, there was no reason why the plaintiff should assign. Even if such a constructive assignment could be deemed to have taken place, Howard and Gibbs could not be in the condition of assignees of a bond, nor entitled to issue process in the plaintiff's name. The obligee who assigns a bond always covenants to permit the assignee to sue in the obligee's name, and such suit is, therefore, with his privity and consent, but the present execution is issued without any such covenant on the part of the plaintiff, and even, for aught that appears, without his knowledge. In *Butt v. Conant* (1) the payment was made, not by the agents of Butt or on his account, but by entire strangers and for the sole benefit of the defendant. In *Godsall v. Boldero* (2) a creditor who had been paid by the public a debt due from Mr. Pitt was not allowed to recover the amount from an insurance office. The defendant in the present case is no more than an insurer or surety.

DALLAS, C.J.—This is an application on behalf of a surety, and, therefore, entitled to the favourable consideration of the court. It appears that in the course of the transaction which is the subject of the present discussion payments of a certain kind have been made, and the surety claims the benefit of those payments, being willing to discharge any balance which may be found due after those payments shall have been taken into account, and there can be no doubt he is entitled

to the benefit of these payments if they were made on account of the annuity which has been granted by his principal.

What are the facts of the case? Henry Michael Goold is the grantor of the annuity; Howard and Gibbs are the trustees for Williamson; and the defendant, who is a surety for Henry Michael Goold, gives a bond and warrant of attorney to Williamson to enter up judgment for any arrears of the annuity which may be due from Henry Michael Goold. Cookson is appointed receiver on the spot to act under Howard and Gibbs, the persons who negotiated the annuity and are trustees for the payment of this and other encumbrances charged on the estate of Henry Michael Goold. In effect, and with a view to the discharge of his trust, Howard was to receive the rents of the estate. This, therefore, is not the case of a stranger but of an agent, standing as it were in the midst of several parties, and accountable to all. This, therefore, disposes of *Butt v. Conant* (1) and of all other cases in which the payment in question was not made by an agent of the party.

The applicant in the present case, who is in custody under an execution for the amount of the annuity which may be in arrear, prays to be discharged on payment of the balance which may be found due. If anything has already been paid, it is clear that the grantee must not be paid twice, but it is equally clear that Williamson has been paid a considerable sum. Such a payment is distinctly sworn to, and Williamson makes no affidavit denying the payment, repudiating it, or in any way accounting for it. It has been urged that this payment was in truth an advance made by Howard and Gibbs out of their own funds and with a view to its being replaced by the rents of the estates. If so, and the question were merely in what form or from whom Howard and Gibbs could recover the money so advanced, it might, perhaps, be contended they were entitled to recover it as against the principal, though not against the surety, but the question is, not whether they can recover the money if it has been so advanced, but whether they can recover it by such a course as they have at present pursued. I deny that they could recover it even against the grantor. I think they can neither legally nor equitably recover it against the surety, and if they can recover it in any quarter, it must be by a course very different from the present. The payments made by them were made on account of the annuity, they were accounted for as such, and a remuneration of $2\frac{1}{2}$ per cent. was claimed and received as for such annuity payments.

These, therefore, though voluntary payments to the grantee, were received by him on account of the annuity. Can he then, after this, set up a claim as in case of non-payment? Looking to the form and effect of the deed, it appears to me clearly not. He has been paid, and Howard and Gibbs cannot recover back from him what they have paid, because they have received their commission upon it. If they had merely lent a sum of money instead of paying it on account of the annuity and had received no commission on the payment, then, indeed, they might have sued the borrower for the money lent, but it is not pretended that the transaction was of this nature. Can they without the consent of the grantee or of the other creditors put themselves in his place? I know of no principle or case that can warrant such a proceeding. It is said that the debt due from the grantor of the annuity has been assigned by the grantee to Howard and Gibbs, but no such assignment has ever taken place. It is said that the circumstances of the transaction gave them an equitable right to stand in the grantee's place. Admitting this to be so for the purpose of argument (and I can admit it no further) as against the grantor, as against his surety they can only claim under a legal right, for the doctrines of equitable right do not apply as between the grantee and the surety. I forbear to inquire how far any equitable right may arise as between the creditors of Howard and Gibbs and the surety. If there be any such right in a court of equity, it must be ascertained; in this court and in this form, they can have no right to affect the surety. On every ground, therefore, no facts being disputed, and there being no doubt about the principle, I think this rule must be made absolute.

PARK, J.—I am of the same opinion. This rule was obtained last term calling on the plaintiff to show cause why the execution should not be set aside on payment of the balance due, and, as he now makes no affidavit, we must assume that he admits the facts which form the ground of the defendant's application. The defendant, as surety engages to pay when default shall have been made in payment by his principal. That is the whole of his undertaking. He is, therefore, only liable where Henry Michael Goold has made default, but to the extent of £3,213 he has made no default, for the plaintiff has received the money from Howard and Gibbs and they have had their commission on the payment. If Sir George Goold had paid this money, Howard and Gibbs could not pretend to use the process of the court against the surety, nor can they now, having, as agents of Henry Michael Goold, paid the plaintiff, call on the surety to repay them what they have advanced. He is only bound to answer for the default of Henry Michael Goold towards the plaintiff, but in consequence of what his agents have done, Henry Michael Goold has (to the extent of what they have paid) made no default.

BURROUGH, J.—The affidavit of Henry Michael Goold says that £3,213 has been paid. This the plaintiff should have answered, because, if it is true, the surety is entitled to be relieved to that extent. The answer given is that Howard and Gibbs advanced this money in anticipation of the sums due to the plaintiff, and that they held the deeds in their hands all the time, whence the court is desired to infer that they held them as a security for the money so advanced, but the deeds were in their hands because a term in Henry Michael Goold's lands was conveyed to Howard for the plaintiff's security. Although it is sworn that the money was advanced by Howard and Gibbs, not in payment, but in anticipation of the annuity, no one fact is adduced to substantiate that statement—no receipts, no engagements of any kind. On the contrary, Howard and Gibbs admit their having received a commission of $2\frac{1}{2}$ per cent., which is the commission usually charged by them on regular payments. If this money had been advanced, as is pretended, by way of loan, would there not have been a stipulation for interest, to which the parties would have been fairly entitled? Would there not have been some memorandum and a power to use the plaintiff's name in suing out execution, the common machinery in such cases? That the plaintiff has received the money is clear from the circumstance of his making no affidavit to the contrary. Whatever sum the plaintiff has received, the surety is discharged to that extent, for it is immaterial to him whether the money was paid by Henry Michael Goold or his agent; the surety is only liable in case of its not being paid at all. When we see a money scrivener getting grantor, grantee, and all estates and securities into his own hands, we are bound to look with eagle eyes at such a transaction. In the present case, as far as the plaintiff has received his annuity, there has been no default in payment for which the surety can be held responsible, and, therefore, this rule must be made absolute.

Rule absolute.

DUKE OF BEDFORD v. BRITISH MUSEUM TRUSTEES

LORD CHANCELLOR'S COURT (Lord Eldon, L.C., and Sir Thomas Plumer, M.R.),
July 6, 1822]

[Reported 2 My. & K. 552; 1 Coop. temp. Cott. 90, n.; 2 L.J.Ch. 129;
39 E.R. 1055]

Sale of Land—Restrictive covenant—Discharge—Alteration by vendor of adjacent property rendering covenant inappropriate.

Where land is conveyed in fee simple subject to covenants by the purchaser restricting the use of the land and subsequently the character of the property is altered in consequence of the acts of the vendor or those claiming under him so that the restrictions in the covenants become inappropriate, a court of equity will take the view that the vendor has waived and abandoned the control which was applicable to the property in its former state and will decline to enforce by injunction the covenants against persons claiming under the purchaser.

Notes. Applied: *Hawkins v. Scarborough* (1833), 2 L.J.Ch. 126; Considered: *Tulk v. Moxhay* (1848), 11 Beav. 571. Distinguished: *Kemp v. Sober* (1851), 1 Sim. N.S. 517. Considered: *Child v. Douglas* (1856), 2 Jur. N.S. 950; *Western v. MacDermott*, [1861-73] All E.R. Rep. 671; *Peck v. Matthews* (1867), L.R. 3 Eq. 515. Distinguished: *Kilby v. Haviland* (1871), 24 L.T. 353. Considered: *Doherty v. Allman* (1878), 3 App. Cas. 709. Distinguished: *Sayers v. Collyer*, [1881-5] All E.R. Rep. 385; *Brown v. Inskip* (1884), Cab. & El. 231. Considered: *Mackenzie v. Childers* (1889), 43 Ch.D. 265; *Knight v. Simmonds*, [1896] 2 Ch. 294; *Osborne v. Bradley*, [1900-3] All E.R. Rep. 541. Referred to: *Keppell v. Bailey*, [1824-34] All E.R. Rep. 10; *Squire v. Campbell* (1836), 1 My. & Cr. 459; *Dietrichsen v. Cabburn* (1846), 7 L.T.O.S. 445; *Kirk v. Bromley Union* (1846), 16 L.J.Ch. 114; *Tulk v. Moxhay*, [1843-60] All E.R. Rep. 9; *Patching v. Dubbins* (1853), Kay, 1; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Wilson v. Hart* (1865), 2 Hem. & M. 551; *Mitchell v. Steward* (1866), L.R. 1 Eq. 541; *Bowes v. Law* (1870), L.R. 9 Eq. 636; *German v. Chapman* (1877), 7 Ch.D. 271; *Renals v. Cowlshaw* (1879), 11 Ch.D. 866; *Meredith v. Wilson* (1893), 69 L.T. 336; *Sobey v. Sainsbury*, [1913] 2 Ch. 513; *Alliance Economic Investment Co. v. Berton*, [1923] All E.R. Rep. 539.

As to the enforcement and discharge of covenants, see 14 HALSBURY'S LAWS (3rd Edn.) 568-574; and for cases see 40 DIGEST (Repl.) 362-364.

Motion for an injunction to restrain the defendants from erecting certain buildings.

By a settlement made in 1669 on the marriage of Lady Rachel Vaughan with the Hon. William Russell, afterwards Lord Russell, a messuage called Southampton House, and the appurtenances, together with some fields adjoining, situate at Bloomsbury in the parish of St. Giles, in the county of Middlesex, and then the property of Lady Rachel Vaughan, were conveyed to trustees, upon such trusts as she alone should, in manner therein mentioned, appoint. By indenture of feoffment of June 19, 1675, made between the Hon. William Russell and Lady Rachel Vaughan, his wife, of the first part, the trustees of the settlement of the second part, and the Rt. Hon. Ralph Montagu of the third part, it was witnessed that in consideration of £2,600 to the said William Russell and his wife paid by the said Ralph Montagu, and of the covenants thereafter mentioned on his part to be performed, and 5s. paid to the trustees (which sums were acknowledged to have been received for the absolute purchase of the piece of ground thereafter mentioned), they the said William Russell and his wife and by their direction and appointment the trustees, granted, bargained, sold, alienated, released, enfeoffed, and confirmed unto the said Ralph Montagu, his heirs and assigns, a piece of land lying in a field called Baber's Field, in St. Giles's, containing seven acres and

twenty-five perches, and abutting eastward in part upon the messuages lately erected by Mary Hudson and in other part upon other part of Baber's Field, northwards on Baber's Field aforesaid, westward in part upon the messuage then in the occupation of John Morris, and in other part upon Baber's Field aforesaid, southward upon Great Russell Street in Bloomsbury aforesaid, and also the wall encompassing the said parcel of ground and five feet and four inches of ground in breadth, extending the whole front of the said ground abutting upon Great Russell Street, and lying without the south wall, to be pallisaded, and as a security for the said wall. Also granted was a way and free passage for foot, horses, coaches, carts, and all manner of carriages in, by, through, and over the grounds of the said William Russell and Lady Rachel Vaughan, then used, or which thereafter should or might be used, in lieu of those that were then used for or as streets in the said parish unto the said piece of ground or any part thereof in case there should be any alteration thereof and other ways belonging to the said premises or then used with the same, and also free liberty and authority to make or open two doors or passages out of and through the wall on the north part of the premises and to continue the same, and also full power and free liberty to make all such sewers, watercourses, sinks, gutters, drains, conveyances for bringing in of water, and other easements as should be fit or necessary for the accommodation of the messuages and outbuildings intended to be built upon the said piece of land, under ground, and southwards unto the said places then used for streets, and unto and into the common sewer belonging to the buildings in Bloomsbury commonly called Southampton Buildings, and to continue the same, closing up the ground and making up the pavements that should be broken for doing the same, to hold the same to the use of the said Ralph Montagu and his heirs and assigns for ever subject to a rent of £5 per annum to Lady Rachel Vaughan, her heirs and assigns, which he covenanted to pay and for the recovery of which a power of distress was given. The deed then contained a covenant to levy a fine, and covenants for title.

In consideration of the premises, Ralph Montagu covenanted with Lady Rachel Vaughan, her heirs, executors, administrators, and assigns, that in case he, his heirs or assigns, should erect any building upon the said ground, or any part thereof, he or they would erect and build upon the ground one fair and large messuage and dwelling-house, fit for him and his family to inhabit, composed of a uniform building together with stables, coach-houses, and other offices suitable to the mansion, and further would keep fenced in with a brick wall the residue of the piece of ground and make thereout a convenient courtyard, and on the back part thereof would leave space sufficient for convenient gardens and walks and not make any public or other way out of the piece of ground to the fields lying northwards of the same, save only two doors out of the garden to be made for the accommodation of the inhabitants in the mansion-house for walking into and taking the air in the fields nor would erect any public brewhouse on the piece of ground or make any buildings thereon save only convenient offices for the chief messuage, and ornaments and conveniences for the garden. He further covenanted with Lady Rachel Vaughan that if he, his heirs or assigns, should at any time erect any buildings on the north end of the ground which should extend northward beyond the range and building of Southampton House, other than one or more summer house or houses, banqueting house or houses, for the accommodation of the garden to be made in the ground, or what would be for the enlargement of the mansion-house, or do other works in breach of his covenant then he, his heirs and assigns, would forfeit and pay to Lady Rachel Vaughan £3 per day so long as those works should continue. By indentures, dated in 1682, new trustees were appointed of the settlement of 1669, and in 1685, William Lord Russell being dead, the trustees re-conveyed the legal estate to Lady Rachel Vaughan, then Lady Russell.

In pursuance of the covenants, a mansion-house was built by Ralph Montagu

A upon the ground conveyed to him, and, that mansion-house having been destroyed by fire, another was erected on the same site. Soon after the establishment of the British Museum under the authority of an Act of Parliament passed in 1753 this house and premises, known by the name of Montagu House, were purchased, and were vested in trustees for the purposes of that institution. The estates of Lady Russell in Bloomsbury had become vested in the plaintiff in fee, subject to leases of some parts of them, and houses had been erected and streets formed on the north, east, and west sides, adjacent to the museum, some of them overlooking the gardens. The yearly rent of £5 was paid to the plaintiff who claimed under Lady Russell, not by descent, but as a purchaser. The mansion-house, originally called Southampton House, and afterwards Bedford House, stood formerly on the north side of Bloomsbury Square. It was pulled down in 1800 to make way for streets and buildings which were erected on its site.

C The bill was filed to obtain an injunction to restrain the defendants, the trustees of the British Museum, from proceeding to raise in the gardens certain additional buildings which they had it in contemplation to erect. The intended additions were designed for the reception of the statues and other monuments of ancient art brought from Greece by the Earl of Elgin. They were to consist of a wing sixty feet in height, joining the principal building at the eastern extremity, and extending from it into the garden northwards to the distance of two hundred and ninety feet. On the western side a similar wing had been built about the year 1805, extending northwards about one hundred and forty feet, and it was designed to lengthen this wing so as to correspond with that to be built on the east. These wings, if erected, would extend northward considerably beyond what had been the line of the range and building of Southampton House. A motion was made for an injunction before SIR JOHN LEACH, V.-C., who ordered a Case to be stated for the opinion of a court of law upon the question whether the plaintiff could maintain an action of covenant to recover damages in respect of the erection of buildings to the northward of the line of Southampton House, directing that it should be stated in the Case that the covenant in the deed of 1675 was made with the trustees and the rent reserved to them and not to Lady Rachel Vaughan. From this order the plaintiff appealed, and renewed his motion for an injunction, and, as the defendants were also dissatisfied with the Vice-Chancellor's order and had intended to appeal, it was arranged between the parties that the question should be considered as if it were before the court upon cross-motions of appeal. The motion was heard by LORD ELDON, L.C., and SIR THOMAS PLUMER, M.R.

Shadwell, Littledale, Abercromby and C. S. Cullen for the plaintiff.
Sir Robert Gifford, Wetherell, Puller and Bligh for the defendants.

LORD ELDON, L.C. I think it right for myself to say I have formed no opinion, nor do I mean to pronounce any opinion, whether any action could or could not be maintained by the Duke of Bedford against the trustees of the British Museum if they proceed with the proposed building. That is not the subject of this day's consideration. Neither am I disposed to meddle with another question, as to which also I disclaim saying one word judicially—whether now or heretofore the trustees of the British Museum, upon anything that appears in this instrument, could have applied to the court to restrain the Bedford family from doing that which they have done. The point to which I have confined my attention, and upon which I am anxious to have the opinion of the MASTER OF THE ROLLS, is, taking it for granted that an action could be brought by the Duke of Bedford under the deed of 1675, whether, under all the circumstances of this case, His Grace must be content with his legal remedy for the purpose of obtaining compensation for any injury he may have sustained or whether he has a right to the better mode of relief which a court of equity affords by injunction.

When Bedford Square was built it is impossible to doubt that the owners of houses on the east side of that square thought that an increased value attached

to them because the residents in those houses would have the museum on one side and the square on the other. So with respect to Gower Street, everyone remembers that the houses on the east side were always advertised as much more valuable than those on the west, and why? Because from the former there was a prospect of the country extending to Islington, and because also their inhabitants could have a refreshing walk from their own homes through the fields as far as Queen Square, which was then the northern extremity of that part of the metropolis. It was no doubt imagined that the Duke of Bedford could never be advised to cover this land with buildings, and that all the property between Gower Street and what is called Brunswick Square would remain open as long as the leases of the houses in Gower Street should endure, nor was it to be expected that if the Duke of Bedford had a right to tell the trustees of the British Museum that they should not build further without his consent, the tenants on the east side of Bedford Square might not ask of His Grace to insist upon that right for their sakes.

This subject may be illustrated by what has happened with respect to Gower Street. From time to time buildings were raised by the lessees in that street contrary to the covenants in their leases but with the consent of the Duke of Bedford, until the covenant against the tenant erecting buildings behind his house became, with reference to the situation of his neighbours, an oppressive, though not an unjust, restriction. Suppose, for example, there were ninety houses on the east side of Gower Street, and the duke had allowed the tenants of eighty of them to raise their back buildings to a height extremely inconvenient to the others from whom he withheld that permission, it could not be said that he was acting illegally or improperly in so doing, but it becomes quite a different question if, under such circumstances, he files a bill to prevent those others from raising their washhouses or outbuildings. If such a bill were filed, it is questionable whether the court would not say it was clear from all the circumstances that each of those tenants thought he was entitled to the benefit which His Grace, by declining to enforce the covenant, had allowed to the rest. The question, therefore, is, not whether the party can bring an action, but whether he can come into equity for relief and thereby render an action for compensation unnecessary—whether, under all the circumstances of the case, the Duke of Bedford can be heard to say: “I can or I cannot maintain an action at law; but be that as it may, I will not seek relief in that mode, but will come into a court of equity, and insist upon having the extraordinary relief which that court gives beyond what is afforded by courts of law. I will have an injunction, to prevent the necessity of my consulting any law courts whatever as to my relative situation with regard to these trustees.”

Consider how the matter stands upon the deed of 1675. It appears that from the year 1675 to the year 1800 buildings in the neighbourhood of Bedford House have been erected to the eastward; there has been a prolongation of streets from Bedford House to the New Road, and buildings have also been erected on the westward through Bedford Square; there were no buildings at all in the space between Brunswick Square and Gower Street, but the large mansion, to which the terms of this instrument refer and which now forms the museum, had stood upon its present site up to the year 1800. The deed is for considerations, partly pecuniary and partly to be found in covenants, the pecuniary considerations being £2,600 and a rent of £5 a year, and the covenants contained in that instrument being expressly stated to be part of the consideration. A grant is then made, and (what is not immaterial) in the description of the premises it appears that at the time the grant was made there was at least one messuage on the east side of Montagu House and one messuage on the west side, but no messuages whatever on the north side. There is, further, the usual covenant to pay the rent, and then follows this covenant:

“And in consideration of the premises, the said Ralph Montagu, for himself, his heirs, executors, administrators, and assigns, covenants, promises, and

grants, to and with the said Lady Rachel Vaughan, her heirs, executors, administrators, and assigns, that in case the said Ralph Montagu, his heirs or assigns, shall erect any building upon the said ground and premises, or any part thereof, he, the said Ralph Montagu, his heirs or assigns, shall and will erect and new-build upon the said piece of ground hereby granted, or mentioned to be granted, one fair and large messuage and dwelling-house,"

The construction put upon these words is not only a construction to be found in a subsequent part of this instrument, but is the construction which the Duke of Bedford himself gives to it, namely, that the grantee is to build a chief messuage fit for the dwelling-house of a large and noble family with the necessary conveniences and ornamental appendages. The instrument goes on to covenant that the house is to be fit for Ralph Montagu and his family to inhabit, composed of a uniform building, together with all convenient stables, coach-houses, and other offices suitable to the mansion or dwelling-house, and, further, that Ralph Montagu shall keep fenced in with a brick wall the residue of the ground and shall make thereout a court yard, and, on the back part thereof, shall leave space sufficient for gardens and walks and not make any public or other way out of the ground into the fields lying northwards of the same, save only two doors out of the garden to be made for the accommodation of the inhabitants of the mansion-house for walking into and taking the air of the fields which are on the north side of the house. So the grantee is to have two doors towards the north, which was open ground, but not on the east or the west, nor is he to erect any buildings on the ground save only for offices for the chief messuage and ornaments and conveniences for the garden, "the walls of those to be of brick or stone, and not of timber," and, further, it is covenanted that he shall not make any watercourse, drain, or sewer out of the ground backwards northward into the fields, nor erect any buildings on the outermost wall of the ground next to the fields—all this again showing care and attention to what was, or what was not, to be done northward and carrying that care to the extent that the grantee was not to raise any structure upon the wall to the northward of the garden.

In determining how a court of equity ought to proceed it is proper to consider not only what would be done in the actual matter before it, but what the court would do in other cases falling within the same principle. Suppose that after Mr. Montagu had built this house ranging with all the surrounding buildings that belonged to the Duke of Bedford, and ranging with Powis House and other large mansions standing in Great Russell Street; suppose that after the summer house and banqueting house had been erected (which clearly would not have affected the prospect from Bedford House), and after the garden wall (on which the feoffee was not to place three additional bricks) had been built, the Duke of Bedford had said: "There is nothing to restrain me. I will place a sugar house on one side and a soap house or gas works on the other side;" or rather, suppose, which is a handsomer way of putting it, that the duke had built a row of houses close to the wall, and afterwards Mr. Montagu had said he did not like to have his gardens overlooked by his neighbours' servants and he would therefore, notwithstanding the covenant, build this wall twice as high as it was before, though I admit that the Duke of Bedford might have had a proper ground of action, would this court have granted an injunction? My answer is, No, for, upon looking to authority, I find the law to be as LORD KENYON has laid it down. If this deed is permitted to be urged against what I must call, not the legal, but the actual, intention of the parties, and if you have the means of obtaining any remedy, you may have recourse to your deed, but you cannot under such circumstances come into a court of equity for a remedy which the court never grants except in cases where it would be strictly equitable to grant it. It is impossible to state, as the doctrine of a court of equity, that the court will carry into execution a specific covenant in all cases where the legal intention of the deed is found. A doctrine like that would be widely inconsistent

with general practice, and would directly contradict the daily and hourly experience of us all. A

The deed proceeds further and states as a distinct covenant that if the said Ralph Montagu, his heirs or assigns, or any of them, shall at any time thereafter erect any building of what nature soever on the north end of the said piece of ground, which shall extend northward beyond the range and building of Southampton House, situate near thereunto, other than one or more summer house or other houses for the accommodation of the garden, he and they shall forfeit and pay, etc. What would it have signified as between these parties, in the consideration of such a case as this, whether a house was or was not built in the range of Southampton House, if there were placed between this house and Southampton House three or four streets excluding the smallest possible view from Southampton House of any thing north of this mansion, and by the acts of the Bedford family themselves destroying the very purpose for which this covenant was here inserted? B C

Suppose again that the moment after Mr. Montagu had in discharge of the original engagement built this great mansion fit for the pleasurable residence of a nobleman or gentleman of fortune, and had also according to the covenants erected suitable offices and the ornamental banqueting house and summer house, the Duke of Bedford had then put a public brewhouse in the vicinity of the garden, what would the Montagu family have said? Yet there is nothing here from which it can be pretended that there is an express prohibition of such a proceeding. Neither do I say whether the Bedford family could have built a public brewhouse to the north of this mansion, but suppose such a thing had been done, and the Duke of Montagu had then said: "You have spoilt my banqueting house and summer house unless I am to drink nothing but porter. I must, therefore, build a wall which will likewise prevent the smoke of the engines of the brewhouse coming from the north." Will it be contended that in such a case the Bedford family could come to a court of equity for protection on the ground that the Duke of Montagu was going to build a wall higher than the covenants permitted, or even, we will suppose, an immense brewhouse, they having on their part religiously kept their covenant by making two archways through which his grace might go and take the salubrious air which it was intended he should have? D E F

If the parties have so dealt with regard to the legal rights that the object of the one party is defeated, is the other to do what he pleases, while the first is not at liberty to call upon that other to account for doing that which he himself is by the deed prohibited from doing? I do not think that a court of equity is to act by reciprocity of covenant. I rather mistake what has been held to be the doctrine of courts of equity during the whole course and practice of my life if this court does not say to parties who are so circumstanced: "Confine yourselves to your legal remedies if you have any, and do not come here in cases of this description to ask of the court to give you more relief than could be obtained in a court of law." G

Upon this point I am anxious to have the opinion of the MASTER OF THE ROLLS, first making most respectfully this single observation upon a subject which calls for vigilant attention, that, if there be a question in a court of equity the decision of which will render the consideration of it in courts of law unnecessary, it is then the duty of the court of equity first to decide that question. If, for example, it should happen in this case that after the parties had gone to trial and the defendant had obtained a verdict at law, this court would nevertheless have given no relief, then it is for the interest of the suitors that they should be told so in the first instance, and not in the last stage of the proceedings. Why is the court to send them to law and afterwards to tell them when they come back that nothing can be done for them here? If that is to be the course, it is better to dismiss them out of court at once and in the first instance, let the result of the application to a court of law be what it may. I confess myself unable to say that this is one of the cases in which the court ought to give relief by injunction. The difficulties I have stated are difficulties H I

A I am unable to get over, and I state them without prejudice. Having done so, I request the MASTER OF THE ROLLS to state what view he has taken of the case.

B **SIR THOMAS PLUMER, M.R.**—The single question now before the court is one which respects the exercise of the jurisdiction, and this court, while it determines that question upon principles peculiar to itself, cautiously abstains from deciding whether either party has a remedy at law against the other, leaving each of them, as, in my opinion, it ought to leave them, to agitate that question in a court of law.

C If this were a case in which the plaintiff had not a legal, but only an equitable, remedy, as was attempted to be argued by his counsel on the assumption that, by reason of certain technical forms, he was debarred from obtaining any redress at law—if the case was reduced to that point, it would become extremely material to consider whether the party had any claim at all to come into a court of equity for its equitable assistance. That, however, is not the present question. On the contrary, those who support the application for the injunction also insist that the Duke of Bedford has a clear legal right; that upon the true construction of the contract and upon all that has happened between the parties, it is competent to the duke, as representing the original vendor, to assert his legal right. Undoubtedly it is perfectly open to him to take that course, and nothing which this court shall determine will, in the least, abridge his right.

D Again, in considering whether the plaintiff is precluded from having the equitable assistance of this court, it must not be supposed that the slightest imputation is cast upon his conduct. It is not on the ground that the party applying for relief has conducted himself improperly—so contrary to the agreement as to deprive himself of that remedy that assistance by injunction may be refused, but the question is whether, from the altered state of the property, altered by the acts of the party himself, he has not thereby voluntarily waived and abandoned all that control which was applicable to the property in its former state. It was perfectly competent to the plaintiff to make what use he pleased of his contiguous lands; he was not fettered in so doing by any previous obligation to the contrary, and when he took upon himself to act in the manner in which he has acted and to cover the vacant ground with buildings, the question is whether, having regard to the mutual dealings between the parties with respect to the property as it stood both originally and afterwards, it is consonant with the principles of equity to interpose at this time of day.

G In that point of view it appears to be a consideration of great importance, more especially with reference to property in the metropolis, how far parties shall now be permitted to go back and revive all the objections arising out of long antecedent covenants and engagements and to give them such an application to the buildings of the metropolis in its present rapidly increasing state that, while one party is left at liberty to obtain the most profitable consideration for his land, every obligation which is in the nature of restriction shall be enforced by that party as against the owner of the adjoining land. The question is not to be determined on the letter of the contract. By the letter of the contract the duke is under no positive engagement to leave the northern boundary open, but the question is whether, according to good faith and the true understanding of the parties at the time when this contract was entered into, the terms of the engagement had not reference to the property while it remained in its then state. There were, here, two large mansions—one erected, the other to be erected, contiguous to each other—to be enjoyed by two noble families with their appendages of gardens and offices, and the question is whether the obligation did not remain so long as those two mansions remained, the parties mutually contemplating all the enjoyment to be derived from everything which could contribute reciprocally to their beauty, ornament, and use.

I It is to be recollected that the piece of ground in question was bought for the very purpose, and it is an obligation cast upon the purchaser, if he builds at all,

that he shall erect one mansion only—one large fair mansion, with suitable gardens and offices attached to it, his understanding being that he should have all the advantages which the site then possessed, unless, indeed, it is to be presumed that he could undertake to erect a mansion in such a situation and on so magnificent a scale, with all the obligations thrown upon himself and none on the contrary, expressed or implied, imposed upon the other party who had subjected him to those obligations.

This understanding between the parties results from every part of the agreement. The party whom the duke represents covenants that Mr. Montagu shall have the unlimited enjoyment of the property conveyed with all that belonged to it. It is quite evident from the expression with respect to the opening into the fields that it was in the contemplation of the parties that the land to the north should remain fields or open ground, and in the parts of the deed referring to the streets to the southward and the contiguous buildings to the east and west, there is not a syllable which indicates an intention that the northern boundary was not to remain open. It was that which principally induced Mr. Montagu to build. If the subject-matter of the contract is changed, if, from the alterations which take place in the lapse of time, both noble families quit their residences, and the mansion which had been built ceases to be a place of residence for a family of this description and becomes appropriated to other purposes, a new set of interests and rights would be applicable to it in its altered state. Who is it that has created this alteration? The party who now seeks to enforce the obligation which applied to the property in its former state. It was perfectly competent to the Duke of Bedford to build to the northward all the streets he has built, and to surround and enclose Montagu House with buildings for trade and commerce, or in any way he thought proper, but, having so done, can it be said to be equitable or consonant with justice, after having induced a man to build a suitable mansion, after having surrounded him with buildings, blocked up all that tempted him to build, and precluded him from the pleasurable or profitable enjoyment of his mansion, to insist on its remaining in the state in which, by the letter of the deed, the party is bound to preserve it? At law such conduct may be no defence. Notwithstanding his having altered the state of the property, the duke may still be entitled to the benefit of the covenant. If so, let him take his legal remedy, but the question is whether a court of equity must not consider how far it is reasonable to permit a party who has so dealt with the property and so altered its condition to obtain his remedy by the interposition of this court.

The case made by the bill, therefore, is not that which was contemplated by the deed. The case made by the bill is that this erection will obstruct the view of the lessees of the new houses which have been built on the adjoining land. Was that the design of the obligation? The very circumstance of the Bedford family having surrounded Montagu House with streets and buildings after having become parties to this contract (the intention being that the two contiguous mansions should be inhabited by noble families) is made the ground on which the equitable relief is sought, because, otherwise, it is said, these lessees will be prevented from enjoying the view into the gardens and grounds of the museum. Would not that be to apply all the covenants of the deed to a different state of things from that which was the object and design of both parties?

The question then is whether a court of equity is bound to assist a party to do that which neither party contemplated, and whether it would not be inequitable, unreasonable, and unjust to enforce the covenants specifically in the existing state of the property, and, considering it in that view, I entertain a strong opinion that this is not a case in which the court ought to interfere. Upon these grounds, and without the least imputation upon the duke or those who advised him, I think he has voluntarily brought the property into a state which makes this part of the agreement no longer applicable, or which at least renders it unreasonable that the covenant should be enforced.

[At the close of the judgment the plaintiff's counsel stated that, as the sole object of the Duke of Bedford in instituting the suit was to obtain the opinion of the court upon the question of right, it became unnecessary to prosecute the cause further. An order was, accordingly, taken by arrangement between the parties, dismissing the bill.]

VERNON v. SMITH

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), October 20, 1821]

[Reported 5 B. & Ald. 1; 106 E.R. 1094]

Landlord and Tenant—Covenant—Covenant running with the land—Covenant to insure demised premises against fire.

A covenant by a tenant to insure the demised premises against fire runs with the land, and, therefore, is one on which an assignee of the reversion is entitled to sue.

Per BAYLEY, J.: If a covenant respect the thing demised and be co-extensive with the estate of the covenantee, and be made with him and his assigns, it passes to his assignee.

Per BEST, J.: A covenant in a lease which the covenantee cannot, after his assignment, take advantage of, and which is beneficial to the assignee as such, will go with the estate assigned.

Notes. Applied: *Boyer v. Warbey*, [1953] 1 All E.R. 269. Referred to: *Keppell v. Bailey*, [1824-34] All E.R. Rep. 10; *Doughty v. Bowman* (1848), 17 L.J.Q.B. 111; *Re Barker, Ex parte Gorely* (1864), 11 L.T. 319; *Coward v. Gregory* (1866), L.R. 2 C.P. 153; *Forster v. Elvert Colliery Co.*, *Quin v. Same*, *Seed v. Same*, *Morgan v. Same*, [1908] 1 K.B. 629.

As to covenants running with the land, see 23 HALSBURY'S LAWS (3rd Edn.) 644-651; and for cases see 31 DIGEST (Repl.) 149-156, 400-406. For the Fires Prevention (Metropolis) Act, 1774, s. 83, see 13 HALSBURY'S STATUTES (2nd Edn.) 9.

Cases referred to:

- (1) *Spencer's Case* (1583), 5 Co. Rep. 169; 77 E.R. 72; 31 Digest (Repl.) 153, 2907.
- (2) *Baily v. Wells* (1769), Wilm. 341; 3 Wils. 25; 97 E.R. 130; 31 Digest (Repl.) 154, 2919.
- (3) *Congleton Corp'n. v. Pattison* (1808), 10 East, 130; 103 E.R. 725; 31 Digest (Repl.) 152, 2903.
- (4) *Sadlers' Co. v. Badock* (1743), 2 Atk. 554; 1 Wils. 10; 26 E.R. 733, L.C.; 29 Digest (Repl.) 446, 3262.
- (5) *Lynch v. Dalzell* (1729), 4 Bro. Parl. Cas. 431; 2 E.R. 292, H.L.; 29 Digest (Repl.) 448, 3276.
- (6) *Webb v. Russell* (1789), 3 Term Rep. 393; 100 E.R. 639; 31 Digest (Repl.) 240, 3744.

Demurrer to action for damages in respect of the breach of a covenant by the defendant, a lessee, to insure the demised premises.

One J. Hance was tenant for the residue of a term of years, whereof seven years were then unexpired, of tenements and premises with the appurtenances which were situate within the weekly bills of mortality [returns by parish clerks stating the number of deaths in the parish] mentioned in the long title to the Fires Prevention (Metropolis) Act, 1774 and, being so possessed thereof, he leased to the defendant the tenements and premises with the appurtenances for seven years at a

certain rent therein mentioned. The defendant covenanted that he would from time to time during the term insure in some of the insurance offices in London or Westminster the messuage, dwelling-house, coach-house, stable, and premises demised or thereafter to be erected and built, to the amount of £800, in the joint names of himself, his executors, administrators and assigns, and of Robert Stone the ground landlord of the premises, his heirs or assigns, and would, at the request of Hance or of the ground landlord, produce the policy and receipts for such insurance. The lease contained a proviso for re-entry on breach of any of the covenants. The plaintiff alleged that, in breach of his covenant, the defendant did not insure. He stated that, before the making of the demise to the defendant, Robert Stone was seised in fee of the demised tenements, and by an indenture demised the same to J. Hance to hold for eighty-five years and six months. Hance, by that indenture, covenanted to insure the premises from fire to the amount of three-fourths of the value thereof in the joint names of himself and Stone, with a proviso for re-entry in case of non-performance of the covenants. Three-fourths of the value of the premises amounted to £800. By reason of the premises remaining uninsured, Stone brought an action of ejectment for the forfeiture, and the plaintiff, to whom Stone had assigned his interest in the lease, was forced to pay the costs to him, amounting to £500, and also to sustain his own costs, amounting to £1,000. To this declaration the defendant demurred.

Comyn in support of the demurrer: The assignee of the lessor cannot maintain this action because the covenant to insure against casualties by fire is a mere personal covenant. Covenants which run with the land must be such as affect the land itself, and not the collateral interest of the lessor. The rule upon this subject is accurately laid down in *Spencer's Case* (1), *Bally v. Wells* (2), and *Congleton Corpn. v. Pattison* (3). In *Spencer's Case* (1) it is expressly stated that a covenant to pay a collateral sum to the lessor or a stranger, shall not bind the assignee because it is merely collateral and in no manner touches or concerns the thing demised. By the covenant to insure, the lessee agrees to pay an annual sum to a stranger in consideration of which that stranger is to pay to the lessee a certain stipulated sum in case the premises should be injured by fire. There is not any stipulation that that sum, when recovered, shall be laid out upon the land, and the tenant may, therefore, apply it to any other purpose. The covenant does not in any respect affect the nature, quality, or value of the thing demised independently of collateral circumstances and so is not a covenant which passes to the assignee. Secondly, the nature of the covenant cannot be altered by the provisions of the Fires Prevention (Metropolis) Act, 1774, which apply only to the case where an insurance has actually been made, and does not regulate the covenants between lessor and lessee. No insurance having been made in this case, it does not fall within the statute. Thirdly, the statute only enables the directors of the insurance company, upon the request of the persons interested in a house damaged by fire, or upon any ground of suspicion that the persons insured have been guilty of fraud or wilfully setting their houses on fire, to cause the insurance money to be expended in re-building the premises. As it appears, from the preamble of the clause, that the object was to prevent fraudulent insurances, the power of the directors so to apply the money ought to be restrained in such cases only. Nor does it apply to a case where the money has been disposed of among contending parties previously to the application of the parties interested. The statute, therefore, is not absolutely directory that the money recovered shall at all events be laid out on the premises, and, consequently, it does not alter the situation of the defendant in this case.

Chitty for the plaintiff: The lessee, having covenanted to cause the insurance to be effected in the joint names of the ground landlord and himself, could not, in the event of his having effected such an insurance and a loss having occurred, have received the money without the consent of such landlord, and a court of

A equity would have directed the money to be laid out in re-building or repairing the premises. The interest of the landlord is materially varied by the circumstance of the lessee being bound to insure, for the rent reserved is decreased in proportion to the amount of the annual premium paid. The covenant, therefore, to insure affects the nature, quality, or value of the thing demised, and, therefore, is a covenant which runs with the land. It is quite clear that, by the provisions of the Act of 1774, the covenant to insure in the present case becomes, by operation of law, a covenant to lay out the money recovered in re-building the premises at the request of the lessor, for the enacting part of the clause does not confine the power of the directors to lay out the money to cases of fraud; it is in the alternative and enables them so to do in any case upon the request of the party interested. Coupling, therefore, the covenant with the statute, it is, in effect, a covenant to lay out money recovered in re-building the premises, in case the lessor requires it, and, that being so, it is clearly a covenant which respects the thing demised, and, therefore, passes to the assignee.

D **ABBOTT, C.J.**—It is not necessary to give any opinion on the effect of a covenant to insure premises situate without the limits mentioned in the Fires Prevention (Metropolis) Act, 1774. These premises lying within those limits, the effect of that statute is to enable the landlord, by application to the governors or directors of the insurance office, to have the sum insured laid out in re-building the premises. A covenant to lay out a given sum of money in re-building or repairing the premises in case of damage by fire would clearly be a covenant running with the land, that is, such a covenant as would be binding on the assignee of the lessee, and one which the assignee of the lessor might enforce. Here the defendant does not covenant expressly in those words, but only that he will provide the means of having £800 ready to be laid out in re-building the premises in case of fire. But, connecting that covenant with the Act of Parliament, the landlord has a right to say that the money, when recovered, shall be so laid out. It is, therefore, as compulsory on the tenant to have the money laid out in re-building and as beneficial for the landlord as if the tenant had expressly covenanted that he would lay out the money he received in respect of the policy upon the premises. For these reasons, I think that this is a covenant running with the land, for the breach of which the assignee of the lessor may sue, and, consequently, there must be judgment for the plaintiff.

G **BAYLEY, J.**—I am clearly of opinion that the assignee of the reversion is entitled to sue upon the covenant in question. The rule is that, if the covenant respect the thing demised and be co-extensive with the estate of the person to whom it is made, and be made with him and his assigns, it passes to his assignee. The only question in this case is: Does this covenant respect the thing demised? It is a covenant to insure the premises against damage by fire. By the operation of the Fires Prevention (Metropolis) Act, 1774, the effect of that insurance is not merely to put into the pocket of the person effecting it in case of loss the amount of the money insured, but to entitle the owner of the estate to have that money laid out on the land, and if such be the effect of the covenant, it does affect the thing demised as much as a covenant to repair or re-build, in case of damage by fire. I think, therefore, that there must be judgment for the plaintiff.

I **HOLROYD, J.**—I am of the same opinion. If the covenant to insure to the amount of £800 in case of fire could be considered as a covenant to pay a collateral sum to the lessor, the present action could not be supported, but, taking that covenant, together with the Fires Prevention (Metropolis) Act, 1774, s. 83, I think that the sum insured is not to be considered as a collateral sum, but as a sum which, by operation of law, must be laid out upon the premises. It is, therefore, a covenant to do a matter which concerns the land, and falls within the rule laid down in *Spencer's Case* (1), and by *WILMOT, C.J.*, in *Bally v. Wells* (2). He there lays it down thus (*Wilm.* at pp. 344, 345);

"Covenants in leases, extending to a thing 'in esse,' parcel of the demise, run with the land, and bind the assignee, though he be not named, as to repair, etc. And if they relate to a thing not 'in esse,' but yet the thing to be done is upon the land demised, as to build a new house or wall; the assignees, if named, are bound by the covenants: but if they in no manner touch or concern the thing demised, as to build a house on other land, or to pay a collateral sum to the lessor, the assignee, though named, is not bound by such covenants: or if the lease is of sheep or other personal goods, the assignee, though named, is not bound by any covenant concerning them. The reasons why the assignees, though named, are not bound in the two last cases, are not the same. In the first case, it is because the thing covenanted to be done has not the least reference to the thing demised; it is a substantive, independent agreement, not 'quodam modo,' but 'nullo modo,' annexed or appurtenant to the thing leased. In the case of the mere personalty, the covenant doth concern and touch the thing demised; for it is to restore it or the value at the end of the term; but it doth not bind the assignee, because there is no privity, as there is in the case of a realty between the lessor and lessee and his assigns, in respect of the reversion; it is merely collateral in one case; in the other it is not collateral, but they are total strangers to one another, without any line or thread to unite and tie them together; and to constitute that privity which must subsist between debtor and creditor to support an action."

After citing several cases, from which he deduces the principle laid down, he says (*ibid.* at p. 346):

"All these cases clearly prove that 'inherent' covenants, and such as tend to the support and maintenance of the thing demised, where assigns are expressly mentioned, follow the reversion and the lease, let them go where they will."

In the present covenant, assigns are expressly included, and, inasmuch as the performance of the covenant would, in the event of the premises being destroyed or injured by fire, tend to the support and maintenance of the thing demised, I am of opinion, that it falls within the rule laid down by WILMOT, C.J., and, consequently, that there must be judgment for the plaintiff.

BEST, J.—It has been argued from the preamble to s. 83 of the Fires Prevention (Metropolis) Act, 1774, that this provision of the statute only applies to cases where fraud is suspected, but the enacting part of the clause goes beyond the mischief mentioned in the preamble, and is large enough to embrace this case. For, under the first branch of it, where the owner of the building requests the insurance company so to apply the money, no suspicion of fraud is necessary to make the request compulsory on the directors. Within the district, therefore, to which the Act applies, this covenant provides a fund for the re-building of the premises which the owner has a right to require shall be applied to that purpose, and then it is clear that the assignee has a direct interest in having the insurance kept up.

I think, also, that, if the premises were in any other part of the kingdom, this would be a covenant that would pass to an assignee. A covenant in a lease which the covenantee cannot, after his assignment, take advantage of, and which is beneficial to the assignee as such, will go with the estate assigned. If this were not the law, the tenant would hold the estate discharged from the performance of one of the conditions on which it was granted to him. The original covenantee could not avail himself of this covenant; he sustains no loss by the destruction of the buildings, and, therefore, has no interest to have them insured.

In *Sadlers' Co. v. Badcock* (4), LORD HARDWICK says that LORD KING, L.C., in *Lynch v. Dalzell* (5) held, that a person who had assigned his interest in a house before the fire happened which consumed it had no right to the money under the

A policy. I cannot say whether a court of equity would take any steps to secure the application of the money insured for the benefit of the estate. I presume that, if a court of equity would assist a covenantee to have the money, recovered under the policy by his tenant, expended on the estate, it would render the same assistance to an assignee. If a court of equity will not interfere, either for the one or the other, still this covenant is as beneficial to an assignee as it was to the covenantee. It secures to the tenant the means of performing his covenant, and to the landlord, a solvent instead of a ruined tenant. It is a covenant beneficial to the owner of the estate, and to no one but the owner of the estate, and, therefore, may be said to be beneficial to the estate, and so directly within the principle on which covenants are made to run with the land.

C At the time when the statute 32 Hen. 8, c. 34 [relating to grantees of reversions : repealed by Law of Property Act, 1925], was passed an immense quantity of land passed from the dissolved monasteries to the King, and from the King to the most favoured and powerful of his subjects. Much of this land was on lease, and both the King and his Parliament must have been anxious that the assignees of the reversion should be in as good a situation as the lessors were. This statute expressly enacts that grantees of estates shall

D "have and enjoy like advantage against lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing of waste or other forfeiture, and . . . the same . . . benefit and remedies by action only, for not performing of other conditions, covenants, or agreements . . . as the lessors or grantors themselves might have had . . ."

E SIR EDWARD COKE (Co. Litt. 215 b.) limits the operation of these general words, to "such conditions as are incident to the reversion as rent, or for the benefit of the estate." He adds that the statute does not extend to "covenants for payment of a sum in gross, delivery of corn, wood, or the like." A sum in gross is in the nature of a fine which belongs to the lessor and can never be intended for an assignee. By the deliveries of corn and wood were meant deliveries of those articles at the mansion-house of the lessor and not rents payable in corn or wood without any stipulation as to the place where the articles were to be delivered. These deliveries at the mansion-house were inconsiderable in value, and would be of no use to the assignee unless he became the assignee of the mansion as well as the farm.

G In 5 Co. Rep. at p. 18, it is said :

"The statute of 32 Hen. 8, c. 34, was resolved to extend to covenants which touch or concern the thing demised, and not to collateral covenants."

In *Spencer's Case* (1) (Moore, K.B. 159), the same doctrine is laid down in the same terms, and this case is put by GAWDRY, J., and assented to by all the judges and serjeants

H "that a covenant that a lessor will, at the end of the term, grant another lease runs with the land."

I The covenant here mentioned is not beneficial to the estate granted in the strict sense of the words, because it has no effect until that estate is at an end, but it is beneficial to the owner as owner and to no other person. By the term collateral covenants which do not pass to the assignee is meant such as are beneficial to the lessor without regard to his continuing the owner of the estate. This principle will reconcile all the cases. In *Webb v. Russell* (6), LORD KENYON considers grantees or assignees to stand in the same situation and to have the same remedy against the lessees as heirs-at-law of individuals, or successors in the case of corporations, had before the statute. For these reasons, I am of opinion that the plaintiff is entitled to judgment.

Judgment for plaintiff.

ROBERTS v. OGILBY AND ANOTHER

[COURT OF EXCHEQUER (Sir Richard Richards, C.B., Graham, Wood and Garrow, BB.), May 17, 1821]

[Reported 9 Price, 269; 147 E.R. 89]

Agent—Insurance broker—Duty to account—Money received on account of assured—Claim to share by third persons.

An agent is not entitled to retain as against his principal, on the ground that a claim has been made by a third party, money which he has received on behalf of the principal. Accordingly, an insurance broker cannot, after receiving money from underwriters on behalf of an assured on whose instructions he has effected an insurance, refuse to pay it to the assured because third persons have claimed a share of it.

Notes. Distinguished: *Hardman v. Willcock* (1832), 9 Bing. 382, n.; *Suart v. Welch* (1839), 4 My. & Cr. 305. Considered: *Blaustein v. Maltz, Mitchell & Co.*, [1937] 1 All E.R. 497.

As to an agent's and an insurance broker's duty to account, see 1 HALSBURY'S LAWS (3rd Edn.) 186-188, and *ibid.*, Vol. 22, p. 45, 46. For cases see 1 DIGEST (Repl.) 509 et seq.; 29 DIGEST (Repl.) 70 et seq.

Cases referred to:

- (1) *Bell v. Ansley* (1812), 16 East, 141; 104 E.R. 1042; 1 Digest (Repl.) 652, 2258.
- (2) *Dixon v. Hamond* (1819), 2 B. & Ald. 310; 106 E.R. 380; 1 Digest (Repl.) 517, 1511.
- (3) *Sargent v. Morris* (1820), 3 B. & Ald. 277; 106 E.R. 665; 1 Digest (Repl.) 752, 2707.
- (4) *Page v. Fry* (1800), 2 Bos. & P. 240; 3 Esp. 185; 126 E.R. 1258; 29 Digest (Repl.) 138, 786.
- (5) *Hiscox v. Barrett* (1747), 2 Park's Marine Insces. (7th Edn.), p. 603, n.; 29 Digest (Repl.) 138, 758.
- (6) *Ex parte Christie* (1804), 10 Ves. 105; 32 E.R. 783; 4 Digest (Repl.) 424, 3761.

Rule Nisi obtained by the defendants, insurance brokers, to set aside the verdict of a jury in favour of the plaintiff, an assured, in an action brought by him for money had and received to recover from them the amount of a total loss received by them from underwriters. The defendants denied liability.

The cause was tried before SIR RICHARD RICHARDS, C.B., when the jury found a verdict for the plaintiff. From the learned judge's report of the evidence, it appeared to have been proved that the defendants effected a policy of assurance as well in their own names or as agents of the plaintiff in the usual manner on a vessel called the *Snow Dinas* and sent the policy to the plaintiff. The policy was "on ship valued at £1,000" dated February 15, 1818. Their authority for so doing was a letter, addressed to them by the captain in the following terms:

"Please to insure on the *Snow Dinas*, under my command, the sum of £1,000, at and from hence to London, laden with a cargo of slates; and have the goodness to send the policy to Mr. Robert Roberts [the plaintiff]. Bank, Carnarvon. (Signed) Henry Evans—*Dinas*."

On April 25, the plaintiff wrote the defendants the following letter:

"Captain Henry Evans is just returned here after having the misfortune of losing the *Dinas* on a sunken rock near the Runnell Stone, and has delivered to me a paper containing a statement of the *Dinas*' account with you. The insurance effected on said vessel was ordered by me (being duly authorised by writing) on the share of some of the Welsh owners only. The other owners,

to wit, widow Robert Jones, London; Mr. Herley, Cork; Mr. Orford and Mr. Kirkham, of Liverpool, never requested me nor the captain at any time to insure their share. Consequently, the total sum (though trifling) is to be received by me, they having no interest in any part of it."

The letter then referred to an account of trifling articles saved from the wreck, and required the broker's advice as to proceedings. On May 1 the defendants wrote thus to the plaintiff:

"Your favour of the 25th ultimo, was yesterday to hand; and have been in daily expectation of receiving the protest, etc., of *Dinas*, in order that we might settle the loss, for, although we apprehend no danger in the present case, still experience proves that every day there is a risk of some of the underwriters going. We have, therefore, to request, for your own safety, dispatch. What we want, is the protest of the sales of the materials sold. The expenses of Captain Evans, etc., cannot be charged the underwriters. As to that of the protest, it might be deducted from the proceeds of sales, but we do not consider the extending a protest an expense falling on the underwriters. It will not be taken notice of by deducting it from sales as the owner of the cargo would, no doubt, contribute towards it, as he is anxiously looking out for it.

"P.S. We know you only in the business. We could only recover the premium of insurance from you, and we have no right to look further than our orders."

The defendants received the sum insured, from the underwriters. After several other letters had passed between the plaintiff and the defendants on the subject, not materially bearing on the question, the plaintiff wrote to the defendants on June 8, a letter requesting to know whether he might draw on them for £500 on account of the insurance of the *Snow Dinas* in a bill at two months. To that letter the defendants returned the following answer:

"Your esteemed favour, under date 8th current, is to hand, and we see no objection to your valuing on us for £500 at two months. We have had three letters delivered to us, one from Mr. C. Herley and one from Mr. Orford, desiring us to hold on their account their proper division of the £1,000 insured per *Dinas*, and holding us accountable if we part with the money. We are well aware they have no claim for to prevent our doing so, and we will thank you to say what part of the ship you held, as it is necessary we should know you were actually part owner. We will, on receipt of your answer, make out the account and take our solicitor's advice, which (no question) will be to pay you."

In answer to that letter the plaintiff stated that he had drawn for £500. He added:

"I beg to inform you that my share of the *Dinas*, together with my friends here, was ten-sixteenths and one thirty-two parts. Mr. C. Herley and Mr. T. Orford did not authorise me or the captain to insure their shares on the vessel; consequently, their shares could not be included in the insurance effected by you."

The bill for £500 was accepted and paid, but the defendants previously received notice from Herley and Orford of their interest in the ship, and that they would hold the defendants liable if they paid over the proceeds of the insurance to the plaintiff. Those notices were accompanied by an affidavit verifying the ownership of the claimants. The defendants, in consequence, being advised they could not safely pay the balance to the plaintiff, did not pay it, and this action was brought.

Jervis and *Tindal* obtained a rule to show cause why the verdict should not be set aside and a nonsuit entered on the ground that the plaintiff could not alone

maintain the action in his own name, being a single part-owner only, and it was in evidence that there were many other part-owners, not one of whom was party to the record, some of whom the plaintiff in one of his letters admitted were interested in the insurance.

Taunton, showing cause against the rule, contended that the plaintiff had clearly an insurable interest in the ship, and could legally insure it to the full extent, separate and distinct from any other owner. The plaintiff, being a considerable part-owner and the ship's husband, had insured his interest by means of his captain's letter. There could be no legal objection founded because the plaintiff had an exclusive right to do so; if there would otherwise have been any doubt about it, the defendants' own letter—wherein by the postscript they profess to know nothing of any other person than the plaintiff, disclaiming all privity with any other persons—would be conclusive against them. Assuming that *Bell v. Ansley* (1), would be relied on for the defendants in support of the rule, he insisted that that case was wholly distinguishable from this. The objection there was that, the interest being laid to be in John Bell, there was a variance in the proof, the interest being really in John Bell and his brother and the policy made for their joint use and benefit. Here there is no variance. The action is not brought on the policy. It is for money had and received against the brokers who have settled with the underwriters, and the only question is who is to be paid the money received by the brokers. That is clearly the party, by whose order, for whom, and on whose account, he effects the insurance. It is a universal rule that where one treats as an agent with another as his principal the former cannot dispute the title of the latter. In *Dixon v. Hamond* (2), that was distinctly determined, and it was there said by ABBOTT, C.J. (2 B. & Ald. at p. 313) that an agent:

“shall not, after accounting with his principal, and receiving the money in that capacity, afterwards say, that he did not do so, and did not receive it for the benefit of his principal, but for that of some other person.”

In that case, too, it was held that an agent insuring for partners is accountable to them only for the money received by him from the underwriters because he is estopped by his character of agent. In such cases, the action may be brought either in the name of the agent, or of the principal, and it is no answer, to say that the plaintiff is merely an agent. In *Sargent v. Morris* (3), BAYLEY, J., dwells much on that rule, as applied to that case. In this case the agent attempts to set up an interest in third persons against the claim and title of his principal, and an objection is taken, that the policy ought to have been made in the joint names of all the parties interested. That is not required by law. It was not so held in *Bell v. Ansley* (1). All that was determined there was, that where several insure a joint interest the names and interest of the parties must appear, for the reasons given in the judgment in that case which it is not necessary in this instance to dispute as this is the case of an individual insuring separately his particular interest.

In *Page v. Fry* (4), which is distinguished by LORD ELLENBOROUGH in *Bell v. Ansley* (1), from that case, and much more nearly resembles this, the court determined that the parties insuring had a sufficient interest in the entirety—the object of the Marine Insurance Act, 1745, being merely to prevent gaming policies—to entitle them to insure notwithstanding other persons had also an interest, and such an interest as would support the averment that they were interested in the whole. It was said that the assured were not bound by the terms of the averment to show anything more, than that they had an interest, and that, if they showed an interest to the extent of one-hundredth part of the cargo, it would be sufficient. So in *Hiscox v. Barrett* (5), cited by LORD ELLENBOROUGH in *Bell v. Ansley* (1), it was ruled that the party with whom the contract was made was entitled to recover the whole sum subscribed although another person was jointly interested. Those cases were all actions on policies against underwriters, and,

even if they were adverse in principle and not favourable, as they were, they would not be applicable to oppose a case of an action against the broker for money had and received wherein the plaintiff is clearly entitled to enforce the contract as between himself and the defendant. Whether he would be answerable over to the other parties interested in the ship raises a different question. In addition to the fact of the defendant's express disclaimer of knowledge in the transaction, of any other person, if the ship had arrived safely the plaintiff would have had no right to call on the other part-owners, who had not given authority to insure, to contribute any proportion of the premiums due to the underwriters. Nor could they bring any action against the brokers, because there was no privity between them, and the right to bring such an action did not follow the interest in the ship.

Jervis and Tindal, in support of the rule, contended that the plaintiff had misconceived his action. One of partners could not alone, and in his own name only, recover on a policy of insurance made on joint property: per LORD ELLENBOROUGH in *Bell v. Ansley* (1). They also used, as strongly in point against this action, the doctrine found in ABBOTT ON SHIPPING (4th Edn.), part I, ch. 3, pp. 102, 103, where, after stating that the several part-owners of a ship make in law but one owner, and in case of injury done to their ship by the wrong or neglect of a stranger they ought to join in one action, and, if they do not join, the non-joinder must be pleaded in abatement, it is added :

"In the case, however, of an action for the freight of goods conveyed in a general ship, all the part-owners ought to join; or if they do not, the defendant may avail himself of the objection, by evidence at the trial, and without plea in abatement; according to the general rule of law, and the distinction between contracts and wrongs; unless perhaps someone should have received his own share, or have released his claim to it. The necessity of all the part-owners joining as plaintiffs in the suit in this case, is founded upon the consideration, that all of them are partners with respect to the concerns of the ship."

The author refers to *Ex parte Christie* (6) before the Lord Chancellor in bankruptcy, where his Lordship refused to allow the owners of a ship to set off their respective demands (arising out of separate and distinct concerns) on the master, who had become bankrupt, against the claims of his assignees for their shares of the general debt.

In the present case, the captain ordered the insurance to be effected and the plaintiff was part-owner and ship's husband, and so prima facie, the insurance was effected on the whole ship on the part of all the owners, who were represented by the plaintiff. He could not, therefore, recover without naming all the persons actually interested, because interest is always a question of fact to be tried in such cases, and it becomes necessary to put the names of the parties interested on the record. Here all the owners had an interest in a general insurance by the ship's husband, and might have recovered from the underwriters in equity, if not at law. This verdict would not be a bar to another action against the defendants, if brought in the names of all the owners having an interest, and, therefore, though this was not in fact an action directly on the policy, it was subject to all the rules which affected such actions, and in substance was founded on the policy of insurance. *Page v. Fry* (4) did not apply to the present case, as the question raised there was not whether all parties interested ought to join in the actions on the policy, but whether the interest of the assured was such an insurable interest as to make the policy not a wager policy. In *Dixon v. Hamond* (2), the interest in the insurance was in the bankrupt surviving partner of the firm for whom the insurance had been effected, and the defendant, who claimed the interest as mortgagee of the ship, could have had none because he was clearly only the agent of the partners in effecting the insurance. On the subject of the contents of the postscript to the defendant's letter of May 1, there was nothing in the tenour of that which must necessarily operate conclusively against the defendants as an

estoppel. Anything written by them in ignorance of their legal liabilities could not conclude [estop] them in this action. The letter was an answer to the letter in which the plaintiff declared himself not to be solely interested in the insurance and said that it was effected on the part of other persons and it proved that an avowment of interest solely in the plaintiff in an action on the policy would not have been true. Notwithstanding that letter, therefore, in order to maintain this action, which was an equitable action, and should be grounded on equitable principles, the plaintiff ought to have sued as representing all the parties entitled, and, if any of them had objected and released the defendants, the court would have set the release aside on an indemnity being given.

SIR RICHARD RICHARDS, C.B.—We are of opinion that this verdict must be sustained. It is clear that Roberts, the plaintiff, through the medium of Evans, contracted with the defendants, and that they knew that Evans acted for Roberts and Roberts was the only party contracting with them. It appears from the letter of the defendants dated May 1 that they knew (how they knew it does not appear) that Roberts, by the letter containing the order of the captain, authorised them to insure the ship for himself only, and they disclaim all agency for any other person. They, following his directions, insured the ship as his agent, and they received the money from the underwriters as his agent. It is true that the plaintiff writes a letter wherein he says that he ordered the insurance on the share of other persons, the Welsh owners, but that was clearly the first intimation the defendants had that there were any other persons connected with Roberts in the adventure, and that he was not owner of the whole. That they themselves expressly state in the postscript to their letter in answer to that of the plaintiff. They would, undoubtedly, as they state, have been entitled to recover the premiums from Roberts and from him only, and that would be sufficient to give him a right to recover on his own sole account in this action against them, on the ground of mutuality of liability.

It was urged that all the owners might still bring an action against the defendants notwithstanding this verdict. I think they cannot, for there is no privity between other persons and these defendants. There is nothing out of which the other owners could make a case against them, whatever they might do against Roberts. It now appears, indeed, that the plaintiff considered the defendants agents of others as well as himself; but that was not known to the defendants at the time when they effected the insurance and they have since in fact disclaimed such agency in terms. The plaintiff alone employed the defendants, and they, as his agents, having since received the money from the underwriters, must be held to have received it for his use, and are, therefore, liable to him for the amount. The action is, I think, in the proper form, and there is no ground for setting aside the verdict.

GRAHAM, B.—I had certainly some doubts in this case, but they are now entirely removed, and the opinion to which I most inclined during the argument, I now find confirmed by my LORD CHIEF BARON. *Dixon v. Hamond* (2) has had great weight with me, and I cannot distinguish the cases, regarding this, as I do, as a mere question between principal and agent. I was, certainly, very much staggered by the letter of the plaintiff wherein he states the interest of other persons, but I think that difficulty is removed by the answer of the defendants who disclaim in the postscript of that letter, any agency for, and all knowledge of, any other person in the transaction, than the plaintiff. Considering this, therefore, as a case of principal and agent purely, without reference to anything else, I think the defendants ought not, under the circumstances, to be allowed to turn the plaintiff round on the objections which have been raised to defeat this action.

WOOD, B.—I am entirely of the same opinion. This is, in my view of the case, a very important question, and, if we were obliged to decide it against the plaintiff, we should place very great difficulty in the way of those who have similar claims

against brokers for money received by them in that character under such circumstances as constitute the demand on which this action is founded. I fear that we should in all, or in most of such cases, find that the title of the assured would be disputed in the action by setting up a right of claim in others. In this case it appears clearly, that the plaintiff was the only principal in this transaction with respect to the defendants, the brokers, and that they considered themselves the agents of the plaintiff only. That appears from the postscript to the defendants' letter, wherein they expressly state themselves to be the agents of the plaintiff. Acting under that acknowledged agency, they receive the money from the underwriters by the order of the plaintiff requiring them to settle with the underwriters on his behalf, and, consequently, they receive it for his use. By way of defence to this action for money had and received, and it is the only defence they make, they dispute the plaintiff's title. I am of opinion that they have failed in setting up that defence. By acting under his orders upon the terms of their contract with him, the defendants have made that contract absolute in law, and they were bound to perform it. The relationship of principal and agent was established between them, the rights and duties of those characters attached on the plaintiff and the defendants, and they have become reciprocally subject to mutual advantages and liabilities.

As to the form of the action, I am of opinion that the count for money had and received may be supported under the circumstances in evidence in this case. If the declaration, instead of being in the common form for money had and received, had been special, setting forth the nature of the demand, it would have been good, and it would have been no answer to it to plead the matters now set up by way of defence—that other persons were entitled to a proportion of the sum claimed as part-owners of the ship. Whether the other part-owners may have any action against the plaintiff, or what would be the result of proceedings in equity to establish a title in other persons, is another matter, and quite foreign to the question now brought under the consideration of the court. I am clearly of opinion, that there is no ground for disturbing this verdict.

GARROW, B.—I am also of the same opinion. The short and true question is whether this action can be sustained. It is neither more nor less than an action brought by a principal against his agent to obtain the fruits of the agency. I am of opinion that in a case of this sort it would be most improper to nonsuit the plaintiff, and, if we were obliged to do so, the consequences would be mischievous and dangerous to an incalculable extent. In all insurance cases where policy brokers had settled a loss with the underwriters the brokers would be obliged to find out every, the most remote, representative of parties claiming to be interested before they could be secure in paying over the money, to the infinite delay and expense of the parties entitled to receive the money. It might also often be used as a pretence for keeping them out of their just demands, and of punishing them with costs, if they should venture to enforce them. I have no difficulty in declaring my opinion to be, that the verdict is right, and ought to stand.

Rule discharged.

WILKINSON v. ADAM AND OTHERS

[HOUSE OF LORDS (Lord Eldon, L.C.), June 11, 1823]

[Reported 12 Price, 470; 147 E.R. 780]

Will—Children—Illegitimate child—Inclusion—Gift to “the children which I may have by A.”—Right of testator’s existing illegitimate children by A. to take.

A testator, being married and never having had any legitimate children, but having three illegitimate children by Ann, made a will during the lifetime of his wife which was re-published by him after her death. By this will he devised certain lands (subject to a prior interest) “to the children which I may have by the aforesaid Ann and living at my decease or born within six months after.” Other lands he devised (subject to a prior interest) to the use of “the child or children which I may have by the said Ann as above mentioned. His mansion-house he devised to his wife for life, and then to Ann for life or until marriage, and he directed that on the decease or marriage of Ann the same “shall vest in my said child or children born to me by her as aforesaid.” In default of such children, the testator’s nephew was entitled to such lands under the will.

Held: the three illegitimate children were entitled to all the testator’s lands under the devise in the will.

Notes. Distinguished: *Bagley v. Mollard* (1830), 1 Russ. & M. 581. Considered: *Re Overhill’s Trusts* (1853), 22 L.J.Ch. 485; *Barnett v. Tugwell* (1862), 31 Beav. 232. Applied: *Clifton v. Goodbun* (1868), L.R. 6 Eq. 278; *Re Wells’ Estate* (1868), L.R. 6 Eq. 599. Considered: *Dorin v. Dorin* (1973), L.R. 17 Eq. 463; *Occleston v. Fullalove* (1874), 9 Ch. App. 147. Applied: *Laker v. Horder* (1876), 1 Ch.D. 644. Considered: *Re Makein, Makein v. Makein*, [1955] 1 All E.R. 57. Referred to: *Osmond v. Tindall* (1825), 5 Ves. 534, n.; *Gill v. Shelley* (1831), 2 Russ. & M. 336; *Dover v. Alexander* (1843), 2 Hare, 275; *Warner v. Warner* (1850), 20 L.J.Ch. 273; *Howarth v. Mills* (1866), L.R. 2 Eq. 389; *Hill v. Crook* (1873), L.R. 6 H.L. 265; *Levy v. Solomon* (1877), 37 L.T. 263; *Re Haseldine, Grange v. Sturdy* (1886), 31 Ch.D. 511; *Re Hall, Branstow v. Weightman* (1887), 35 Ch.D. 551; *Re Jodrell, Jodrell v. Seale* (1890), 59 L.J.Ch. 538; *Re Deakin, Starkey v. Eyres*, [1894] 3 Ch. 565; *Re Pearce, Alliance Assurance Co. v. Francis* (1913), 83 L.J.Ch. 266.

As to gifts to illegitimate children, see 39 HALSBURY’S LAWS (3rd Edn.) 1056, 1057 and 1070-1075; and for cases see 44 DIGEST 807 et seq.

Cases referred to in argument:

Godfrey v. Davis (1801), 6 Ves. 43; 31 E.R. 929; 44 Digest 820, 6711.

Earle v. Wilson (1811), 17 Ves. 528; 34 E.R. 205; 44 Digest 225, 496.

R. v. Wyke (1746), Burr. S.C. 264; 28 Digest (Repl.) 483, 2.

Cartwright v. Vawdry (1800), 5 Ves. 530; 31 E.R. 719, L.C.; 44 Digest 807, 6604.

Swaine v. Kennerley (1813), 1 Ves. & B. 469; 35 E.R. 182, L.C.; 44 Digest 807, 6605.

Kenebel v. Crafton (1802), 2 East, 530.

Doe d. James v. Hallett (1813), 1 M. & S. 124; 105 E.R. 47; 44 Digest 839, 6934.

Blodwell v. Edwards (1596), Cro. Eliz. 509; Moore, K.B. 480; 78 E.R. 758; sub nom. *Bladwell v. Edwards*, Noy, 35; 3 Digest (Repl.) 430, 253.

Coryton v. Helyar (1745), 2 Cox, Eq. Cas. 340; 30 E.R. 156; Digest Supp.

Metham v. Duke of Devonshire (1718), 1 P. Wms. 529; 24 E.R. 502, L.C.; 44 Digest 224, 482.

Appeal by Thomas Jones, the nephew of John Wilkinson, from a decision of the High Court of Chancery, dated April 13, 1813, that under the will of the testator, John Wilkinson, the respondents Mary Ann Wilkinson, Jonina Wilkinson and John Wilkinson, were the illegitimate children of the testator by Ann Lewis, were entitled to his real estate under devise for “the children which I may have by the

said Ann Lewis;" the appellant was, under the will, entitled to the real estate in default of such children.

The testator, by his will, dated Nov. 29, 1806, after devising to his wife, Mary Wilkinson, since deceased, for life, his mansion-house at Castlehead, and declaring that such devise, together with an annuity of £500 given thereby to her charged on his real estates and ironworks thereafter devised, and also bequeathing to her the use of his chattels at his mansion-house at Castlehead, made the following bequest:

"And from and after the decease of my said wife, I give and devise unto Ann Lewis [the respondent Ann Wilkinson], who now lives with me, during the term of her natural life, provided she so long continues single and unmarried, but not otherwise, all that my mansion at Castlehead, with the appurtenances: And I give and devise to the said Ann Lewis (subject to the proviso aforesaid) the use of all my household goods, plate, furniture, and other chattels, of what kind soever, being at my mansion-house at Castlehead aforesaid, for her life; which devises are for the separate and peculiar use, benefit, and enjoyment of the said Ann Lewis, during the term, and on the proviso aforesaid; and are to be looked upon as entirely distinct from, and having no reference to the joint trust wherewith she is hereinafter intended to be invested by this my will."

After devising part of his real and his personal estate (except what he had before given to his wife and Ann Lewis for their respective lives) to Ann Lewis, James Adam, William Vaughan, Cornelius Reynolds, and Samuel Fereday, for thirty-one years, to commence from his decease, upon the several trusts mentioned in his will, the last of which was to purchase lands of inheritance to be limited for the term of thirty-one years to such and the same uses, and upon the same trusts, as the testator's estates of inheritance, thereby devised to them in trust were limited, the said testator expressed himself in the following words:

"And from and after the expiration of such term, to the children which I may have by the aforesaid Ann Lewis, and living at my decease, or born within six months after, and equally to be divided between such children and their heirs, share and share alike; and if but one such child, then to such only child, and his or her heirs for ever; and if no such child or children be living at my death, or born within six months after my decease as aforesaid, to my nephew, Thomas Jones [meaning the appellant], and his heirs for ever: and if the said Thomas Jones shall, at the time of such purchase, be dead, in that case to such person heir of the said Thomas Jones, and to his, her, or their heirs for ever."

The will continued, so far as material:

"And after the expiration of the said term of thirty-one years, I give and devise all other my estates, lands, tenements, and hereditaments whatsoever, which I may be possessed or entitled unto, in the several counties of Stafford, Denbigh, Flint, Surrey, Middlesex, Lancaster, Westmoreland, or elsewhere, to the use and behoof of the child or children which I may have by the said Ann Lewis, as above mentioned, to be divided equally between them, share and share alike, and his, her, or their heirs for ever: And in default of such child or children born to me as aforesaid, then to the use and behoof of my said nephew Thomas Jones, and his heirs for ever, provided he or they do take the name of Wilkinson: And in case I leave any child or children by the said Ann Lewis, then I give and bequeath to my said trustees, for each and every such child per year, during the continuance of the said term of thirty-one years, such a sum of money as they, or the major part of them, in their discretion, shall think adequate and sufficient for the support, maintenance, education, and bringing up of such child or children which I may have by the said Ann Lewis as aforesaid, during so long of the said term as he, she, or they may happen to live, but not to exceed the sum of £200 in each year for each and every such child or children: And it is my will, and I do hereby expressly limit,

give, and appoint the said sum of £200 per year to the said Ann Lewis, for her own peculiar and separate use, for her care, management, and guardianship of the said children, during such time as she continues such guardianship: and I charge my estates with the payment thereof accordingly. . . . And it is my will, and I do hereby direct, that immediately after the expiration of the said term of thirty-one years, all my real and personal estate, not hereinbefore by this my will otherwise disposed of, shall be vested in the child or children which I may have by the said Ann Lewis as above mentioned, except such part thereof as is before devised to the said Ann Lewis for her own use, during her natural life, and continuing single and unmarried, and his, her, or their heirs for ever, share and share alike: And in default of such child or children born to me as aforesaid, then the same to vest in the said Thomas Jones, his heirs, executors, administrators, and assigns, to his and their own use, upon the condition aforesaid: And it is my will, and I do hereby further direct, that immediately on the decease or marriage of the said Ann Lewis which shall first happen), the mansion-house at Castlehead, and also the household furniture so devised to her as aforesaid, shall vest in my said child or children born to me by her as aforesaid, equally between them: and in default of such issue, then to the said Thomas Jones, his heirs, executors, administrators, and assigns, upon the condition aforesaid."

The testator nominated and appointed Ann Lewis executrix, and his trustees James Adam, William Vaughan, Cornelius Reynolds, and Samuel Fereday, executors of his will, and directed his executors to pay to the several and respective persons named in the schedule to his will annexed, the several and respective legacies set opposite to their respective names, out of his personal estate. After such direction the testator concluded his will in the following words:

"Lastly, it is my earnest wish and desire, that the observations and directions which I shall leave (in a written book), for the better improvement of my estates, and carrying on the different works, as well as other matters, be followed and attended to as much as if they were inserted in this my will."

In December, 1806, the testator's wife Mary Wilkinson died, without having ever had any children. After her death, and on or about Mar. 26, 1807, the testator re-published his will; and on Jan. 5, 1808, he again re-published it; and such re-publications both took place in the presence of three witnesses, who duly subscribed their names thereto. By a codicil which the testator added to his will at the time of the last-mentioned re-publication, he directed that the term of trust mentioned in his will should be for twenty-one years only from the time of his decease, instead of thirty-one years, as also mentioned in the will. The testator, while he was of sound mind, duly made and published another codicil dated June 6, 1808, to his will, which codicil was also executed and attested in the manner required by law in devises of real estates; and he by the codicil revoked the appointment of Cornelius Reynolds, and in his stead nominated and appointed William Smith, therein described, to be one of his trustees and executors. The testator at the same time duly re-published, by a writing signed by him, his last will and testament; and such last-mentioned re-publication was attested as required by law in cases of devises of real estates; and, in each instance when the testator re-published his will as aforesaid, the several paper writings, signed by him for the purpose, expressed that he re-published "the contents of this and the preceding eight or nine sheets, as and for his last will and testament."

The testator made divers entries, in his own handwriting, in a manuscript book which was found after his death, and which was entitled: "The book referred to in my will." The book contained, among other matter, eight entries, not attested so as to pass real estate, but which have been proved in the Prerogative

Court of Canterbury as testamentary. Such entries, as far as they are applicable to or bear upon this case, were as follows :

"Register of my children by Ann Lewis, which, for more certainty, is entered by John Wilkinson. Mary Ann, born July 27, 1802, about eleven o'clock. Jonina, born Aug. 6, 1805, about four o'clock. John, born Oct. 6, 1806, half past eight o'clock in the morning."

"Bradley, Mar. 26, 1807. Whereas in my last will and testament, republished this day, it is limited that the child or children which should be entitled to co-shares of my estate, real and personal, as is more fully explained there, should be born to me of the body of Ann Lewis, within six months of my decease, now I do hereby declare that such limitation as to time should not operate absolutely to the deprivation of any child or children which may be born of the body of the said Ann Lewis within the utmost bounds (after my decease) prescribed by law for gestation; and I, therefore, hereby authorise my said trustees to make such provision for such child or children, if any such there be, as they, or the major part of them, may think right, according to the circumstances of the case: and further, lest doubts should arise as to the expression 'children born to me by the said Ann Lewis,' I hereby declare that my meaning is to include a daughter of the said Ann Lewis, called Mary Ann, now about five years old; another daughter of the said Ann Lewis, called Jonina, now about two years old; and a son of the said Ann Lewis, called John, about six months old. And further, where in my will it is expressed that the said Ann Lewis should have for her own peculiar and proper use £200 during the time of her guardianship of my said child or children, my intention was and is, that such annuity should continue to her during her natural life, provided she remains so long unmarried, in the same manner as my bequest to her of my mansion-house and appurtenances at Castlehead, and on precisely the same condition: my idea being, at the time of making my will, that she should be considered the natural guardian of her children during life: this explanation is, therefore, given to prevent a different legal construction being put on that term or expression."

"Bradley, June 4, 1808. Memorandum.—Whereas in my last will and testament, duly published, mention is made of Ann Lewis as the guardian of my children by her the said Ann Lewis, which expression is only to be understood as a mark of my regard for her, and wish that such children should not be taken from her during their tender age for any purpose but that of education; nevertheless my intention and will is, that in all things of importance, and particularly in the education of such children described by the names of Mary Ann, Jonina, and John, or any other children which may be born of the body of the said Ann Lewis, as in my will particularly described, the direction and management should be in my said trustees, or the survivor of them, and of such new trustees as may be appointed pursuant to my said will, and may choose to act, anything in my said will to the contrary in anywise notwithstanding: And further, I hereby express my will and desire that my said children may assume and take the name of Wilkinson, in addition to their present name of Lewis, and that my trustees should take such steps for that purpose as may be requisite. (Signed) John Wilkinson."

On July 14, 1808, the testator died without having revoked his will and codicils, except as far as they revoked or altered the will or any other of the codicils, leaving the respondents Mary Ann Wilkinson, Jonina Wilkinson, and John Wilkinson, his children by the respondent Ann Lewis, all of whom subsequently took the surname of Wilkinson; Mary Ann Wilkinson and Eliza Wilkinson of Chester (the only children of his late brother William Wilkinson), his nieces, his co-heirs-at-law, and the appellant Thomas Jones, his nephew (who has since taken upon himself the further name of Wilkinson), him surviving. The respondents

James Adam, Ann Wilkinson (formerly Ann Lewis), William Vaughan, Samuel A Fereday, and William Smith, duly proved the will and codicils; and, as devisees in trust, entered into and continued in the possession and receipt of the rents and profits of the testator's real estates; and possessed themselves of his personal estates and effects, to an amount much more than sufficient to pay his debts, funeral expenses, and the legacies.

The appellant filed his bill in Michaelmas Term, 1810, against the respondents B James Adam, etc. (the testator's trustees and executors), Mary Ann Wilkinson, Jonina Wilkinson, and John Wilkinson (the testator's natural children by Ann Wilkinson), and against Mary Ann Wilkinson and Eliza Wilkinson, the said C testator's co-heirs-at-law, stating the will of the testator John Wilkinson, and the other matters aforesaid, and insisting that the respondents Mary Ann Wilkinson, Jonina Wilkinson, and John Wilkinson, were not the children of Ann D Lewis by the testator, but were the illegitimate children of Ann Lewis, and did not, therefore, answer the description in the will contained; and claiming accounts and other consequential relief.

The respondents (the trustees), by their answers (in substance) admitted all the facts as before stated; and further stated that the testator acknowledged the respondents Mary Ann Wilkiuson, Jonina Wilkinson, and John Wilkinson D to be his children, and frequently declared that he had provided for them by his will as such. The respondent Ann Wilkinson stated that she cohabited with the testator for many years previous to, and at the time of his death, and their E cohabitation was well known to the testator's wife while she lived, the testator being very desirous of having children of his own to whom he might leave his property, and not expecting any from his wife; that during such cohabitation the testator had three children by her (Ann Wilkinson), now living, namely, the F respondents, Mary Ann Wilkinson, born July 27, 1802, at the testator's dwelling-house at Bradley; Jonina Wilkinson, born on Aug. 6, 1803, at the testator's same G dwelling-house; and John Wilkinson, born Oct. 8, 1806, at the same house. The respondent Ann Wilkinson, formerly Ann Lewis, by her answer admitted that she never was married to the testator; that he always acknowledged the respondents F Mary Ann Wilkinson, Jonina Wilkinson, and John Wilkinson, as his children by her, and usually called them by his surname, by which they went; and they were looked upon by all persons acquainted with them as the testator's children by her: that they were brought to and placed at his table, and were always maintained and educated at his expense, as being his children. She then submitted that the three children (all of whom were born before the date of the H will) had, when the testator's will and codicils were made, acquired names of reputation, and also the reputation of being the children of the testator by her; that having acquired such names and reputation, and being also sufficiently I designated in his will and codicils, they fell within the description therein, or were to be considered as the persons thereby intended, and that they were entitled to all his real and personal estates, except what he specifically disposed of. The respondents, the three children of Ann Lewis, put in their answers to the same effect.

The cause came on to be heard before LORD ELDON, L.C., on Feb. 25, 1812, and several days afterwards, when his Lordship ordered the cause to stand over in order that it might come on to be argued before him in the presence of THOMPSON, LE J BLANC, and GIBBS, JJ., who were to assist him upon the occasion. The cause came on again to be argued in June, 1812, before his Lordship, assisted by the said three judges; and, on Mar. 1, 1813, the Lord Chancellor and the three judges severally delivered their opinions thereon, "that the said respondents, the three children of the said testator John Wilkinson, by Ann Lewis, who had acquired the reputation of being such children before the date of his will, were entitled to his real estates under the will alone." On April 13, 1813, his Lordship ordered that the bill should stand dismissed. From that order the appellant appealed.

Sir R. Gifford and D. F. Jones for the appellant.

Wetherell for the respondents, being about to address the House,

LORD REDESDALE suggested that it would be convenient, as the learned judges were in attendance, to ascertain if there was any difference of opinion among them on the question in this case, as, if there were none, the question might be at once put to them, and their further attendance might be dispensed with.

Upon that suggestion the following question was put:

“Whether, according to the true construction of the will of John Wilkinson, of Nov. 29, 1806, regard being had to the fact that the testator duly re-published his will after the death of his wife Mary Wilkinson, named in the will, children born of the body of Ann Lewis, named in the said will, and which children had, previously to the date thereof, acquired the character of reputed children of the testator by Ann Lewis, took an estate in the lands devised by the testator?”

To that question **ABBOTT, C.J.**, on the part of himself and the learned judges present, delivered their unanimous opinion, in the words of the question propounded to them, that such children did take an estate in the lands devised.

Whereupon the House of Lords affirmed the decree.

Appeal dismissed.

SULLIVAN v. OLDACRE (FALSELY CALLED SULLIVAN)

[COURT OF ARCHES (Sir John Nicholl), June 16, 1819]

[Reported 3 Phillim. 45; 161 E.R. 1253]

Marriage—Banns—Publication—Validity—Name of party—Addition of name to true baptismal name and surname—No intention to conceal true identity.

Marriage—Avoidance—Consent—Artifice or misrepresentation—Due publication of banns.

A ceremony of marriage took place between a man nearly 18 years old and a woman about three years older. In an action in which the man sought a decree of nullity, it was alleged that the woman's parents used artifice to induce the marriage, and concealed it from the man's parents. It was also claimed that the marriage was void for undue publication of the banns. The woman was described in the banns as Maria Holmes Oldacre. Maria was her name of baptism, and Oldacre was her surname of repute. The name “Holmes” was her mother's maiden name, and the reason for introducing it in the banns was because she was born before the marriage of her parents, and it was believed that the name of the mother was the only true name of an illegitimate child.

Held: (i) the interposition of the name Holmes was not introduced for the purpose of concealing the identity of the woman, nor could it have produced that effect, and, a satisfactory explanation being given for its introduction, namely, that it was to make sure of using the true name, there was no undue publication of the banns; and (ii) averments of artifice and misrepresentation were no ground of nullity if the banns were duly published; for there to be a fraudulent artifice which might make a marriage void, it must be such as to take away consent so that the party contracting did not understand the contract; and the marriage was, accordingly, valid.

Notes. As to void marriages, see now the Marriage Act, 1949, s. 25 (28 HALSBURY'S STATUTES (2nd Edn.) 673).

Referred to: *Moss. v. Moss* (1897), 66 L.J.P. 154.

As to banns, see 13 HALSBURY'S LAWS (3rd Edn.) 359-364; as to requisites of a valid marriage, see 19 HALSBURY'S LAWS (3rd Edn.) 775; and for cases see 27 DIGEST (Repl.) 36-40; 48-52.

Case referred to:

- (1) *Fellowes v. Stewart* (1815), 2 Phillim. 257; 161 E.R. 1136; 27 Digest (Repl.) 51, 292.

Appeal by John Augustus Sullivan (a minor suing by his father, the Rt. Hon. John Sullivan) from a decision of SIR JOHN NICHOLL at the Consistory Court of London dismissing the appellant's claim for a decree of nullity, and pronouncing the appellant's marriage to the respondent Maria Oldacre (otherwise Sullivan) valid.

John Augustus Sullivan had been left by his father at his seat called Riching's Lodge, in Buckinghamshire, to pass the period which was to elapse between his quitting Eton College and his admission to the University of Oxford, under the care and superintendence of a private tutor. During this interval, he, without the knowledge of his parents, but with the privity to a certain extent at least of his private tutor, cultivated an acquaintance which had commenced in the preceding hunting season with Maria Oldacre, who resided with her father at Gerrard's Cross, which in the course of a few months led to the marriage in question. The marriage took place in St. Olave's Church in the borough of Southwark on July 15, 1816, the husband being then rather more than three months under the age of eighteen, the wife being within three months of twenty-one years of age. None of the relations or friends of the husband were present at, or apprised of the marriage. At the time of the solemnisation the officiating minister questioned the parties as to the correctness of the proceeding; and in the course of the ceremony he stopped to interrogate them whether they were both of age, and resident within St. Olave's parish, on which a reply was instantly given by the mother of Maria Oldacre, who said: "Everything is right; she is my daughter, and we live in the parish in Tooley Street." It appeared also in evidence that an attempt had been made to get the banns published in St. Andrew's, Holborn, which did not succeed.

The grounds on which the validity of the marriage was impeached were set forth in the following manner in the eighth article of the libel: "That Thomas Oldacre, and Amelia his wife, used various means to effect a marriage, without the knowledge of the party proponent, between John Augustus Sullivan, and their daughter. That John Augustus Sullivan being prevailed upon by the artifices and misrepresentations of Thomas Oldacre, otherwise Oldaker, and Amelia his wife, to consent to such marriage, banns of marriage were published in the parish church of Saint Olave, Southwark, in Surrey, for three Sundays, to wit, Sunday June 13, Sunday July 7, and Sunday July 14, 1816, between him, the said John Augustus Sullivan, and the aforesaid Maria Oldacre, otherwise Oldaker, describing them respectively, as John Augustus Sullivan, a bachelor, and Maria Holmes Oldaker, spinster, both of the parish of Saint Olave, Southwark. And the party proponent doth allege and propound that Maria Oldacre, otherwise Oldaker, the party cited in this cause, was falsely described in the said banns of marriage by the name of Maria Holmes Oldacre aforesaid. That the name of Holmes was not her baptismal name, nor her name of repute, for that she was not baptised by such name of Holmes, nor was she at any time called or known by such name, nor did she ever use the name of Holmes in any way whatever: but, at all times prior to her pretended marriage with the said John Augustus Sullivan, was known and called by the names of Mary or Maria Oldacre, otherwise Oldaker only, and by no other name or names; and the name of Holmes was unduly used in the publication of the banns of marriage for the purpose of fraud, deception, and

concealment, and to prevent the real names and condition, and situation of the parties respectively, coming to the knowledge of those who heard the banns published, and of the said Right Honourable John Sullivan, and others interested therein, and likewise to conceal the same from the priest or minister by whom the marriage should be afterwards solemnised."

To this it was replied that the name of Holmes was not used for the purposes of fraud, but from caution, and the desire of having the banns correctly published; for that being born before the marriage of her parents (which she was proved to have been), and, consequently, illegitimate, she had taken the surname of her mother, as well as that of her father, to prevent the possibility of mistake as to her real name. The charges of artifice and misrepresentation were denied; and letters were produced from John Augustus Sullivan, written to his wife subsequent to the marriage, couched in the language of ardent affection and attachment.

Stoddart, Jenner and Dodson in support of the marriage.

Swabey and Phillimore for the appellants.

SIR JOHN NICHOLL.—This case comes in the form of an appeal from the Consistory Court of London, where it was a suit of nullity of marriage. Both parties are minors; the suit is brought by the father of the young man as his guardian. The woman at first appeared by her father acting as her guardian: but she has in the course of the proceedings become a major, and acts for herself. The usual proceedings were had in the court below. A libel was given in, and twenty witnesses were examined on it; this was answered by an allegation on which seven witnesses were examined. The judge pronounced that the father had failed in the proof of his libel, and dismissed the suit, thereby pronouncing the marriage valid. I am to decide the case on the same facts which were brought to the view of the court below.

The decision of every court of competent jurisdiction carries with it a presumption in its favour; and it is hardly necessary to add that the personal character of the judge who decided this, as far as it can weigh, gives peculiar weight to the decision. But it is the duty of every court to form its own judgment with as little prepossession as possible; if I see reason to differ, it is my duty to reverse the sentence: and, in that case, it would be necessary to enter fully into the circumstances of fact and law, in order that the reasons of the difference might be clearly understood. If, on the other hand, on mature and deliberate consideration of the arguments, I see no reason to differ; then it is not only unnecessary, but there are peculiar reasons of delicacy, why I should not enter into the less material circumstances, but should confine my observations to the real point.

On the facts of the case there is no conflicting evidence. The true question is whether the banns were unduly published: that is the only point of nullity arising out of the proofs. The citation is somewhat complex: it is to answer in a cause of nullity by reason of minority and undue publication of banns. In a marriage by banns, minority has nothing to do in the citation, as a primary and direct cause of nullity. It might properly enough have found its place in the libel, as a collateral circumstance: but undue publication of banns is the real essence of the suit. Again, it is pleaded that Oldacre and his wife used arts to induce the marriage: if this be true, it is no cause of nullity, though it may throw light on the publication of banns. Concealment of the marriage by the parents of one of the parties from the parents of the other is not fraud. The law lays no obligation on the party to discover it; it may be unseemly and dishonourable; it may give a character to the publication, if it be doubtful whether it be a due or undue publication: but it goes no further; averments of artifices and misrepresentations are no ground of nullity, if the banns are duly published. This court does not lay it down that, under no circumstances, there can be fraudulent artifice which may make a marriage void: but it must be such as to take away consent, so that the party contracting did not understand the contract. If he

did contract, and is capable of consent, as a minor of eighteen is, the marriage is valid, though there may be some contrivance as to the circumstances; consent is of the essence of marriage, "*consensus non concubitus facit matrimonium.*" In the libel it is stated that he was prevailed upon to consent; the evidence gives no countenance to the allegation of artifice being used against him. The courtship was carried on in the presence of his tutor: the young man was active himself in the transaction, and ardent in his addresses.

The real merits of the question lie then in what is stated in the latter part of this article of the libel. It is pleaded that the woman's name was Maria Oldacre, and that she is falsely described in the banns as Maria Holmes Oldacre, which was not her name by baptism, use, or otherwise; but was unduly used for the purpose of fraud and to conceal her real name from the persons who heard them, the father of the minor, and others. If such was the purpose and effect, the publication was undue, and the marriage is void: but if the name of Holmes was used not for the purpose nor with the effect stated, then the marriage is valid. I agree in the point of law laid down, that fraud must be in the use of the name: other circumstances may bear collaterally, but not directly, upon this. I take this to be the result of all the cases. Those cases were fully discussed in argument, and I shall not travel through them. I shall only advert to that of *Fellows v. Stewart* (1), which I perfectly remember was decided on the ground that the names were introduced for the purpose of deceiving the woman and her friends, and that it was calculated to effect that purpose. It is proper, therefore, to inquire whether the name was introduced here for that purpose, and whether it produced that effect; if fraudulent concealment was the purpose, the court would infer the effect. So if the mode of publication would produce concealment and disguise, a fraudulent purpose would necessarily be inferred. But if the introduction of the name of Holmes is easily accounted for on other grounds; if it is not calculated to effect that purpose; if all the ends of publication would be as well answered with that name as without it; if the use of it is fully explained, and it appears to have been used *ex abundanti cautela*, it is impossible in my judgment to decide that this is such an undue publication as to render the marriage invalid.

The presumption of law is in favour of marriage; a marriage *de facto* was formally solemnised in the face of the church, after publication of banns, and was followed by cohabitation. Before the Marriage Act [1753, 26 Geo. 2, c. 33: repealed by the Marriage Act, 1823] this was unquestionably a good marriage. Parties actually joined together are not lightly to be put asunder. The marriage may be of great disparity, and the connection to be lamented: yet, in natural justice, it is also to be remembered that if it were annulled, the young woman would suffer irreparable injury; hence the maxim that, *semper præsuntur pro matrimonio*, where marriage is solemnised with religious ceremony. The Marriage Act gives no direction as to the mode of publishing banns; it requires notice; but does not expressly say that the marriage shall be void if the wrong names are used. But courts of law have very properly held that the very nature of banns, and the object of publication, require the names to be used, which shall give effect to them. It is laid down, therefore, that banns must be so far in the true name as to designate the person who is about to be married. Sometimes there is a difficulty in determining what is the true name. The original names are sometimes dropped, and there may be doubts as to them: but that is not the present case.

Here the true names are used; it is not a case of the omission of the true name. Three names are used. Maria is the name of baptism, Oldacre is the name of repute; and there can be little doubt that it is the true name. The name of Holmes is interposed; this may be a fraudulent interposition, and so disguise the parties as to defeat the object of publication, as was the case in *Fellows v. Stewart* (1). It comes then to this, whether Holmes could have that effect. If Holmes was added to that of Oldacre, there might possibly have been some mistake as to the identity. But a third intermediate name is so frequently dormant, and

dropped, that even her former lover, if he had heard this publication, would have known it to have been intended for her. The object however was not to disguise it from her friends: but how any connection of Mr. Sullivan's could have been imposed upon by hearing these banns it is difficult to imagine, for his name was rightly published. If there had been an omission of his second name Augustus, and the banns had been published for John Sullivan, and not John Augustus Sullivan, it might have concealed his identity.

On these grounds I am of opinion that the interposition of the name of Holmes is not calculated to conceal the identity of the woman. I think it was not introduced for that purpose, and could not have produced that effect. Still the court might require the introduction of that name to be accounted for; explanation on this point is satisfactorily given. It appears that the woman was born before the marriage of her father and mother; that they married soon after her birth; that she was called by the father's name, and her illegitimacy was known but to few. It is not an uncommon, though it is an erroneous opinion, that the name of the mother is the only true name for an illegitimate child. The name of Holmes was used for caution—not to evade the law, but to make sure of using the true name. These facts satisfactorily explain the purpose for which the name was introduced.

On the whole view of the case I think the name used was not calculated to disguise the marriage, nor intended to conceal it, and that the banns were not unduly published. In this view of the case the other circumstances are not material. The court is expressly forbidden to inquire into the residence of the parties by [s. 10 of] the Act [now s. 24 of the Marriage Act, 1949]. I am not willing to enter into the consideration of other circumstances which cannot answer any good end; they may be properly left to the good sense of the parties. I shall best discharge my duty, after the full examination this case has met with here and elsewhere, by proceeding without further remarks to affirm the sentence of the court below.

Appeal dismissed.

STEAD v. LIDDARD

[COURT OF COMMON PLEAS (Dallas, C.J., Park and Burrough, JJ.), April 17, 1823]

[Reported 1 Bing. 196; 8 Moore, C.P. 2; 1 L.J.O.S.C.P. 52; 130 E.R. 79]

Guarantee—Form—Sufficiency—Endorsement on back of document—Reference to terms of agreement.

A guarantee in the form of an endorsement on the back of a letter containing the terms of an agreement and signed by the contracting parties which referred to the terms of agreement, **held**, to be a sufficient memorandum of the consideration for the guarantee for the purpose of the Statute of Frauds.

Notes. Referred to: *Mayfield v. Robinson* (1845), 9 Jur. 826; *Fishmongers' Co. v. Dimsdale* (1852), 22 L.J.C.P. 44.

As to the form required for a guarantee, see 18 HALSBURY'S LAWS (3rd Edn.) 433; and for cases see 26 DIGEST (Repl.) 44 et seq.

Cases referred to in argument:

- (1) *Wain v. Warlters* (1804), 5 East, 10; 1 Smith, K.B. 299; 102 E.R. 972; 26 Digest (Repl.) 49, 333.
- (2) *Saunders v. Wakefield* (1821). 4 B. & Ald. 595; 106 E.R. 1054; 26 Digest (Repl.) 18, 62.
- (3) *Jenkins v. Reynolds* (1821), 3 Brod. & Bing. 14; 6 Moore, C.P. 86.

Motion by the defendant for a rule nisi to set aside the verdict and for a new trial in an action on a guarantee.

At the trial before DALLAS, C.J., it appeared that the defendant's son, Lewis Agassiz Liddard, was residing at Drontheim, when the plaintiff arrived there with part of a cargo of stock fish, on board a vessel called the *Fancy*. The defendant's son purchased a quantity of stock fish and oil on account of the plaintiff which was paid for by the plaintiff in bills drawn by the plaintiff and accepted by the defendant's son. The defendant's son was engaged by plaintiff to dispose of the fish and oil, and for so doing, was to be interested in one-third as a compensation for his trouble. This agreement was completed by the plaintiff's writing to the defendant's son on Dec. 29, 1819, the following letter:

"Dear Sir,

"Having paid chief part, and come under acceptance for the remainder of the cost of the cargo of fish per *Fancy*, and 200 barrels of oil to Amsterdam and Altona, with the freight and premium insurance per *Fancy* also paid by me, I have drawn on you of this date

		£
At two months date for ...	...	1,600
— three months date for ...	...	1,000
		£2,600

which you will please accept, and which I pledge myself for; the same to be appropriated for the repayment to me of the above; and you, on the other hand, are to remit your father or me the proceeds of the above goods, and the balance due by Jenssen on the bills given him at Trondlijem, to meet the payment of your acceptances as above, to be put into the hands of my bankers. Sir P. Pole & Co., for the purposes mentioned. The profit or loss on the cargo of fish, per *Fancy*, and the 200 barrels being on account of yourself one-third, and me two-thirds. (Signed) D. Stead."

A copy of the above letter was made and kept by plaintiff at the foot of which defendant's son wrote:

"Above is copy of a letter handed to me this day by Mr. Stead, and agree

to its contents, errors excepted, having accepted the bills in question to be handed to Sir P. Pole & Co. (Signed) Lewis Agassiz Liddard, Dec. 29, 1819."

On the back of the copy of the above letter in possession of the plaintiff, was written the following guarantee of the defendant:

"February 26, 1820.

"Mr. D. Stead,

"Sir,

"I hereby agree to pay or to hand over to you or to Sir. P. Pole & Co. immediately on receipt thereof, all such sums of money and bills of exchange as may come to my hands from, or be remitted to me by my son Lewis Agassiz Liddard, agreeably to the foregoing copy of a letter, and agreement or undertaking; such bills or moneys to be appropriated to the payment of the acceptances mentioned in the said copy letter. And in consideration of your having paid for the whole cost of fish and oil as therein stated, and having given to said L. A. Liddard an interest in such shipment to the extent of one-third, I hereby engage to be responsible and accountable to you for the proceeds that may be procured by him for the same, and for the due application and remittance by said L. A. Liddard, in conformity with said copy letter, of all moneys and bills which he may receive, or that may be paid to his order on account of the said fish and oil, and the balance of bills given to Jenssen. (Signed) William Liddard."

Upon this paper, when it was produced, there was one agreement stamp.

Serjeant Lens now applied for a rule nisi that this verdict might be set aside and a nonsuit entered; and submitted, (i) that the action could not be maintained as the guarantee of the defendant on which it was founded was inadmissible in evidence for want of a proper stamp; and, (ii) that even if it were, there was no sufficient consideration on the face of it, to entitle the plaintiff to recover. First, the defendant was no party to the agreement between the plaintiff and his son as to what manner the proceeds of the cargo should be debited and appropriated, and although it may be said that the guarantee refers in terms to the plaintiff's original letter, yet, they must be considered as two distinct and separate agreements; for, although they were written on the same sheet of paper, they were between different parties, and consequently required separate stamps. Although by the Stamp Act, 1815, Sched. Part 1, tit. Agreement, it was provided that the stamping of one of several letters should be sufficient; yet here, the letter from the plaintiff to the defendant's son could not affect the defendant as the statute applies only to letters or agreements between the same parties. The two transactions, therefore, were perfectly distinct; and as the original letter only was stamped, the guarantee cannot be rendered available as against the defendant, unless it had a stamp of a similar description. Secondly, there is no sufficient consideration to support the defendant's undertaking as the guarantee, not only refers to a consideration as between the plaintiff and his son, but to a past or executed consideration affecting the two former alone, viz., in consideration of the plaintiff's having paid the whole cost of the fish and oil; and which, without the addition or proof of a previous request, amounted to no consideration whatever. *Wain v. Warlters* (1), *Saunders v. Wakefield* (2), and *Jenkins v. Reynolds* (3), are decisive to show that, in order to render a defendant liable on a guarantee, within the Statute of Frauds, the consideration or promise for the undertaking must appear on the face of the instrument.

DALLAS, C.J.—I am of opinion that there is no ground whatever for either of these objections, and more particularly so as to the first. The guarantee given by the defendant referred to the original letter written by the plaintiff to his son, and recognised and adopted the terms as therein stated, and it must be considered as having such retrospective operation, as the defendant thereby engaged to pay or hand over to the plaintiff or his bankers, all such money as might come to his

hands, or be remitted to him by his son, agreeably to the plaintiff's former letter. The whole, therefore, forms but one transaction, and more particularly so, as it was written on one and the same sheet of paper. I also think, that there is a sufficient memorandum of the consideration to bring this case within the Statute of Frauds, as, taking all the transaction together, it furnishes evidence of a request which, by the terms of the commencement of the guarantee, cannot be said to apply to a past or executed consideration, as the defendant undertook to pay the plaintiff all sums which might come to him from his son on account of the cargo in question.

PARK, J.—On looking at the whole of the transaction, I am of opinion that there is a sufficient consideration expressed on the face of the guarantee to entitle the plaintiff to recover, and we are not bound to confine ourselves to one letter alone. It, therefore, appears to me that this verdict ought not to be disturbed.

BURROUGH, J.—This must be considered as one agreement, and tending to bind the defendant, and more particularly so, as he referred to the terms of the plaintiff's original communication to his son; and it must be taken that he entered into the guarantee at the request of the latter. At all events, it furnishes evidence of such a request. I, therefore, concur with the court in thinking that there is no ground for this application.

Rule refused.

HALEY AND OTHERS *v.* BANNISTER AND OTHERS

[VICE-CHANCELLOR'S COURT (Sir John Leach, V.-C.), July 23, 26, February 10, 1820]

[Reported 4 Madd. 275; 56 E.R. 707]

Accumulation—Direction in will to accumulate—During minority of person unborn at death of testator—Surplus accumulations falling into residue.

The Accumulations Act, 1800, **held**, to prevent an accumulation directed by will of interest during the minority of an unborn child. The excess formed part of the residue.

Trust—Infant—Maintenance—Common interest in fund—Inability of father to maintain—Recourse to mother's separate estate.

Wherever children born and to be born have a common interest in a fund, the fund, if necessary, may be applied for the maintenance of the children. If the father is not of ability, the court will allow maintenance for the children, although the mother has a competent separate estate.

Notes. The Accumulations Act, 1800 (commonly called the Thellusson Act) has been repealed by s. 206, Sched. 7 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 844, 896), and its effect re-enacted by s. 164 of that Act (*ibid.* 771), so that now accumulation of income is restricted to one of four statutory periods; and as amended by s. 13 of the Perpetuities and Accumulations Act, 1964 (44 HALSBURY'S STATUTES (2nd Edn.) 684) an additional two periods. Under s. 31 of the Trustee Act, 1925 (26 HALSBURY'S STATUTES (2nd Edn.) 94) trustees have a discretion to apply income for maintenance and to accumulate surplus income during a minority.

This case which is reported as still being useful, must be read with the reservation that, that part of the headnote supported by the dictum (at commencement of judgment) "The statute prevents an accumulation of interest during the minority of an unborn child" although accepted as accurate by LORD LANGDALE, M.R.,

in *Ellis v. Maxwell* (3 Beav. at p. 597) and by SIR JOHN ROMILLY, M.R., in *Bryan v. Collins* (16 Beav. at p. 17) and see the dictum of KAY, J., in *Jagger v. Jagger* (25 Ch.D. at p. 733), it was not followed by NEVILLE, J., in *Re Cattell, Cattell v. Cattell* ([1907] 1 Ch. at p. 573, Ch.D.) and it is now accepted that as regards the fourth statutory period the accumulation need not commence from the death of the testator and is not confined to persons born in the lifetime of the testator and extends to the minorities of persons born after the testator's death and also to successive minorities. The accumulation beginning at the birth of such a person, unborn at the death of the testator, can continue till he is twenty-one; if a provision for such an accumulation were bad then the fourth period would add nothing to the third period and its insertion in the Act would have been for no purpose.

Applied: *Ellis v. Maxwell* (1841), 3 Beav. 587. Doubted: *Re Cattell, Cattell v. Cattell*, [1914] 1 Ch. 177. Referred to: *Bryan v. Collins* (1852), 16 Beav. 14; *Tench v. Cheese* (1854), 19 Beav. 3; *Chapman v. Chapman*, [1954] 1 All E.R. 798.

As to calculation of the statutory periods of accumulation directed by a will; and as to application of surplus accumulation in the case of an invalid direction to accumulation contained in a will. see 29 HALSBURY'S LAWS (3rd Edn.) 342 and 350, respectively; and for cases see 37 DIGEST (Repl.) 145 et seq., and 159 et seq., respectively. As to maintenance of infants—former practice of court, see 21 HALSBURY'S LAWS (3rd Edn.) 175; and for cases see 28 DIGEST (Repl.) 574.

Cases referred to:

- (1) *Errat v. Barlow* (1807), 14 Ves. 202; 33 E.R. 498; 23 Digest (Repl.) 460, 5318.
- (2) *Cavendish v. Mercer* (1776), 5 Ves. 195, n.; 31 E.R. 543, L.C.; 23 Digest (Repl.) 467, 5396.

Further Directions on the Master's report.

By an order of July 4, 1818, it was referred to the Master to inquire and state whether the defendant, Aylmer Haley, was of ability to maintain and educate the plaintiffs, his infant children; and in case he was not, to state what would be proper to be allowed for that purpose, and for what time, and out of what fund. By his report, dated May 30, 1819, the Master found, that all the property of Aylmer Haley consisted only of an annuity of £180 during his life, of which he was not then in the receipt; but that his wife, Amelia Haley, was in possession of a separate estate to the amount of £1,300 a year, subject to the annuity of £180; and that he was of opinion that Aylmer Haley, personally and independently of Amelia his wife, was not in circumstances and of ability to maintain the plaintiffs, his infant children; and, therefore, that he had proceeded to consider the other parts of the reference, and found that the testator, R. Bannister, by his will, dated July 11, 1812, devised certain estates, after the decease of Aylmer Haley and his wife, to the use of all the children of his daughter Amelia Haley, then born or thereafter to be born, as tenants in common, and to their respective heirs for ever; and that the testator, by the first codicil to his will, directed that £6,000 3 per cent. consols, and £6,000 3 per cent. reduced annuities, should be purchased in the names of his executors, and that they should receive and invest the dividends so as to accumulate until one of the children should attain the age of twenty-one, and upon his or her attaining that age (if there should be only one child who should attain that age) transfer the whole of the two several sums to such only child; and if more than one such child then living, to transfer to such children one equal part of the annuity and accumulations, in proportion to the number of such children then living: and he found, that in pursuance of an order, the two sums of £6,000 and £6,000 had been carried over to the infants' separate account, and that there was standing on their separate account £6,810 11s. 4d. 3 per cent. consols, and £6,688 19s. 11d. 3 per cent. reduced annuities, and in cash £100 6s. 8d. which had arisen from the annuities; and that the

plaintiffs, the children (five in number), were all infants, the eldest being only ten years old, and that the present expense of educating and maintaining them would amount to £230 a year; but that to enable the father to live in a style suitable to the expectations of his children, he was of opinion it would be proper to allow £300 a year for their maintenance and education, from the testator's death, on Dec. 28, 1815, to April 5, 1819, and from that time an allowance of £50 a year for each of the five children; and that, as it did not appear to him that the infants were entitled to any fortune in possession, except the annuities placed to their separate account as aforesaid, he conceived it would be proper that the sum of £100 6s. 8d. in cash, and by the sale of so much of the annuities standing to their separate account as should be necessary for that purpose; and that the several allowances of £50 for the maintenance of each of the infant children, from April 5, 1819, and for the time to come, should be paid out of the dividends of the £6,810 11s. 4d. 3 per cent. consols, and £6,688 19s. 11d. 3 per cent. reduced annuities, placed to their separate account, or so much thereof as should remain after the sale thereof before mentioned.

The residuary clause in the second codicil to the testator's will was as follows:

"And instead of my daughter Amelia Haley being my residuary legatee, I make my executors residuary legatees, in trust for the benefit of my daughter Amelia Haley's children, whatever the residue may be; my executors will add to it the other consolidated and reduced bank annuities which I have left to my daughter Amelia Haley's children."

The cause now came on for further directions upon the Master's Report.

Wetherell and Lovat for the plaintiffs.

Hart, Simpkinson and Perkins for the defendants.

July 23. **SIR JOHN LEACH, V.-C.**—The statute [Accumulations Act, 1800] prevents an accumulation of interest during the minority of an unborn child; but as to the principal, the law remains as before the statute. The excess of accumulation, prohibited by the statute, would form part of the residue.

[It was then argued that there was no fund out of which maintenance for the children could be directed.]

SIR JOHN LEACH, V.-C.—*Errat v. Barlow* (1) comes very near this case; but as it appears by the report that the case stood over, that LORD ELDON, L.C., might look into the will, I wish that the Registrar's Book should be searched, to see what was finally ordered in that case. May it not be a question, whether the court will give maintenance to the father where the mother has a competent separate estate?

Hart, Simpkinson, and Perkins, for the defendants: In *Errat v. Barlow* (1) no order appeared by the Registrar's Book to have been made by LORD ELDON, L.C.; but it appeared that, on an application afterwards to SIR WILLIAM GRANT, M.R., in the same case, it was

"Ordered, that the Master's report should be confirmed; and that the sum of £50 per annum, certified by the report as proper to be allowed for the maintenance and education of each of the infants, during their respective minorities, from April 28, 1807, be allowed accordingly, with a direction for payment to the father."

On the question whether the mother of the children, having a separate estate, would be liable to maintain her children, where her husband is not of ability there is no authority.

July 26, 1819. **SIR JOHN LEACH, V.-C.** I believe the point is new. In *Cavendish v. Mercer* (2) it was not discussed, and if it had been, the wife's separate

estate of £400 a year was so small a sum, that it could hardly, under the circumstances of that family, have been an object worth considering. The order made by SIR WILLIAM GRANT, M.R., in *Errat v. Barlow* (1) appears to have been an *ex parte* order.

Feb. 21, 1820. **SIR JOHN LEACH, V.-C.**—The wife, during the life of the husband, not being under a legal obligation to maintain the children, I think this court cannot take into consideration her separate estate.

The next question is whether, attending to the terms of this will, I can order maintenance to be paid to the father out of the property bequeathed to the children? I am of opinion I can; for I take the principle to be, that wherever the children have a common interest on a fund, the income of the fund, if necessary, may be applied to their maintenance. In this case, children born or to be born have a common interest, and, therefore, the income of the fund is in this case applicable to maintenance.

Order accordingly.

CRUTCHLEY AND OTHERS v. JERNINGHAM

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), June 25, August 1, 1817]

[Reported 2 Mer. 502; 35 E.R. 1032]

Specific Performance—Sale of land—Payment into court of purchase-price—Entry into possession by purchaser—Admission of good title.

In an action for specific performance an order may be made for payment into court by the purchaser of the purchase-price where the purchaser is in possession and has admitted a good title from the vendor.

Notes. Referred to: *Greenwood v. Turner* (1891), 39 W.R. 315; *Pearlberg v. May*, [1950] 2 All E.R. 1022.

As to payment into court in actions for specific performance, see 36 HALSBURY'S LAWS (3rd Edn.) 343, 344; and for cases see 44 DIGEST (Repl.) 145 et seq.

Cases referred to in argument:

- (1) *Burroughs v. Oakley* (1815), 1 Mer. 52, 376; 35 E.R. 596, L.C.; 44 Digest (Repl.) 146, 1272.
- (2) *Morgan v. Shaw* (1817), 2 Mer. 138; 35 E.R. 892, L.C.; 44 Digest (Repl.) 139, 1162.

Motion in an action for specific performance.

By articles of agreement dated Mar. 19, 1814, the plaintiffs agreed to sell, and the defendant to purchase, for £7,350, to be paid as therein mentioned; and it was further agreed that the plaintiffs should deliver to the defendant or his solicitor, within three months, a full abstract of title and, on or before Mar. 25, 1815, execute proper conveyances and deliver the title deeds, "unto and to the use of, or for, the defendant, his heirs and assigns, or such other person or persons use or uses, as he or they should direct," such conveyances to be prepared at the expense of the defendant and to contain the usual covenants. The defendant to enter into possession on Mar. 25, 1814, and to pay or allow interest on the purchase-money from that time until the completion of the purchase.

On Mar. 25, 1814, the defendant was let into possession according to the agreement and, within the time specified, an abstract of title was delivered, to which no objection was made on the part of the defendant, who continued in possession and received the rents and profits, exercising acts of ownership, as charged by the bill.

On Mar. 7, 1816, the purchase not being yet completed, the solicitor for the

plaintiffs wrote to the defendant, offering to allow him time for the payment until Lady Day, 1817, on condition that the interest, up to Lady Day, 1816, should be then paid and the subsequent interest as it should become due. The defendant replied stating his intention to perform the agreement and pay the purchase-money at Lady Day, 1817, but without noticing the payment of interest. On May 7 following, another letter was written by the plaintiffs' solicitor, requiring an explicit answer on that point, to which no answer was returned.

The bill, stating these facts, prayed a specific performance of the agreement.

The defendant, by his answer, stated that the premises were, some time previous to the agreement in question, put up for sale by public auction in three lots, but were not sold at such auction; that the defendant, being informed by the plaintiffs' agent that the same were to be sold by private contract, and being desirous, "on behalf of himself, Sir Richard Bedingfield, Bart., and Francis Hargrave, as trustees for the defendant's brother, Sir George Jerningham," to purchase the premises comprised in lot three, it was represented to him that, if he would purchase the whole, he might easily find a purchaser for the other two lots, at such price as to bring down the purchase-money for lot three to a certain sum per acre; whereupon he agreed, "on behalf of himself and his co-trustees," to purchase the whole of the premises in trust as aforesaid, and the agreement was drawn up and executed by himself and the plaintiffs.

He said that the plaintiffs' agent treated with him as a trustee and concluded his agreement with him in that character, and that he, the defendant, "understood, and verily believed, that the plaintiffs knew that he entered into the agreement as such trustee." He admitted his having taken possession and received the rents and profits, "as agent of his brother, Sir George Jerningham," but denied that he, or (to his knowledge) any person, "save the tenant in possession," had exercised any acts of ownership other than by the receipt of rent, or that he or any other person (to his knowledge) had caused any trees to be felled as stated in the bill.

He believed it might appear by the abstract that the plaintiffs were able to make a good title, but said that the title had not been approved by counsel, and, therefore, reserved the right of objecting. That in April, 1815, no purchaser for the two first lots having been procured, the defendant became desirous of abandoning the purchase, conceiving he had a right to do so on forfeiting the deposit.

He admitted the correspondence with the solicitor for the plaintiffs, alleging that it did not amount to a positive undertaking on his part to complete the agreement; and stated that he had, since the date of the last letter (which he did not answer, being then abroad), on behalf of his brother, paid the interest up to last Michaelmas. He said that, in consequence of no purchaser having been procured for the two lots, he was unable to pay the purchase-money without resorting to the sale of other estates of which he was in like manner a trustee for his brother. He submitted that Sir George Jerningham and his co-trustees ought to be made parties to the suit.

The plaintiffs now moved that the defendant might be ordered within a fortnight to pay the remainder of the purchase-money into court, with interest from Michaelmas last. This motion was supported by affidavit stating that the plaintiffs had no notice of the defendant being a trustee or that he acted as such trustee on behalf of his brother and co-trustees, in making the purchase, until long after he had been admitted into possession, and then only as the circumstance was introduced by way of parenthesis in a letter (dated May 4, 1816) from the defendant to the plaintiffs' solicitor. The affidavit further stated acts of ownership in the felling of a poplar tree by a person in the employ of defendant, in letting part of the estate to a former tenant at an increased rent, taking distresses, and giving notice to quit, and in letting other parts to a tenant who had underdrained the meadows, ploughed, sown and taken crops, since the time when he entered into possession.

A *Hart and Rose* for the plaintiffs, supported the motion : There are two questions : (i) whether the agreement is within the statute; and, (ii) whether there are circumstances of conduct such as would lead the court to anticipate the decree so far as to secure the purchase-money. The agreement could, for this purpose, be considered only as the agreement of the defendant; and the acts of ownership which were alleged by the bill, although not admitted by the answer, were **B** substantiated by affidavit, which it was competent for the plaintiffs to read, notwithstanding the answer : *Burroughs v. Oakley* (1).

Sir Samuel Romilly and *Blake* for the defendant : The affidavit should not be read. In this case, the title not having been approved, it was not ascertained that there existed such a contract as the court would specifically perform; and, **C** unless that was clear, the court would never interfere to order the payment in of the purchase-money.

The admission in the answer was only as to the defendant's single belief of the sufficiency of the title, but it must first be accepted by his co-trustees. No act was proved amounting to waiver of objection to title. The defendant entered into possession under the agreement which provided for his taking possession, the **D** question of title being left open. If the only question before the court were that of title, the plaintiffs are entitled to an immediate reference and they ought, therefore, to set down the cause for hearing. In similar circumstances the Lord Chancellor refused, in *Morgan v. Shaw* (2), to order payment of the purchase-money, and refused it with costs.

E Aug. 1, 1817. **LORD ELDON, L.C.**—This is the case of a gentleman purchasing on behalf of himself and others, when it did not appear on the face of the contract that he was purchasing except for himself alone. The time fixed for the payment of the purchase-money is long since passed. A purchaser has no right to say that he will put an end to the agreement, forfeiting his deposit. Here the purchaser admitted receipt of rents and profits, notwithstanding he denied acts of ownership. **F** But the material circumstance was that he had admitted a good title, insisting, nevertheless, that he had a right to object, the title not having been approved by counsel. I am of opinion, however, that, having admitted so much and having entered into the agreement in his own name alone, those with whom he had contracted had a right to hold him to his purchase and that the circumstances of the case do not vary the general rule now established.

G *Order to pay the money into court before the next seal.*

DOE d. GOODBEHERE v. BEVAN

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Le Blanc, Bayley and Dampier, JJ.), January 23, 1815]

[Reported 3 M. & S. 353; 2 Rose, 456; 105 E.R. 644]

Landlord and Tenant—Lease—Covenant—Covenant by lessee not to assign without consent—Bankruptcy of lessee—Right of assignee in bankruptcy to assign lease to purchaser without lessor's consent.

Bankruptcy—Lease—Assignment—Covenant by lessee not to assign without consent—Bankruptcy of lessee—Right of assignee in bankruptcy to assign lease to purchaser without lessor's consent.

A lessee covenanted that he, his executors, administrators, or assigns, would not assign the lease or his or their interest therein, or sublet the premises to any person without the consent in writing of the lessor. There was a proviso to the lease that if the lessee, his executors, administrators, or assigns, should part with his or their interest contrary to the covenant the lessor might re-enter. The lessee deposited the lease as a security for money borrowed. He then became bankrupt, and the lease was sold by direction of the Lord Chancellor to pay his debts.

Held: the assignees under the commission might assign the lease to the vendee without the consent of the lessor.

Notes. Applied: *Winter v. Dumergue* (1865), 12 Jur. N.S. 56; *Re Birkbeck Permanent Benefit Building Society, Official Receiver v. Licenses Insurance Corpn.*, [1913] 2 Ch. 34. Considered: *Re Farrow's Bank*, [1921] 2 Ch. 164. Explained and Distinguished: *Re Wright, Ex parte Landau v. Trustee*, [1949] 2 All E.R. 605. Referred to: *Dyke v. Taylor and Cannan* (1860), 6 Jur. N.S. 1329; *Re Riggs, Ex parte Lovell*, [1901] 2 K.B. 16; *Cohen v. Popular Restaurants, Ltd.*, [1916-17] All E.R. Rep. 1113.

As to whether trustee in bankruptcy is affected by proviso for re-entry on assignment without consent, see 23 HALSBURY'S LAWS (3rd Edn.) 647; and for cases see 5 DIGEST (Repl.) 1022.

Cases referred to:

- (1) *Doe d. Mitchinson v. Carter* (1798), 8 Term Rep. 57; 101 E.R. 1264; 31 Digest (Repl.) 409, 5381.
- (2) *Weatherall v. Geering* (1806), 12 Ves. 504; 33 E.R. 191; 31 Digest (Repl.) 410, 5395.
- (3) *Goring v. Warner* (1724), 2 Eq. Cas. Abr. 100; 22 E.R. 86, L.C.; 31 Digest (Repl.) 435, 5621.
- (4) *Philpot v. Hoare and Robertson* (1741), Amb. 480; 2 Atk. 219; 27 E.R. 314, L.C.; 31 Digest (Repl.) 435, 5619.
- (5) *Crusoe d. Blencowe v. Bugby* (1771), 3 Wils. 234; 2 Wm. Bl. 766; 95 E.R. 1030; 31 Digest (Repl.) 435, 5630.
- (6) *More's Case* (1584), Cro. Eliz. 26; 78 E.R. 291; 31 Digest (Repl.) 433, 5602.
- (7) *Anon.* (1563), Moore, K.B. 44; 72 E.R. 430; 23 Digest (Repl.) 298, 3639.
- (8) *Anon.* (1549), 1 Dyer, 65 b; 73 E.R. 139; 31 Digest (Repl.) 410, 5404.
- (9) *Cox v. Brown* (1656), 1 Rep. Ch. 170; 21 E.R. 540; 31 Digest (Repl.) 433, 5600.
- (10) *Roe d. Gregson v. Harrison* (1788), 2 Term Rep. 425; 100 E.R. 229; 31 Digest (Repl.) 434, 5603.
- (11) *Roe d. Hunter v. Galliers* (1787), 2 Term. Rep. 133; 100 E.R. 72; 5 Digest (Repl.) 707, 6176.

Rule Nisi obtained by the plaintiff to set aside a nonsuit in an action of ejectment.

By a lease dated Nov. 29, 1808, the plaintiff Goodbehere demised a public house to one Shaw for a term of years with a covenant by the lessee for himself, his

A executors, administrators, and assigns, not to assign the indenture or his or their interest therein or assign, set [i.e., let] or underlet the messuage and premises or any part thereof to any person or persons whatsoever without the consent in writing of the lessor, his executors, administrators, or assigns, with a proviso for re-entry in case the lessee, his executors, administrators, or assigns, should part with his or
 B Afterwards Shaw deposited the lease with Whitbread & Co. as security for money owing to them, and later became bankrupt. His estate and effects were assigned by the commissioners to his assignees, but on the petition of Whitbread & Co. the lease was directed by LORD ELDON, L.C., to be sold in discharge of their debt, and was accordingly sold to the defendant, Bevan, and assigned to him by the assignees without the plaintiff's consent. The defendant entered upon possession of the premises. The plaintiff sued in ejectment under the proviso for re-entry. At the trial before HEATH, J., at Surrey Assizes, the judge ruled that the assignees in bankruptcy, being assignees by operation of law, were not within the proviso and directed a nonsuit. The plaintiff obtained a rule nisi to set aside the nonsuit.

Serjeant Best and *Espinasse* for the defendant, showing cause against the rule :
 D The proviso only applies to acts that the party does voluntarily, but not to those that pass in invitum; this distinction governed the decision of *Doe d. Mitchinson v. Carter* (1), where all the principal cases are collected, and was recognised in *Weatherall v. Geering* (2). The same distinction will hold in the case of an assignment under a commission of bankruptcy, which is by the operation of the statute, and not by the act of the party; LORD MACCLESFIELD was of this opinion in *Goring v. Warner* (3). In *Pilpot v. Hoare and Robertson* (4) LORD HARDWICKE expressly stated that he was of opinion that a covenant by a lessee not to assign without licence did not bind the assignee of the lessee who became bankrupt, at law; and the only reason why he set the assignment aside in that case was because of the fraud. In *Crusoe d. Blencowe v. Bugby* (5), which was a covenant "not to assign, etc., or otherwise do or put away the indenture of demise," the court in giving
 F judgments enumerated several modes by which a term may be put away, and among others, that "the lessee becoming bankrupt is a doing or putting away;" but yet they add: "None of these amount to an assignment, or to a breach of the covenant or condition." Then if the assignee of the bankrupt may take, without incurring a forfeiture, it follows that he may assign; because he takes nothing for his own benefit, but only as the channel of conveyance to the whole body of creditors; and,
 G therefore, it would be absurd to hold that he cannot assign. Also, the depositing of the lease originally with Whitbread & Co. was not a forfeiture; for the courts have always looked narrowly into these provisos, and here there are no words that the lessee shall not part with the indenture, but only that he shall not part with his interest. And though the depositing this lease might create an equitable mortgage, in favour of Whitbread & Co., it conveyed no legal interest.

H *Knowlys* and *Lawes* for the plaintiff, cited *More's Case* (6) and *Anon.* (7), "That a covenant by the lessee for him and his assigns will bind his administrator." An administrator is as much an assignee appointed by statute, as the assignee of a bankrupt. If *Doe d. Mitchinson v. Carter* (1) had decided that Carter might have assigned, it would have been in point; but it only shows that the assignment to the assignees, which is by operation of law, is not within the proviso, not that these assignees may assign without the consent of the lessor. If they could, this absurdity will follow, that the assignees will be in a better position than the bankrupt himself :
 I see 7 VINER'S ABRIDGMENT 85, pl. 10 :

"that the law is very clear that the assignees are exactly in the same place as the bankrupt, and stand in his place to every particular, and any agreement entered into shall bind them."

If, therefore, the bankrupt has only a qualified estate, his assignees can have no more; and though they may part with it, yet they must do so in such manner and

upon such conditions as the bankrupt has agreed to do. There is no question but that they may assign; the only question is as to the mode by which they must exercise their right. The distinction is that if the proviso extends to the lessee only, then the assignees in law are not within it, and they may assign without consent without incurring a forfeiture: *Anon.* (8) and *Cox v. Brown* (9); but it is otherwise if they are named, for then they as well as the lessee are bound by it: *Roe d. Gregson v. Harrison* (10), a covenant for the lessee, his executors and administrators, and the administrator underlet; and per BULLER, J. (2 Term Rep. at p. 430):

"This assignment is by the act of the party himself, and the executors and administrators are expressly named in the covenant."

Here the covenant names the lessee and his assigns and the assignment is by the act of the assignees, so that *Roe d. Gregson v. Harrison* (10) is expressly in point. No inconvenience will follow from holding the assignees within this clause of restraint, because if the lessor should withhold his consent capriciously, doubtless a court of equity would interfere. *Roe d. Hunter v. Galliers* (11) has determined that there is nothing unlawful in the lessor's imposing such a restraint.

LORD ELLENBOROUGH, C.J.—I had understood it to be a point long settled that a landlord has the power of restraining the alienation of his tenant by a general proviso against alienation, which is applicable to ordinary cases; and that in extraordinary cases, such as the bankruptcy of his tenant, he may restrain the alienation by an express proviso. We are now upon the consideration of a case which has no express proviso, but stand on the effect of the ordinary clause restraining the tenant, his executors, administrators or assigns from assigning. In *Roe d. Gregson v. Harrison* (10) the proviso extended to the lessee, his executors and administrators, expressly restraining them by name from alienation; therefore, it was held that the administrator could not assign. Here the question is upon the meaning of the term assigns, whether by that term the proviso was meant to have effect against assigns in law, as it would have against assigns by act of the party.

The courts have construed it to mean voluntary assigns as contradistinguished from assigns by operation of law, and further than that, that the immediate vendee from the assignee in law is not within the proviso; the reason of which is that the assignee in law cannot be encumbered with the engagement belonging to the property which he takes, such as in this case the carrying on the bankrupt's trade in the public house, which is a strong instance. In such cases, therefore, the law must allow the assignee to divest himself of the property and convert it into a fund for the benefit of the creditors. That "assigns" does not relate to assignees in law I consider as determined in *Doe d. Mitchinson v. Carter* (1) and *Goring v. Warner* (3), but more distinctly in *Doe d. Mitchinson v. Carter* (1). Nor do I find that *Roe d. Gregson v. Harrison* (10) impugns these authorities, because that passed entirely on the ground of the executors and administrators being specially named. But an executor is a volunteer, he is at liberty to renounce, and an administrator is wholly voluntary; therefore it does not follow from that decision that "assigns" must necessarily comprehend such as are involuntary and do not come in by the act of the party, as the assignees under a commission of bankruptcy do not.

This case, therefore, appears to me to be concluded by the authorities, as well as by the reason of the thing. Here, if the assignees might of themselves assign the terms, they might certainly do so under the Lord Chancellor's order.

LE BLANC, J.—There can be no doubt that the lessor might have relieved himself from all inconvenience by expressly providing in the lease that if the lessee should become bankrupt or should deposit the lease with any person, the lease should be void. In this case he has not so done, but has contented himself with a covenant from the lessee for himself, his executors, administrators and assigns not to assign the indenture or premises, without the lessor's consent. The question is if it be a breach of covenant in the assignees of the lessee, who has become bankrupt, to assign

A the lease. It is clear that there has been no assignment by the lessee himself; it is also clear that the lessee's becoming bankrupt is not a breach; but the assignees under the commission have assigned. They were bound to assign because they took only as trustees for the purpose of disposing of the property to the best advantage for the benefit of the creditors; and they were compelled under an order of the Court of Chancery to sell in discharge of the debt of Whitbread & Co. Therefore, this was not an assignment within the meaning of the covenant, because in *Doe d. Mitchinson v. Carter* (1) it was considered that an assignment under compulsion of law by the sheriff to an execution-creditor was not within a general covenant by the lessee, his executors, administrators and assigns not to assign.

C The commission of bankruptcy is a statutable execution, and there is no material difference between the compulsory course under which the sale was made in both cases. *Roe d. Gregson v. Harrison* (10) is very distinguishable from the present case, for there the administrator being expressly named in the covenant not to let, did by his own act underlet. He did not come in like the assignees of a bankrupt under a statutable execution and act under it by compulsion of law; but being expressly bound by the covenant, it was held that he could only convey in the same manner as his intestate, the covenantor. But the assignees of a bankrupt, in like manner as the sheriff, are relieved from the operation of the word assigns, because "assigns" means only such as are voluntary assigns. Therefore, both on the authorities and upon principle I think there is no doubt.

D **BAYLEY, J.**—I think this case admits of no reasonable doubt. If the decision of *Doe d. Mitchinson v. Carter* (1) is correct this decision also must be supported. Following that decision, I say in this case that there has been no such assignment as was intended to be guarded against by this proviso. In *Doe d. Mitchinson v. Carter* (1) it was decided that a proviso that if the lessee, his executors, administrators or assigns should assign, the landlord might re-enter, contemplated only a voluntary assignment and not one which passed in invitum of the lessee, and where the party making the assignment acted in discharge of a duty cast upon him by the law. It has never been considered that the lessee's becoming bankrupt was an avoiding of the lease within this proviso; and if it be not, what act has the lessee done to avoid it? All that has followed upon his bankruptcy is not by his act but by the operation of law, transferring his property to his assignees. Then shall the assignees have capacity to take and yet not to dispose of it? Shall they take it only for their own benefit, or be obliged to retain it in their hands to the prejudice of the creditors, for whose benefit the law originally cast it upon them? Undoubtedly that can never be. They must, therefore, have a power to sell for the purposes for which it was given them, and the Lord Chancellor will compel them if they neglect to do it. It appears that the Lord Chancellor has directed this lease to be sold, and that so far from being volunteers they acted under the compulsion of this order. If "assigns" means voluntary assigns, what act is there to make them voluntary? G This is no new law; it is as old at least as *Goring v. Warner* (3). The same was so considered in *Crusoe d. Blencowe v. Bugby* (5), and it was said and admitted that a devise of the term by the lessee is not a breach of the covenant not to assign. Such also has been the general impression in the minds of the profession for a long series of years. Parties may, if they please, stipulate by a special proviso that the lease shall determine upon the bankruptcy of the lessee; that indeed was doubted until *Roe d. Hunter v. Galliers* (11) established that it was not a stipulation against law; but the very doubt shows that it never could have been conceived that the general proviso extended to restrain an assignment under a commission of bankruptcy. The distinction in *Roe d. Gregson v. Harrison* (10) is that there was such letting by the act of the party as the party covenanted against.

I **DAMPIER, J.**—I think *Doe d. Mitchinson v. Carter* (1) establishes upon a review of all the cases this position, that the assignees of a bankrupt lessee, whose assignment is not voluntary but passes in invitum and by operation of law, are not within

the general word "assigns" in this proviso. It is not pretended that the assignment by the commissioners to the assignees is a breach of the proviso, but it is said the assignment by the assignees afterwards is their own voluntary act. But what is the duty of the assignees? They would incur a great risk if they did not so manage the estate of the bankrupt as to fulfil their trust: consequently they were bound at their own peril to assign over the term for the benefit of the creditors; and moreover they are compelled to it in this instance by the Lord Chancellor's order for the benefit of one particular creditor; which they of course would resist as far as they could in order to have it for the benefit of the whole body of creditors. This case, therefore, falls within the reason of *Doe d. Mitchinson v. Carter* (1), upon the authority of which I think this assignment is not within the proviso. The bankruptcy of the lessee might have been specially guarded against as in *Roe d. Hunter v. Galliers* (11).

Rule discharged.

FILLINGHAM v. BROMLEY

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), March 6, 11, 1823]

[Reported Turn. & R. 530; 37 E.R. 1204]

*Will—Condition—Uncertainty—Forfeiture on non-compliance with condition—
"Live and reside" on the estate.*

A devise in a will contained a condition prohibiting the letting of the estate and directing that "every such [devisee] should live and reside on the said estate . . ." The testator directed that there should be a forfeiture of the estate for non-compliance with the condition.

Held: what the testator meant by the words "live and reside" was uncertain, and, therefore, a decree that a forfeiture had taken place would not be granted.

Notes. Considered: *Walcot v. Botfield* (1854), Kay, 534; *May v. May* (1881), 44 L.T. 412; *Jeffreys v. Jeffreys* (1901), 84 L.T. 417; *Re Talbot-Ponsonby's Estate*, *Talbot-Ponsonby v. Talbot-Ponsonby*, [1937] 4 All E.R. 309. Referred to: *Potter v. Richards* (1855), 24 L.J.Ch. 488; *Clavering v. Ellison* (1859), 7 H.L. Cas. 707; *Duddy v. Gresham* (1878), 39 L.T. 48; *Re Tyler and Charitable Trusts Acts, 1853 to 1894* (1901), 45 Sol. Jo. 204; *Re Vivian, Vivian v. Swansea* (1920), 36 T.L.R. 222; *Sifton v. Sifton*, [1938] 3 All E.R. 309; *Clayton v. Ramsden*, [1943] 1 All E.R. 16; *Re Coxen, MacCullum v. Coxen*, [1948] 2 All E.R. 492; *Re Gape's Will Trusts, Verey v. Gape*, [1952] 2 All E.R. 579; *Re Brace, Gurton v. Clements*, [1954] 2 All E.R. 354.

As to uncertain conditions in respect of residence, see 39 HALSBURY'S LAWS (3rd Edn.) 922-924; and for cases see 44 DIGEST 442.

Action for the specific performance of an agreement entered into by the defendant for the purchase of some property, formerly part of an estate called Juts in the parish of St. Stephen in Cornwall.

The plaintiff's title to the property in question was deduced in the following manner. A testator, Pendock Neale, by his will, dated Nov. 13, 1768, gave and devised the estate called Juts, together with divers freehold estates situate in the county of Nottingham, subject to certain rent charges, to his nephew, Pendock Neale for life, and after the determination of that estate by forfeiture or otherwise in his lifetime, to trustees and their heirs during the life of the said Pendock Neale, upon the usual trusts for preserving contingent remainders, and to permit Pendock Neale to receive the rents during his life, and after his decease, to the first and other sons of Pendock Neale, severally and successively in tail male.

A with remainder to the brothers of Pendock Neale, severally and successively, in tail male, with divers remainders over.

B The testator directed that it should be lawful for all and every person and persons who, by virtue of any of the limitations thereinbefore contained, should from time to time be entitled to the lands and hereditaments thereinbefore devised, if of full age, but if not for their respective guardians, to demise or lease in possession the said premises or any part thereof for any term not exceeding twenty-one years, at the best rent that could be reasonably obtained for the same (except his aforesaid estate called Juts), it being his will that such person or persons who should be entitled to and possessed of the said lands and hereditaments should not set, let, or lease out the said estate called Juts, or any part thereof, and that every such person or persons should live and reside on the said estate called Juts, and for default thereof, he gave and devised all his said lands and hereditaments to such person who should be the next entitled to the possession of the same by virtue of any devise or limitation in the will, as if such person so refusing or neglecting to reside or live at Juts aforesaid had been actually dead, anything in his will contained to the contrary notwithstanding.

D Pendock Neale the testator died in 1772, leaving Pendock Neale the devisee an infant. Pendock Neale the devisee attained twenty-one on Aug. 27, 1778, and afterwards married and had issue Pendock Barry Neale, his eldest son, who was born on May 6, 1783. In Trinity Term, 1804, Pendock Neale and Pendock Barry Neale suffered a recovery of the property in question, and they afterwards sold and conveyed it to the plaintiff: the grantors in the deed for making the tenant to the praecipe, upon the recovery being suffered, were Pendock Neale and Pendock Barry Neale.

E By the decree made upon the hearing of the cause, on Mar. 7, 1816, it was referred to the Master to inquire whether the plaintiff could make a good title to the premises comprised in the agreement; and, on June 8, 1818, the Master reported in favour of the title.

F The defendant excepted to the report, and on the hearing of the cause upon the exception and for further directions, on July 16, 1818, it was referred back to the Master to inquire whether, previous to the recovery being suffered in Trinity Term, 1804, there had or had not been a forfeiture or forfeitures of the estate and premises in question by not complying with the terms of the will of the testator Pendock Neale. It was ordered that the Master should state the evidence upon which his conclusion was founded, and that the exception should stand over in the meantime.

G On Feb. 17, 1819, the Master made his further report, stating that upon consideration of the will of the testator and of the evidence laid before him respecting the residence of the said Pendock Neale the devisee upon the said estate called Juts, he found that, previous to the recovery being suffered in Trinity Term, 1804, there had not been any forfeiture of the estate and premises in question by not complying with the terms of the said testator's will; and, in a schedule to his report, he set forth the evidence upon which he had come to such conclusion. By the evidence contained in the schedule to the report it appeared that for about two years next after he attained twenty-one, Pendock Neale the devisee was living and residing, and described himself as living and residing at Juts; that he then went into Nottinghamshire, where he remained for about a year, when he returned to Juts with his wife, whom he married in the interval, and that, while he was absent from Juts upon that occasion, his servants there were upon board wages; that after he had returned to Juts with his wife, he continued to live and reside, and describe himself as living and residing there, for about another year, when, for the purpose of his wife's confinement, he again went into Nottinghamshire, where Pendock Barry Neale was born; and that from the time of his quitting Juts on the last-mentioned occasion, he discontinued to live and reside, or to describe himself as living and residing there, except that he was in the habit of coming

there occasionally, for a few weeks or months, sometimes with, and sometimes without, his family and establishment. It appeared, however, that he had at all times two or three servants at Juts on board wages, and that he was assessed to the poor-rates, as the occupier of Juts from 1788 to 1790, and for some years subsequent thereto. There was no evidence as to the residence of Pendock Neale the devisee, from the death of the testator until he attained twenty-one, except that one witness deposed that she used to see him in the neighbourhood of Juts and understood that he was residing there with his mother. A B

The defendant took another exception to the Master's further report, insisting that the Master ought to have found that, previous to the recovery being suffered, there had been a forfeiture or forfeitures of the estate and premises in question by not complying with the terms of the testator's will. On Mar. 11, 1819, the cause was heard before SIR JOHN LEACH, V.-C., on the two exceptions, and for further directions, when His Honour ordered that both the exceptions should be overruled, and declared that the agreement ought to be specifically performed, and decreed accordingly. C

From this order the defendant appealed to LORD ELDON, L.C., and the cause now came on upon the appeal.

Heald and Pepys for the appellant: The objection to the title is that before the recovery was suffered, there was a forfeiture by non-compliance with the terms of the testator's will, and that in consequence of the forfeiture, Pendock Neale the devisee and Pendock Barry Neale could not legally suffer the recovery: the evidence makes out that Pendock Neale did not live and reside at Juts according to the plain meaning of the testator. [LORD ELDON, L.C.: What construction do you put upon the words live and reside?] The testator meant that Juts should be the principal residence of the parties entitled to his estates: it is difficult to say that the true construction of the will is that they were never to reside there at all. The evidence shows that in 1782 Pendock Neale discontinued residing at Juts: from that time he held the estate for profit, not for residence. [LORD ELDON, L.C.: Suppose he had been a Member of Parliament, and had had a house in London, would you have said that he did not live and reside at Juts? Assuming that there was a forfeiture by the father, there was the son to make the tenant to the praeceipe.] It is in evidence that the father left Juts, for the purpose of residing elsewhere, before the birth of the son, and the forfeiture must be held to have taken place, on the day of his leaving Juts for that purpose: the estate then went over to the person, who, at that time, was next in remainder and the consequence is that the recovery was bad, there not having been proper parties to it. His LORDSHIP adverted to the estate of the trustees to preserve contingent remainders, but observed that, supposing such estate to have taken place, the father would have had only an equitable estate for life, and the son having the legal estate tail, they could not suffer a recovery. D E F G

Hart, Wetherell, Shadwell and Willis for the respondent: A question of forfeiture is one stricissimi juris: it must be made out most clearly that there has been a breach of the directions contained in the will. There is no precise definition as to what is or is not residence: looking at the context of this will, the intention was merely to prevent the mansion-house being let; the devisee has fulfilled the condition by not letting the estate. [LORD ELDON, L.C.: That will not do, because if the devisee had let any part of the estate, there would have been no forfeiture; the lease would have been void after his death, but by itself, the lease would not have worked a forfeiture.] The occupation of a house is sufficient to satisfy a condition to live and reside in it. Supposing there was a forfeiture, the son took the benefit of it, and he afterwards joined in the recovery. H I

LORD ELDON, L.C.—There is great difficulty in saying that a forfeiture was incurred, when the court cannot see clearly what it was the testator meant. I cannot agree to the construction of this will which has been contended for, that

A the testator meant merely to prevent the letting of the estate. There are two things which he clearly meant to prevent; one the letting, the other the non-living and residing. Then comes the question what is living and residing. Occupation is not living and residing; there are many purposes for which the word inhabitant has been taken to include persons as inhabitants of places in which they never were. The question comes to this: What it was the testator meant, and whether, **B** unless a clear meaning can be put upon the will, the court is to take upon itself to say that there has been a forfeiture.

Mar. 11, 1823. **LORD ELDON, L.C.**, said that he was of opinion the title was good.

Decree affirmed.

R. v. TURNER

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Bayley and Holroyd, JJ.), June 19, 1816]

[Reported 5 M. & S. 206; 105 E.R. 1026]

Criminal Law—Evidence—Burden of proof—Negative averments—Allegation of lack of qualification—Burden of proving existence of qualification.

If a negative averment be made by one party on a matter which is peculiarly within the knowledge of the other, the party within whose knowledge it lies is to prove the affirmative.

E An information against a carrier for having game in his possession alleged that the defendant was not qualified to carry game under the statute 22 and 23 Car. 2, c. 25, s. 3 [repealed by S.L.R., 1863]. The defendant objected that the informant must prove the absence of the defendant's qualifications.

Held: the burden was on the defendant to prove that he possessed the qualification required by the Act.

F **Notes.** Considered: *Doe d. Bridger v. Whitehead* (1838), 3 Nev. & P.K.B. 557; *Elkin v. Janson* (1845), 9 Jur. 353; *Ashton v. London and North Western Rail. Co.*, [1918] 2 K.B. 488. Applied: *Williams v. Russell* (1933), 149 L.T. 190; Considered: *Joyce v. D.P.P.*, [1946] 1 All E.R. 186. Referred to: *Tennant v. Cumberland* (1859), 1 E. & E. 401; *R. v. Harvey* (1871), 19 W.R. 446; *Abrath v. North Eastern Rail. Co.*, [1881-5] All E.R. Rep. 614; *James v. Nicholas* (1886), 50 J.P. 292; *R. v. Scott* (1921), 86 J.P. 69; *R. v. Oliver*, [1943] 2 All E.R. 800.

G As to burden of proof, see 10 HALSBURY'S LAWS (3rd Edn.) 436 et seq.; and for cases see 14 DIGEST (Repl.) 493 et seq.

Cases referred to:

(1) *R. v. Stone* (1801), 1 East, 639; 102 E.R. 247; 14 Digest (Repl.) 494, 4779.

H (2) *Spieres v. Parker* (1786), 1 Term Rep. 141.

(3) *Jelfs v. Ballard* (1799), 1 Bos. & P. 467.

Appeal against conviction by two justices under the statute 5 Ann., c. 14 [Ruff.; 6 Ann., c. 16, in Statutes of Realm: repealed by Game Act, 1831], s. 2, against a carrier for having game in his possession.

I W. Taylor laid an information before the justices that on Feb. 5, John Turner, "carrier, being a person not then having lands, etc. (negating the qualifications of the statute 22 and 23 Car. 2, c. 25) nor then being a person in any manner qualified or authorised by the laws of this realm to kill game, and being then and there a carrier, did then and there unlawfully have in his custody and possession sixteen pheasants and five hares, the same not being sent up or placed in the hands of the said J. Turner, by any person or persons qualified to kill game, contrary to the form of the statute, etc., whereby he hath forfeited the sum of £105, that is, £5 for each pheasant and hare."

The conviction prayed that the defendant might be summoned to answer the premises, and that the informer might have a moiety of the forfeiture. A

The conviction then stated that the defendant was summoned on Feb. 10, 1816, to appear before the justices and that he pleaded Not Guilty. Nevertheless, on Feb. 10 two credible witnesses, to wit, T.T. and W.S. upon their oath, affirmed in the presence of the said J. Turner, that within three months next before the said information, to wit, on Feb. 5, 1816, the said J. Turner being a carrier, did B have in his custody and possession, in his wagon, at the parish of Send and Ripley, in Surrey, sixteen pheasants and five hares, the same not being sent up or placed in the hands of the said J. Turner, by any person or persons qualified to kill game, contrary to the form of the statute. Whereupon J. Turner, being asked what he had to say or offer in his defence, produced one witness who, being duly sworn, C deposed, in the presence of the said J. Turner, and also of the said W. Taylor, that on Feb. 5 at the parish of The Holy Trinity, in Guildford, Surrey, he was present at, and did aid and assist in the packing and loading the said wagon of J. Turner; and that at the day and parish last aforesaid, when the said wagon of the said J. Turner left the warehouse of the said J. Turner, in the said parish last aforesaid, there was not in the custody and possession of the said J. Turner, D in his said wagon, in the parish last aforesaid, any such quantity of game as was above laid to his charge, or any game whatever. The conviction then stated that the justices found the charge against the appellant, as alleged in the information, proved, upon the testimony of the two witnesses, T.T. and W.S. They, therefore, convicted the appellant.

Scarlett and Ross for the appellant: The conviction was ill, first, because the justices have neglected to set forth the evidence in support of the information, and have only stated the conclusion which they drew from it. For the justices have repeated the charge alleged in the information, as if it were the evidence given in support of that charge; but it is impossible to conceive that the witnesses should have deposed in the very same form and words as laid in the information. It was incumbent, therefore, on the justices to set forth the particulars of the E evidence and not the result of it, in order that the court may see that there is sufficient to warrant conviction. Secondly, it was objected, that it does not appear that any evidence was given in support of the information, negating the qualifications mentioned in the statute, which is necessary, in order to found the jurisdiction of the justices; for if the party be qualified in any one respect, the justices have no jurisdiction. And herein a proceeding before a justice differs G from an action. It seems, therefore, that *prima facie* evidence, at least, ought to be required; though it must be admitted that in *R. v. Stone* (1), the court were divided in opinion upon this point.

Nolan and Berens were not called on to support the conviction.

LORD ELLENBOROUGH, C.J.—The question is, on whom the onus of proof H lies; whether it lies on the person who affirms a qualification to prove the affirmative, or on the informer who denies any qualification to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute (22 and 23 Car. 2, c. 25, s. 3), to which the proof may be applied, and, according to the argument of today, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification on each of those several heads. I

The argument really comes to this, that there would be a moral impossibility of ever convicting on such an information. If the informer should establish the negative of any part of these different qualifications, that would be insufficient because it would be said, non liquet, but that the defendant may be qualified under the other. Does not, then, common sense show that the burden of proof ought to be cast on the person who, by establishing any one of the qualifications, will be well defended? Is not the statute of Anne in effect a prohibition on every

A person to kill game, unless he brings himself within some one of the qualifications allowed by law; the proof of which is easy on the one side, but almost impossible on the other?

I remember the decision of *R. v. Stone* (1), and the arguments of the judges who held the necessity of giving negative proof were undoubtedly urged with great force. I felt at the time, however, that if they were right, it would in most cases be impossible to convict at all. In *Spieres v. Parker* (2), I find LORD MANSFIELD laying down the rule that in actions on the game laws (and I see no good reason why the rule should not be applied to informations as well as actions) the plaintiff must negative the exceptions in the enacting clause, though he throw the burden of proof on the other side. The same was said by HEATH, J., in *Jelfs v. Ballard* (3); and such I believe has been the prevailing opinion of the profession and the practice. I am, therefore, of opinion, that this conviction, which specifies negatively in the information the several qualifications mentioned in the statute, is sufficient without going on to negative those qualifications by the evidence.

BAYLEY, J.—I am of the same opinion. I have always understood it to be a general rule that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it and not he who avers the negative.

If we consider the reason of the thing in this particular case, we cannot but see that it is next to impossible that the witness for the prosecution should be prepared to give any evidence of the defendant's want of qualification. If, indeed, it is to be presumed that he must be acquainted with the defendant and with his situation or habits in life, then he might give general evidence what those were; but if, as is more probable, he is unacquainted with any of these matters, how is he to form any judgment whether he is qualified or not, from his appearance only?

Therefore, if the law were to require that the witness should depose negatively to these things, it seems to me that it might lead to the encouragement of much hardihood of swearing. The witness would have to depose to a multitude of facts; he must swear that the defendant has not an estate in his own or his wife's right, of a certain value; that he is not the son and heir apparent of an esquire, etc. How is it at all probable, that a witness should be likely to depose with truth to such minutiae?

On the other hand, there is no hardship in casting the burden of the affirmative proof on the defendant because he must be presumed to know his own qualification and to be able to prove it. If the defendant plead to the information, that he is a qualified person and require time to substantiate his plea in evidence, it is a matter of course for the justices to postpone the hearing, in order to afford him time and an opportunity of proving his qualifications. But if the onus of proving the negative is to lie on the other party, it seems to me that it will be the cause of many offenders escaping conviction. I think, therefore, that the onus must lie on the defendant, and that when the prosecutor has proved everything which, but for the defendant's being qualified, would subject the defendant to the penalty, he has done enough; and the proof of qualification is to come in as matter of defence.

HOLROYD, J.—I also am of the same opinion. It is a general rule that the affirmative and not the negative is to be proved of any fact which is stated, unless, in peculiar circumstances, where the general rule does not apply. Therefore it must be shown that this is a case which ought to form an exception to the general rule.

All the qualifications mentioned in the statute are peculiarly within the knowledge of the party qualified. If he be entitled to any such estate, as the statute requires, he may prove it by his title-deeds or by receipt of the rents and profits. Of if he be son and heir apparent or servant or any lord or lady of a manor appointed to kill game, it will be a defence. All these qualifications are peculiarly within

the knowledge of the party himself, whereas the prosecutor has probably no means whatever of proving a disqualification. If this be so, instead of saying that the general rule of law ought not to apply to this case, it seems to be the very case to which the rule ought peculiarly to apply. The other objections do not appear to me to be well founded; and, therefore, I think this conviction ought to be affirmed.

Conviction affirmed. B

BOEHM v. WOOD

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), May 15, 30, 1820]

[Reported 1 Jac. & W. 419; 37 E.R. 435]

Sale of Land—Contract—Time of performance—Time of the essence—Undertaking to give abstract and possession by particular time.

The motives inducing a party to enter a contract are not to be considered unless they be expressed in the contract itself. The allegation that a property was bought for immediate residence will not make time of the essence of the contract in the absence of any such express term, and such a term is not to be found by the mere undertaking to give an abstract and deliver up possession by a particular time.

Notes. Considered: *Withy v. Cottle* (1823), Turn. & R. 78. Referred to: *Reed v. Dom Pedro North Del Rey Gold Co.* (1863), 2 New Rep. 413; *Tilley v. Thomas* (1867), 3 Ch. App. 61.

As to a vendor's obligation to show good title, see 34 HALSBURY'S LAWS (3rd Edn.) 271 et seq.; and for cases see 40 DIGEST (Repl.) 146 et seq. As to time being of the essence of a contract, see 36 HALSBURY'S LAWS (3rd Edn.) 322-324; and for cases see 40 DIGEST (Repl.) 117 et seq.

Case referred to:

- (1) *Blyth v. Elmhirst* (1812), 1 Ves. & B. 1; 35 E.R. 1, L.C.; 44 Digest (Repl.) 139, 1160.

Action for specific performance of an agreement for the sale of an estate.

The contract, dated July 26, 1819, provided that an abstract of the title should be made out and delivered by Aug. 10, that the conveyance should be executed on or before Sept. 29 following, up to which time all outgoings were to be cleared, and the purchaser, upon payment of his purchase-money, was to be let into possession. The abstract was delivered on Aug. 6, but objections having been taken to the title, the plaintiff was informed on Sept. 29 following that the defendant had in consequence been under the necessity of relinquishing the purchase. The principal objection was that the estate in question, owing to the embarrassed state of the plaintiff's affairs, had, together with other property, been vested in trustees by a deed which was alleged to be an act of bankruptcy. In another action which had been commenced against the purchaser of other property, this question was raised; and it had been decided that the deed was not an act of bankruptcy.

The defendant in his answer stated that he had purchased the estate with a view to immediate residence and that he would not have entered into the agreement if the plaintiff and his agent had not both assured him that he should have possession at Michaelmas, and that possession not having been then given, he insisted that he was not bound to perform the agreement.

Hart and *Stephens* for the plaintiff, moved for a reference of the title.

Wetherell, *Shadwell* and *Simpkinson* for the defendant: A person may contract so as to make possession at a given time part of the contract; that has been done in this case.

LORD ELDON, L.C.—When I came into this court the doctrine was that you could not make time the essence of the contract. I attempted to overrule it, and I hope on satisfactory grounds. When possession, therefore, is made of the essence of a contract, must it not mean, not only that possession will then be given, but that it will be given with such a previous manifestation of title as will show that it can be safely taken? But there is another question that, although you may make the time of possession the essence of a contract, yet if after that time has elapsed the party thinks proper to take possession, does he not waive it?

For the defendant it was argued: Here possession has never been taken. In this case everyone admitted that no purchase could be made without a judicial decision, and many conveyancers thought that the deed was an act of bankruptcy; and yet the plaintiff, knowing this, enters into a contract, and agrees to give possession at a time when he knew he should not be able to give it; in that point of view, it is stronger than that of a mere contract, where time is made of the essence of it. But as the answer tenders another issue, besides the question of title, that is a sufficient ground for refusing the motion; the rule laid down in *Blyth v. Elmsfirst* (1) has been uniformly adhered to.

Hart for the plaintiff, denied that time had been made of the essence of the contract, but, admitting that it had, he contended that there was nothing in this case upon which the defendant could resist the contract, except the question as to the validity of the title. Some conveyancers who had been consulted were of opinion that there had been no act of bankruptcy.

LORD ELDON, L.C.—If another matter is put in issue besides the question of title, it falls within the common rule, and the motion cannot be granted; but then, must not the court take care that that other matter is something, that it is substantial? I admit, however, that if A. B. undertakes to sell another's estate, it does not signify whether A. B. has any interest, provided he can give the estate at the time the purchaser was to have it. When an abstract of title is sent, unless it raises such a difficulty that a court of equity would not specifically perform the contract, that abstract shows a good title; and if that is done before possession is to be taken, it is quite enough. But it is a different thing where another issue tendered by the answer is whether there is such a case upon the whole as to prevent a specific performance of the contract. My impression as to the latter question is that, if before the conveyance is to be prepared a title has been shown by the delivery of the abstract, the doubts of conveyancers, whether it is good or not, amount to nothing, unless it is shown that there is reasonable ground for a court of equity refusing to perform the contract; and there may be such a ground.

May 30, 1820. **LORD ELDON, L.C.**—With reference to the defendant having bought this estate for the sake of residence, the court cannot determine whether a contract should be performed, on the ground that such were his motives, unless he has so expressed himself in the contract itself. The question is whether in this contract that has been done. I do not find a single special word here making time the essence of the contract; a man's undertaking to give an abstract, and deliver possession by a particular time, is not making it of the essence of the contract.

Wetherell then mentioned the assurance which the plaintiff had given with respect to possession.

LORD ELDON, L.C., said he was willing to hear him on it; nothing further, however, was said, and the usual order for a reference of the title was made.

CANNAN AND ANOTHER v. BRYCE

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.),
November 15, 1819]

[Reported 3 B. & Ald. 179; 106 E.R. 628]

Contract—Illegality—Recovery of money lent for an illegal stock-jobbing transaction.

Money lent for the express purpose of settling losses on an illegal stock-jobbing transaction and applied by the borrower for that purpose cannot be recovered by the lender, although he was not a party to the illegal transaction.

Notes. Explained: *Thorpe v. Coleman* (1845), 1 C.B. 990. Distinguished: *Hill v. Fox* (1858), 31 L.T.O.S. 118. Considered: *Pearce v. Brooks*, [1861-73] All E.R. Rep. 102. Referred to: *McKinnell v. Robinson* (1838), 3 M. & W. 434; *Gas Light and Coke Co. v. Turner* (1839), 5 Bing. N.C. 666; *Pritchett v. Smart* (1849), 18 L.J.C.P. 211; *Horton v. Westminster Improvement Comrs.* (1852), 7 Exch. 780; *Taylor v. Chester* (1869), 38 L.J.Q.B. 225; *Thacker v. Hardy* (1878), 4 Q.B.D. 685; *Moulis v. Owen*, [1907] 1 K.B. 746; *Foster v. Driscoll*, *Lindsay v. Attfield*, *Lindsay v. Driscoll*, [1928] All E.R. Rep. 130.

As to nature of an illegal contract, see 8 HALSBURY'S LAWS (3rd Edn.) 126-128; and for cases see 12 DIGEST (Repl.) 263 et seq. As to contracts prohibited by statute, see 8 HALSBURY'S LAWS (3rd Edn.) 140-142; and for cases see 12 DIGEST (Repl.) 300 et seq.

Cases referred to:

- (1) *Faikney v. Reynous* (1767), 4 Burr. 2069; 1 Wm. Bl. 633.
- (2) *Petrie v. Hannay* (1789), 3 Term Rep. 418; 100 E.R. 652.
- (3) *Booth v. Hodgson* (1795), 6 Term Rep. 405; 101 E.R. 619; 12 Digest (Repl.) 302, 2324.
- (4) *Aubert v. Maze* (1801), 2 Bos. & P. 371; 126 E.R. 1333; 25 Digest (Repl.) 437, 188.
- (5) *Webb v. Brooke* (1810), 3 Taunt. 6; 128 E.R. 3; 12 Digest (Repl.) 333, 2575.
- (6) *Ex parte Mather* (1797), 3 Ves. 373; 30 E.R. 1060, L.C.; 12 Digest (Repl.) 326, 2532.
- (7) *Ex parte Daniels* (1807), 14 Ves. 191.
- (8) *Ottley v. Browne* (1810), 1 Ball & B. 360; 3 Digest (Repl.) 177, *240.
- (9) *Lightfoot v. Tenant* (1796), 1 Bos. & P. 551; 126 E.R. 1059; 11 Digest (Repl.) 441, 833.
- (10) *Langton v. Hughes* (1813), 1 M. & S. 593; 105 E.R. 222; 12 Digest (Repl.) 302, 2327.
- (11) *Brown v. Turner* (1798), 7 Term Rep. 630; 101 E.R. 1169; 6 Digest (Repl.) 139, 1004.
- (12) *Mitchell v. Cockburne* (1794), 2 Hy. Bl. 379.
- (13) *Farmer v. Russell* (1798), 1 Bos. & P. 296; 126 E.R. 913; 1 Digest (Repl.) 512, 1474.
- (14) *Steers v. Lashley* (1794), 6 Term Rep. 61; 101 E.R. 435; 6 Digest (Repl.) 139, 1003.
- (15) *Ex parte Bulmer*, *Ex parte Ellis* (1807), 13 Ves. 313; 33 E.R. 311, L.C.; 4 Digest (Repl.) 309, 2796.
- (16) *Barjeau v. Walmsley* (1746), 2 Stra. 1249; 93 E.R. 1161; 25 Digest (Repl.) 438, 198.
- (17) *Alcinbrook v. Hall* (1766), 2 Wils. 309; 95 E.R. 828; 25 Digest (Repl.) 433, 149.
- (18) *Lambert's Case* (1614), Godb. 244; 78 E.R. 142; 36 Digest (Repl.) 469, 392.
- (19) *Fox v. Hanbury* (1776), 2 Cowp. 445; 98 E.R. 1179; 4 Digest (Repl.) 491, 4317.

(20) *Coldwell v. Gregory* (1814), 1 Price, 119; 2 Rose, 149; 145 E.R. 1350; 5 Digest (Repl.) 858, 7209.

(21) *Smith v. Goddard* (1803), 3 Bos. & P. 465.

Action of assumpsit for money had and received in which the defendant pleaded the general issue.

The plaintiffs were assignees of James Amos and Charles Sutherland under a commission of bankruptcy issued against them on Feb. 9, 1816. The defendant was a lieutenant in the service of the East India Co. Amos and Sutherland were merchants in partnership, trading under the firm name of James Amos & Co. On Mar. 1, 1814, Amos, without the knowledge of Sutherland, entered into an illegal stock-jobbing transaction by which he sustained a heavy loss. It was expressly found by the jury, that the defendant was not a partner in such stock-jobbing transaction. Amos was unable to pay the loss, either with his own private funds or with those of the partnership. The defendant lent the produce of £5,000 4 per cent. consols, for the purpose of paying such loss, and it was applied for that purpose.

In consideration of this money so lent, Sutherland joined Amos in a bond to the defendant, which bond, by some mistake, had no condition annexed. In consequence of this it was afterwards cancelled, and another bond in the penal sum of £7,000 was executed between the same parties on March 10, 1815. The condition of this bond was, "to replace the stock on or before Sept. 18 then next, and in the meantime to pay the dividends." The stock was not transferred in pursuance of the condition of this bond; and the firm of Amos & Co. became very much embarrassed before Sept. 18, 1815, and Sutherland having committed an act of bankruptcy on Aug. 27 preceeding, went to America, and remained there till after the bankruptcy of Amos. During his absence Amos had the sole management of the business.

Amos afterwards executed to the defendant, at his request, three several deeds of assignment of three several cargoes; the first two of which had been shipped on account of Sutherland and Amos, and the third on account of Amos alone. These deeds were executed by Amos only. On Jan. 17, 1816, Amos committed an act of bankruptcy, and on Feb. 9 following a joint commission issued against Amos and Sutherland. In April, 1817, the defendant received sums of money on account of the proceeds each of the three cargoes mentioned in the deeds of assignment. The sums received did not, however, amount to the debt due from Amos and Sutherland to the defendant.

At the trial before ABBOTT, C.J., the jury found a verdict for the plaintiffs, subject to the opinion of the court on a Case which stated the facts set out above.

J. Evans for the plaintiffs: The condition of the bond was illegal, inasmuch as it was to secure the repayment of money lent for the express purpose of paying losses on illegal stock-jobbing transactions. He admitted that *Faikney v. Reynous* (1) and *Petrie v. Hannay* (2) were authorities against the plaintiff's claim; but he contended that those cases were overruled by *Booth v. Hodgson* (3), *Aubert v. Maze* (4), *Webb v. Brooke* (5), *Ex parte Mather* (6), *Ex parte Daniels* (7), *Ottley v. Browne* (8), *Lightfoot v. Tenant* (9), and *Langton v. Hughes* (10).

Oldnall Russell for the defendant: The only point upon which the authority of *Faikney v. Reynous* (1) and *Petrie v. Hannay* (2) was doubted was whether a party should recover who had himself been concerned in an illegal transaction. In most of the other cases cited, the payment was made by or to the party to the illegal contract; and that was the case also in *Brown v. Turner* (11) and *Mitchell v. Cockburne* (12). Here, however, that fact was expressly negatived by the jury. The authority, too, of *Faikney v. Reynous* (1) and *Petrie v. Hannay* (2), had been recognised in the subsequent cases of *Farmer v. Russell* (13), *Steers v. Lashley* (14), and *Ex parte Bulmer* (15). But even supposing that those cases were not valid authorities, the present case differed from them; first, because the defendant was not in any way concerned in the original transaction; secondly, because the payment

was not made by him directly to the party who was to receive the difference, for the money was advanced to Amos & Co., and they might have employed it as they thought fit: they might even have bought an estate with it. It was similar to the case of money lent to pay a gaming debt, or to pay a bet at a horse-race, and *Barjeau v. Walmsley* (16), *Alcinbrook v. Hall* (17), were authorities to show, that money so lent might be recovered. Another point was made, that one partner could not bind another by deed, and upon that point the court pronounced no judgment. He cited *Lambert's Case* (18), *For v. Hanbury* (19), *Coldwell v. Gregory* (20), and *Smith v. Goddard* (21).

Cur. adv. vult.

ABBOTT, C.J., delivered the following judgment of the court. -This case was lately argued before us. On the part of the plaintiffs it was contended that this loan, being made for the purpose of enabling Amos to pay or compound differences upon illegal stock-jobbing transactions, was in itself illegal, and, consequently, that all securities given for repayment of the loan were void, and the plaintiffs, therefore, entitled to recover the money received by the defendant in virtue of the assignments, after the acts of bankruptcy of Sutherland and Amos.

On the part of the defendant it was contended that as he was not a party to the illegal transaction the loan was not illegal, and the securities, therefore, were available in law. Another point was made upon the effect of the assignments executed, under the circumstances stated, by Amos alone. On this point it is only necessary to observe that, admitting it to be competent to one partner after an act of bankruptcy committed by another to dispose of their partnership property in discharge of legal demands upon the partnership; yet it is not competent for him to do so in discharge of a demand to which the partners are not by law liable; and we think the partners were not liable in the present case, because we think the loan was illegal, and the securities void.

The case was very fully and ably argued, and all the authorities bearing upon it, on one side and the other, were quoted and discussed in such a manner that it is not necessary to notice many of them with any particularity. The authorities principally in favour of the defendant are those of *Faikney v. Reynous* (1) and *Petrie v. Hannay* (2). The propriety, however, of these decisions has been questioned in the several subsequent cases that were quoted on the part of the plaintiff; and the distinction taken in the former of them between *malum prohibitum* and *malum in se* was expressly disallowed in *Aubert v. Maze* (4). Indeed, we think no such distinction can be allowed in a court of law; the court is bound, in the administration of the law, to consider every act to be unlawful, which the law has prohibited to be done. The statute upon which the objection to the loan in this case arises, viz., the 7 Geo. 2, c. 8 [repealed by 23 & 24 Vict., c. 28], was founded upon public policy, to prevent, according to the language of the preamble,

"the pernicious and destructive practice of stock-jobbing, whereby many of His Majesty's subjects are diverted from pursuing their lawful trades and vocations, to the utter ruin of themselves and families, to the great discouragement of industry, and to the manifest detriment of trade and commerce."

By s. 5, upon which this case more particularly depends, it is enacted:

"That no money or other consideration shall be voluntarily given, paid, had, or received for the compounding, satisfying, or making up any difference for not transferring any public stock, or not performing any contract or agreement stipulated to be performed; but that every such contract and agreement shall be specifically performed: and all and every person, who shall voluntarily compound, make up, pay, satisfy, take, or receive such difference-money, or other consideration whatsoever . . . shall forfeit the sum of £100."

So that the act of paying or receiving is prohibited absolutely, and those who pay and those who receive are both placed in *pari delicto*.

This statute differs from the statute against gaming, Gaming Act, 1710; for the latter contains no prohibition against the payment of money lost at play; though it enables the loser to recover back his money within a limited time, and in default of suit by him, enables any person to recover the money and treble the value within a further limited time. Then as the statute in question has absolutely prohibited the payment of money for compounding differences, it is impossible to say that the making such payment is not an unlawful act; and if it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object. We think that the present case cannot be distinguished in principle from that of the druggist who sold to a brewer, for the purpose of being mixed with beer, certain drugs, which the latter was prohibited by an Act of Parliament from mixing with beer. I allude to *Langton v. Hughes* (10), wherein it was decided that the druggist could not recover the price of the drugs sold for that unlawful purpose.

If the defendant acted unlawfully in lending his money to the bankrupts, he could not have sued them for recovery of payment because no suit can be maintained upon an unlawful act: and if recovery could not be enforced at law upon the contract of lending, neither could recovery be enforced upon a bond given for the performance of that contract; the bond was not less void than the contract. If the bond was void, the assignments mentioned in the case, which were only in furtherance of the bond, and which were made by one of the partners after an act of bankruptcy committed by the other, cannot give to the defendants a right to retain the proceeds of the goods against the plaintiffs, who claim under a commission against both the partners for the benefit of the lawful creditors of both, such commission being grounded upon acts of bankruptcy committed by each of them before any of the proceeds of the goods had come to the hands of the defendant in pursuance of the assignments. For these reasons, we are of opinion that the plaintiffs are entitled to recover the whole of the proceeds of the cargoes and investments mentioned in the case. And the *postea* must be delivered to them.

Judgment for plaintiffs.

BODENHAM AND ANOTHER v. PURCHAS

[COURT OF KING'S BENCH (Bayley, Abbott and Holroyd, JJ.), November 6, 1818]

[Reported 2 B. & Ald. 39; 106 E.R. 281]

Contract—Payment—Money paid on account—Appropriation—Guarantee—Bond given by customer to secure debt due to bankers—Payments by customer appropriated to discharge of debt.

Where a customer has secured a debt due to his bankers by a bond and all his dealings with the bankers are mixed by them in one general account, payments made from time to time by the customer will, in the absence of any appropriation by the bankers, be considered as payments on account of and to the discharge of his secured loan in the order in which such payments are received. This is so notwithstanding any change in the constitution of the banking firm between the various payments by the debtor.

Notes. Applied: *Smith v. Wigley and Tunnicliffe* (1833), 3 Moo. & S. 174. Considered: *Chitty v. Naish* (1834), 2 Dowl. 511; *Siebel v. Springfield* (1863), 9 L.T. 324. Approved: *City Discount Co. v. McLean* (1874), L.R. 9 C.P. 692. Referred to: *Simson v. Cooke* (1824), 1 Bing. 452; *Pemberton v. Oakes* (1827), 4 Russ. 154; *Field v. Carr* (1828), 5 Bing. 13; *Mills v. Fowkes* (1839), 8 L.J.C.P. 276; *Bank of Scotland v. Christie* (1841), 8 Cl. & Fin. 214; *Henniker v. Wigg* (1843), 4 Q.B. 792; *Maxwell v. Deare* (1854), 23 L.T.O.S. 1; *Allaway v. Bennett, Allaway v. Harris* (1860), 2 L.T. 434; *Hooper v. Keay* (1875), 1 Q.B.D. 178; *Cory Bros. & Co., Ltd. v. Turkish Steamship Mecca (Owners), The Mecca*, [1895-9] All E.R. Rep. 933; *Deeley v. Lloyds Bank*, [1912] A.C. 756; *Albemarle Supply Co. v. Hind & Co.*, [1927] All E.R. Rep. 401; *Re Yeovil Glove Co.*, [1962] 3 All E.R. 400.

As to discharge of a guarantee, see 18 HALSBURY'S LAWS (3rd Edn.) 493, 494; and for cases see 26 DIGEST (Repl.) 155 et seq.

Cases referred to:

- (1) *Kirby v. Duke of Marlborough* (1813), 2 M. & S. 18; 105 E.R. 289; 26 Digest (Repl.) 96, 663.
- (2) *Peters v. Anderson* (1814), 5 Taunt. 596; 1 Marsh. 238; 128 E.R. 823; 12 Digest (Repl.) 539, 4083.
- (3) *Bosanquet v. Wray* (1815), 6 Taunt. 597; 2 Marsh. 319; 128 E.R. 1167; 12 Digest (Repl.) 539.
- (4) *Hall v. Wood* (1785), 14 East, 244, n.; 104 E.R. 594; 12 Digest (Repl.) 539, 4082.
- (5) *Plomer v. Long* (1816), 1 Stark. 153; 12 Digest (Repl.) 556, 4211.
- (6) *Devaynes v. Noble, Clayton's Case* (1816), ante p. 1; 1 Mer. 529, 572; 35 E.R. 767, 781; 12 Digest (Repl.) 29, 59.
- (7) *Wade v. Wilson* (1801), 1 East, 195.

Action on a bond.

The defendant N. Purchas, the elder, and N. Purchas, the younger, were indebted to the plaintiffs and William Havard, their deceased partner, in the penal sum of £918 16s. 6d. on a joint and several bond dated Jan. 1, 1804. After setting out on over the bond and condition, the latter of which was "for repayment by the defendant, and N. Purchas the younger or either of them, their or either of their heirs, executors . . . unto the plaintiffs and Havard, their executors . . . of a balance of £4,590 18s. 3d., with lawful interest and also of such further sums as they the plaintiffs and Havard might advance or lend, remit or pay, to or on account or for the use of the N. Purchas, the elder, or N. Purchas, the younger, in the course of their business as bankers or otherwise, with interest, according to the usage and custom of their said business, not exceeding in the whole the said sum of £9,000, without any deduction or abatement whatsoever"

the defendant pleaded, first, non est factum, upon which issue was joined; secondly, payment of the said sum of £4,590 18s. 3d. and interest, and such further sum according to the condition of the bond.

It was alleged in replication to the last plea that after making the bond, the plaintiffs and William Havard advanced to the defendant in the course of their business as bankers according to the usage and custom of their business the sum of £4,409 1s. 9d.; yet neither the defendant nor N. Purchas the younger, paid the said £4,590 18s. 3d. mentioned in the condition or such further sum of money, but that the whole £9,000 still remained unpaid and unsatisfied to plaintiffs. The rejoinder was that the defendant and N. Purchas the younger, or one of them, had paid to the plaintiffs and to William Havard, in the lifetime of William Havard, and to plaintiffs since the death of William Havard, the said sum of £4,590 18s. 3d., mentioned in the condition referred to, and the further sum of money advanced to the defendant, as alleged in the replication. On this issue was joined.

At the trial before LORD ELLENBOROUGH, C.J., a verdict was found for the plaintiffs for the penalty of the bond, subject to the award of an arbitrator, who by his award stated the facts of the case (as far as respects the point ultimately decided by the court) to be as follows: The action was brought by the plaintiffs, as surviving partners of William Havard, to recover £923 and interest, upon the bond set out in the pleading, the execution of which was admitted. The plaintiffs and their deceased partner had long prior to, and at the time of the execution of the bond until April 30, 1810, carried on business as bankers at Hereford, in the firm of Bodenham, Phillips and Havard, or Bodenham, Phillips & Co. On April 30, 1810, Havard died.

The defendant during all the period above mentioned, kept an account with the plaintiffs and Havard, and usually balanced his account every three months, when he signed the ledger and received his vouchers. On Mar. 31, 1810, the balance was £2,904 11s. 7d. in favour of the plaintiffs and Havard and on April 30 in that year, the defendant examined his account up to the Mar. 31 preceding, received his vouchers, and signed the ledger as usual. On April 9, the plaintiffs and Havard advanced a further sum of £1,500, which appears to have been the only transaction between Mar. 31 and Havard's death; so that on the death of Havard, the balance due from the defendant was increased to £4,404 11s. 7d. After the death of Havard, the plaintiffs carried on the business, without making any alteration in their firm or their books, till the latter end of the year, when they agreed to take Mr. John Garrett into partnership, as from July 1 preceding; but although the style of the firm was then changed to Bodenham, Phillips and Garrett, the accounts were continued in the same manner as before, and the balance continued as if there had been no alteration in the firm. On June 30, 1810, no notice was taken of Havard's death, but the account, including items both subsequent and prior to that event, was then settled, and the balance of £1,420 struck as if nothing had happened.

In June, 1813, the defendant relinquished his business, and on June 26, he signed an order, directing Bodenham & Co. to transfer his account to that of his sons, N. and R. W. Purchas. In consequence of which an account was made out by Bodenham & Co., which, after stating the several items, concludes thus: "Balance transferred to Messrs. N. and R. W. Purchas, £2,538 13s. 10d."

This account was not signed by the defendant, but on July 30 following, the plaintiffs delivered up to Nathaniel Purchas, Junior, who had for some time acted as agent for his father, the vouchers for his father's accounts, the plaintiffs still retaining the bond. The balance of the father's account was accordingly transferred to the sons, who had for some time kept a separate account with the bankers under the firm of N. and R. W. Purchas. On June 30, 1813, immediately before the transfer, the sons' account was £620 1s. 1d. in their favour; but by the transfer of the father's balance, was turned £1,918 12s. 9d. in favour of the bankers. The

sons' account continued open with the plaintiffs and Garrett till 1816, when they stopped payment, the account having been balanced, and the vouchers given up quarterly; the balance was never reduced below the sum sought to be recovered, viz., £923 14s. 8d., and when they stopped, it was £3,694 18s. 9d. in favour of the plaintiffs. A

If the plaintiffs were bound to have applied or were to be considered as having applied the first moneys received after the death of Havard or after the transfer of the father's balance to the sons' account, to the discharge of the balance due at Havard's death, or at the time of the transfer, sufficient money was received to liquidate such balance, but in fact no such application was directed or specifically made, nor was the balance on any quarterly or half-yearly settlement ever below the sum sought to be recovered in this action of £923 14s. 8d. Nothing was said by or to the defendant, respecting the bond, or any claim made upon him until the sons' failure; but on the plaintiffs and Garrett remonstrating with Nathaniel Purchas the younger, one of the sons, respecting the increase of the account from time to time, he told the plaintiffs they need not be under any apprehension, as they held his father's security, alluding to the bond. It was admitted that the sons had paid a compensation of 15s. in the pound on the balance due, but expressly without prejudice to the plaintiffs' claim for the remainder against the defendant. B C D

On these facts it was contended by the plaintiffs, that the whole of the balance due at the death of Havard had not been discharged, and that they were entitled to a verdict for the sum of £923 14s. 8d. the remaining sum of five shillings in the pound, on the balance of the account as it stood at the time of the sons' failure. On the other hand, it was contended by the defendant that the debt due at the death of Havard must be considered as discharged, either by the first moneys which were paid subsequently to the death of Havard or by the fact of the transfer to the sons' account or by the balance due to the sons immediately before the transfer, and the first moneys paid by them afterwards, and that, therefore, he was entitled to a verdict. The arbitrator was of opinion that the balance due at the death of Havard must be considered as discharged by the first moneys paid in after his death, and, therefore, ordered the verdict to be entered for the defendant, and if the court should think that he was right in that opinion, or that the balance was discharged by any other means, his award was to stand. An application having been accordingly made on the part of the plaintiffs to set aside the award, the court ordered the question to come on in the form of a Special Case. E F G

Chitty for the plaintiffs: The debtor not having specifically appropriated any of the payments to discharge the bonds, the creditors are at liberty to apply the same in discharge of the subsequent advances, and then the bond remains unsatisfied. For the rule of law to be collected from all the authorities, is this: that the debtor at the time of making payment, may apply the same in discharge of any debt he pleases; but if he makes no appropriation, then the creditor may at his election apply the same to the discharge of any one of several debts to the exclusion of the rest: *Kirby v. Duke of Marlborough* (1), *Peters v. Anderson* (2), *Bosanquet v. Wray* (3), *Hall v. Wood* (4); and this rule applies even in prejudice of a surety: *Plomer v. Long* (5). The award is founded upon *Clayton's Case* (6). That was the case of an unsecured banking account, continued after the death of one of the bankers by his surviving partners, who as such, were liable to pay all debts incurred in the lifetime of their deceased partner. The question here arises upon a bond, conditioned not for the paying of one entire sum, but for securing such advances as might from time to time be made. Such a bond, therefore, could not be satisfied by the first moneys paid into the banking house by the obligors, for it was intended as a continuing security for any balance that might at any time remain unsatisfied. To apply the doctrine of *Clayton's Case* (6) to this, would obviously contravene the intention of the parties themselves. H I

Osborne for the defendant, was stopped by the court.

BAYLEY, J.—I cannot distinguish this in principle from *Clayton's Case* (6). The decisions in the courts of law do not break in upon the distinction there taken. The principle established by those decisions is this, that where there are distinct accounts and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply such payment to which account he pleases; but where the accounts are treated as one entire account by all parties, that rule does not apply. In this case the bond was given in 1801, for advances made or to be made in Havard's lifetime; at his death, the balance due was £4,404. The surviving partners might then have called for payment of that sum, or they might have treated it as an insulated transaction, and kept that as a distinct and separate account; but instead of that, they blend it with the subsequent transactions; for in the first account delivered after Havard's death, are included several items, down to June 30, and the payments after his death reduce the balance at that time, to £1,420. They might even then have treated this balance as a distinct account, and as money due on the bond, if they had so chosen. Do they do so? Look at the next account: the parties balance their accounts every three months, and in the next quarterly account, they bring forward the balance of £1,420, and make it an item in one entire account, subsisting between these parties. The account goes on from 1810 till 1813; and the then balance is treated as one entire balance of one entire account, as the result of all the transactions between the parties in the intermediate time. The plaintiffs were not bound to have so treated it at Havard's death, but having done so, there is no authority for saying that they are now at liberty to apply the several payments in reduction of the debt incurred by the subsequent advances, to the exclusion of the bond debt. It certainly seems most consistent with reason, that where payments are made upon one entire account, that such payments should be considered as payments in discharge of the earlier items. *Clayton's Case* (6), where all the authorities were fully considered by SIR WILLIAM GRANT, M.R., is directly against the plaintiffs' right to make any such appropriation as he desires. That case does not break in upon any of the cases at law, and ought to govern our decision in the present instance. I am, therefore, of opinion that there ought to be judgment for the defendant.

ABBOTT, J.—I am also of opinion that the plaintiffs are not entitled to recover. I think that this question is decided by *Clayton's Case* (6), which was very fully argued. All the decisions were there before SIR WILLIAM GRANT, M.R., and he pronounced judgment against Clayton. It was a case decided upon great consideration, and is an authority of great weight. This case in principle is exactly the same. There it was held that payments made by surviving partners to Clayton, with whom there was a general account, should extinguish the old debt: here the converse of the proposition applies, and the payment by the debtor, to the surviving partners from time to time, upon one general account, including the old debt to the plaintiff and Havard, must, upon the same principle, extinguish that debt. SIR WILLIAM GRANT, M.R., said (*ante* p. 6):

"In such a case" [that is a banking account] "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts."

The principle of that decision governs the present, and there must, therefore, be judgment for the defendant.

HOLROYD, J.—It seems to me, that the transfer of the balance of the defendant's account by the plaintiffs to the son may be considered as the payment of so much money by the son, on account of the father, to the banker, and a re-loan by them of the same sum to the sons. In *Wade v. Wilson* (7) which was an action for penalties for taking usurious interest, the declaration stated the loan to be from the defendant to one Goulton. The evidence was, that Goulton owed Flintoft money on bond, and that the latter was indebted to Wilson; and that it was agreed between the several parties that Wilson should accept Goulton as his debtor, instead of Flintoft; Goulton accordingly gave his promissory note to Wilson for the sum therein specified, with 5 per cent. interest, and, in addition to that, paid a premium to Wilson. It was objected that there was not any loan of money from Wilson to Goulton; but that this was the mere substitution of one debt for another. The court, however, held that this constituted a loan from Wilson to Goulton, from the period of the date of the promissory note. The principle upon which that decision took place must have been that the acceptance of Goulton, as the debtor, instead of Flintoft, operated as the payment of the debt of the latter; for if that debt were not paid, there could have been no loan from Wilson to Goulton.

That case, therefore, would seem to show that the mere transfer by the bankers of the father's debt to the sons' account with their assent, operated as a payment of the father's debt by the sons, and a re-loan of the same sum to the latter by the bankers. It is unnecessary, however, to decide the question upon that ground; for *Clayton's Case* (6), which seems to me to have been decided upon the soundest principles, is exactly in point with this, and ought to govern our decision; and, upon the authority of that case, I am of opinion, that there ought to be judgment for the defendant.

Judgment for defendant.

EDWARDS v. KELLY AND ANOTHER

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Bayley, Abbott and Holroyd, JJ.), May 6, 1817]

[Reported 6 M. & S. 204; 105 E.R. 1219]

Distress—For rent—Suspension of debt by distress—Sale of distrained goods by third party with landlord's consent—Third party's undertaking to pay arrears of rent—Right of landlord to enforce undertaking—Statute of Frauds (29 Car. 2, c. 3), s. 4.

The plaintiff, having distrained for arrears of rent on goods which the tenant was about to sell and were of greater value than the arrears of rent, agreed with the defendants to deliver up the distress and permit one of the defendants to sell the goods for the tenant on the defendants' joint undertaking to pay the plaintiff all the rent that was due to him from the tenant. The plaintiff thereupon gave up the distress to the defendants, who had notice of the amount of rent due, but after the sale refused to pay the plaintiff.

Held: this was not a case where one person agreed to pay the debt of another since at the time the promise was made by the defendants the debt was suspended by the distress; the case, therefore, was not within s. 4 of the Statute of Frauds (1677), and the plaintiff was entitled to recover.

Notes. Applied: *Lehain v. Philpott* (1875), L.R. 10 Exch. 242. Referred to: *Thomas v. Williams* (1830), 10 B. & C. 664; *Rounce v. Woodyard* (1846), 8 L.T.O.S. 186; *Fitzgerald v. Dressler* (1859), 7 C.B.N.S. 374; *Harburg India Rubber Comd Co. v. Martin*, [1902] 1 K.B. 778.

As to the existence of a distress being the answer to an action for the rent, see 12 HALSBURY'S LAWS (3rd Edn.) 142; and for cases see 18 DIGEST (Repl.) 340 et seq. For the Statute of Frauds, s. 4, see 4 HALSBURY'S STATUTES (2nd Edn.) 658.

Cases referred to:

- (1) *Read v. Nash* (1751), 1 Wils. 305; 95 E.R. 632; 26 Digest (Repl.) 39, 251.
- (2) *Tomlinson v. Gill* (1756), Amb. 330; 27 E.R. 221; 26 Digest (Repl.) 40, 265.
- (3) *Williams v. Leper* (1766), 3 Burr. 1886; 2 Wils. 308; 97 E.R. 1152; 26 Digest (Repl.) 38, 243.
- (4) *Houlditch v. Milne* (1800), 3 Esp. 86; 26 Digest (Repl.) 44, 288.
- (5) *Castling v. Aubert* (1802), 2 East, 325; 102 E.R. 393; 26 Digest (Repl.) 30, 179.
- (6) *Chater v. Beckett* (1797), 7 Term Rep. 201; 101 E.R. 931; 26 Digest (Repl.) 30, 182.

Action of assumpsit tried before HOLROYD, J., when a verdict was found for the plaintiff for £398 11s. 2d., subject to the opinion of the court on a Case.

The Case stated that Edward Kelly, on Mar. 13, 1816, and for four years preceding, held part of the Barton of Rame, and tenement Bastard Combe, as tenant to the plaintiff, at the yearly rent of £570. On the Mar 13 aforesaid the sum of £398 11s. 2d., being due from him for arrears of rent to Dec. 25, 1815, the plaintiff distrained upon the premises, divers cattle, goods, and chattels of greater value than the arrear of rent, which Edward Kelly being at that time about to sell, the plaintiff agreed with the defendants, Thomas Kelly and Robert Brickwood, to deliver up the distress, and permit the same to be sold by Brickwood for Edward Kelly, upon the defendants jointly undertaking to pay the plaintiff all such rent as should appear to be due to him from Edward Kelly to the said Dec. 25, whereupon the defendants signed the following written statement:

"We, the undersigned, hereby agree and undertake to pay to Thomas Edwards all such rent as shall appear to be legally due to him from Edward Kelly the tenant, of part of the Barton of Rame and tenement Bastard Combe, up to the 25th day of December, 1815.

"ROBERT BRICKWOOD.

"THOMAS KELLY."

"Witness J. Rowe."

The plaintiff, upon the signing and delivery to him of this written statement, gave up the distress, and by his permission the cattle, goods, and chattels were sold by Brickwood for Edward Kelly, and were removed from the premises by the purchasers. The defendants had notice that the sum of £398 11s. 2d. was legally due to the plaintiff from Edward Kelly, and were requested to pay, but refused.

The question for the opinion of the court was whether this case was within the Statute of Frauds, s. 4; and if so, whether, under the provisions of that statute, the plaintiff was entitled to recover.

By s. 4 of the Statute of Frauds:

"No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt default or miscarriages of another person . . . unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

Bayly for the plaintiff, argued that this was not a case within the statute. There is this distinction, whenever there is a new contract and an original consideration, it is not a case within the statute: *Read v. Nash* (1); *Tomlinson v. Gill* (2); *Williams v. Leper* (3); *Houlditch v. Milne* (4); and *Castling v. Aubert* (5). The present case differs in one respect only from *Williams v. Leper* (3), here the

plaintiff having the distress in hand, the consideration for the promise was his giving it up; whereas in *Williams v. Leper* (3), the consideration was his forbearing to make the distress; but the surrender of a benefit acquired is certainly as good a consideration as the forbearance to seek it. A

Gifford for the defendant: This is a promise to pay the debt of another; it is, in the language of the statute, "to answer for the debt, default, or miscarriage of another;" therefore, there must be an agreement in writing. The distinction taken by the plaintiff cannot hold, because every promise to answer for the debt of another is a new contract, yet is it within the statute, for it is expressly declared to be so. As to the other branch of the position, there was not any original consideration, if, by that term is meant a consideration moving to the defendants' benefit, so as to make this a promise on their own account. B

In *Read v. Nash* (1), the defendant was, in the strict sense of the expression, the original contractor; for there was not any debt owing to the plaintiff from any third person at the time when the promise was made, and the judgment proceeded on this distinction. So in *Williams v. Leper* (3), according to the report in *Wilson*, the defendant had an interest in the goods, for a bill of sale had been made to him; wherefore the court, with the exception of *ASTON, J.*, say (2 *Wils.* C
308): D

"This is not a promise for the debt of another, the goods were debtor, and the defendant was in nature of a bailiff for the landlord, and if he had sold them and received money for them an action for money had and received for the plaintiff's use would have lain. The defendant had an interest, and the plaintiff gave up his right to distrain." E

Having waived a right in respect of which the defendant was personally interested, the plaintiff in that case might well be considered as entitled to treat the defendant's promise as a new contract upon a good consideration moving to him. How different is the present case! Here the defendants had no interest in the goods, a bill of sale had not been made to them; one of them, indeed, was to sell the goods, but it does not appear that either of them was to derive advantage from the proceeds; on the contrary, the goods were to be sold for the tenant; so that the consideration of the promise was exclusively moving to him. Although it may be true that the plaintiff was induced to forego a right which he then held, yet that circumstance alone has never been considered sufficient to avoid the statute; for if it had, the decision in *Chater v. Beckett* (6) must have been the other way, because the plaintiff in that case stayed proceedings on a *ca. sa.* F

In *Houlditch v. Milne* (4), *LORD ELDON* considered the possession and use of the thing as the material point. He said (3 *Esp.* at p. 87): G

"If a person got goods into his possession on which the landlord had a right to distrain for rent, and he promised to pay the rent, though it was clearly the debt of another, yet a note in writing was not necessary." H

And *LE BLANC, J.*, in *Castling v. Aubert* (5), holds similar language (2 *East* at p. 332): I

"This is a case in which one man having a fund adequate to the discharge of encumbrances, another man undertook that if that fund were delivered up to him, he would take it with the encumbrances."

Nothing of this applies to a case where the goods were only delivered to the defendants for the use of the tenant, he remaining still liable to the debt, and it being his debt, as the written statement imports, for which the defendants undertook. Money had and received would not have lain against them as in *Castling v. Aubert* (5).

LORD ELLENBOROUGH, C.J.—Perhaps this case might be distinguishable from that of *Williams v. Leper* (3), if the goods distrained had not been delivered up to the defendants. But here was a delivery to them in trust, in effect, to raise

by sale of the goods sufficient to satisfy the plaintiff's demand; the goods were put into their possession subject to this trust. So that in substance this was an undertaking by the defendants that the fund should be available for the purpose of liquidating the arrears of rent. There was, therefore, a consideration for this promise partly falling within the authority of *Williams v. Leper* (3), partly within that of *Read v. Nash* (1).

BAYLEY, J.—I think that *Williams v. Leper* (3) goes the whole length of deciding this case; and that in one particular it is stronger than that case; because in that a distress had not been made, here the plaintiff had the distress in his hands. It is only necessary to attend to the facts in order to see that this case is not within the statute. After the plaintiff had distrained, he held in his own hands his remedy for recovering the rent, and the tenant was at that time no longer indebted; for so long as the landlord held the goods under distress the debt due from the tenant was suspended. What then, I would ask, is the substance of this contract? It is as if the defendants had proposed to the plaintiff in these words; you must convert the goods into money in order to satisfy yourself the arrears due, if you will allow us to do this we will pay you. And what would this have been but an independent contract between these parties? I think that the present case is neither within the letter nor mischief of the Act of Parliament, which was aimed at cases where a debt being due from one person, another engaged to pay it for him. But here, for the reason above stated, at the time when the promise was made, the debt was not owing from the tenant.

ABBOTT, J.—I am unable to distinguish this case in principle from *Williams v. Leper* (3), and I find that case was recognised in *Houlditch v. Milne* (4) and *Castling v. Aubert* (5). I think that this is not a promise to answer the debt of another.

HOLROYD, J.—I am of the same opinion. If debt were brought for the arrears while the goods were under distress, the tenant might plead the distress in answer, which shows that the debt was for the time suspended. The consideration for this promise was a fresh consideration, not merely moving to the tenant, but to those who made the promise to pay a debt which at that time did not exist as the debt of another.

Judgment for plaintiff.

CHASE AND OTHERS *v.* WESTMORE AND ANOTHER

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Bayley, Abbott and Holroyd, JJ.), May 21, 1816]

[Reported 5 M. & S. 180; 105 E.R. 1016]

Lien—Work done—Chattel delivered to workman at different times for work to be done—Entire contract.

A workman who has bestowed his labour upon a chattel in consideration of a price fixed by agreement with the owner may detain the chattel until the price be paid, and this though the chattel be delivered to the workman in different parcels and at different times, if the work to be done under the agreement be entire.

Notes. Considered: *Sanderson v. Bell* (1834), 2 Cr. & M. 304. Referred to: *Crawshay v. Homfray* (1820), 4 B. & Ald. 50; *Scarfe v. Morgan*, [1835-42] All E.R. Rep. 43; *Pinnock v. Harrison* (1838), 3 M. & W. 532; *Spartali v. Benecke* (1850), 10 C.B. 212; *Re Taylor, Stileman and Underwood*, [1891] 1 Ch. 590; *Tappenden v. Artus*, [1963] 3 All E.R. 213.

As to the effect on lien of contract for particular time or mode of payment, see 24 HALSBURY'S LAWS (3rd Edn.) 148; and for cases see 32 DIGEST (Repl.) 260.

Cases referred to:

- (1) *Wolf v. Summers* (1811), 2 Camp. 631; 8 Digest (Repl.) 161, 1029.
- (2) *Collins v. Ongly* (1697), 2 Selwyn's N.P., 10th Ed. 1377; 32 Digest (Repl.) 267, 134.
- (3) *Brenan v. Currint* (1755), Say. 224; 96 E.R. 860; 32 Digest (Repl.) 267, 135.
- (4) *Hostler's Case* (1605), Yelv. 66; 80 E.R. 46; 29 Digest (Repl.) 26, 307.
- (5) *Jones v. Pearle* (1723), 1 Str. 557; 32 Digest (Repl.) 268, 145.
- (6) *Chapman v. Allen* (1632), Cro. Car. 271; 79 E.R. 836; 32 Digest (Repl.) 261, 71.
- (7) *Cowell v. Simpson* (1809), 16 Ves. 275; 33 E.R. 989, L.C.; 32 Digest (Repl.) 275, 207.
- (8) *Cowper v. Andrews* (1612), Hob. 41.

Also referred to in argument:

- Stevenson v. Blakelock* (1813), 1 M. & S. 535; 105 E.R. 200; 32 Digest (Repl.) 267, 136.
- Re Matthews, Ex parte Ockenden* (1754), 1 Atk. 235; 26 E.R. 151, L.C.; 32 Digest (Repl.) 291, 370.
- Green v. Farmer* (1768), 4 Burr. 2214; 1 Wm. Bl. 651; 98 E.R. 154; 32 Digest (Repl.) 277, 229.
- Ex parte Deeze* (1748), 1 Deac. 684, n.; 1 Atk. 228; cited in 4 Burr. at p. 2222; 26 E.R. 146, L.C.; 32 Digest (Repl.) 279, 261.
- Olive v. Smith* (1813), 5 Taunt. 56; 2 Rose, 122; 128 E.R. 607; 4 Digest (Repl.) 438, 3868.

Action of trover for a quantity of wheat meal, fine pollard, coarse pollard, and bran, together with some sacks, brought by the assignees in bankruptcy of William and Thomas Hurst.

The plaintiffs were the assignees in bankruptcy of two partners formerly trading in meal, who before their bankruptcy had entered into an agreement with the defendants, who were in partnership as millers, for the defendants to grind wheat for them at 15s. Od. per load. The bankrupts were to deliver the wheat in their own vessels to the defendants, who for the said sum were to unload the wheat, grind it, provide sacks and return the ground meal, pollard and bran to the bankrupts.

vessels. About nineteen loads of wheat were sent in the first instance, followed by other consignments of varying quantities to a total of 146 loads, the contract also provided for mixing of the grain as and when required, and some mixing was done. At the time of the bankruptcy the defendants were in possession of seven loads of wheat unground, ten of meal ground from the wheat, sixty bushels of fine pollard, twenty bushels of coarse pollard and twenty bushels of bran, produced by the grinding, and eighty sacks delivered by the bankrupts for the purpose of being filled with the meal which had been ground. After the bankruptcy the plaintiffs demanded the delivery of this property, which was refused, and sought to recover it by an action of trover, either as being the property of the bankrupts or of themselves as their assignees.

At the trial before GRAHAM, B., at the Hampshire Spring Assizes, 1815, a verdict was found for the plaintiffs for £1,200 subject to the opinion of the court on a Case which stated the facts set out above. The question for the opinion of the court was whether the defendants had a right to detain the property for the general balance due to them under s. 28 of the statute 5 Geo. 2, c. 30 [see now s. 31 of the Bankruptcy Act, 1914], or whether they had a lien on it, in whole or in part, for the balance due to them for grinding all the wheat ground by them or such as had been ground and remained in their hands at the time of the bankruptcy.

A. Moore for the plaintiffs.

Gifford for the defendants.

Cur. adv. vult.

LORD ELLENBOROUGH, C.J., delivered the following judgment of the court. —This case was argued before us last term and stood over for our consideration upon the single question whether a workman, having bestowed his labour upon a chattel, in consideration of a price or reward fixed in amount by his agreement with the owner, at the time of its delivery to him, can by law detain the chattel until the price be paid, or must seek his remedy by action, no time or mode of payment having been appointed by the agreement. We were all of opinion upon the argument, and still are, that if a right to detain exists in the general case that I have mentioned, the present defendants have a right to detain the goods in question for the money due to them for grinding all the wheat; because we consider the whole to have been done under one bargain, although the wheat was delivered in different parcels and at different times. The general question is of very great and extensive importance.

Several authorities were referred to (which I shall hereafter notice) against the right to detain; but if these authorities are not supported by law and reason, the convenience of mankind certainly requires that our decision should not be governed by them; and we believe the practice of modern times has not proceeded upon any distinction between an agreement for a stipulated price and the implied contract to pay a reasonable price or sum; and that the right of detainer has been practically acknowledged in both cases alike. In *Wolf v. Summers* (1), LAWRENCE, J., does not appear to have been aware of any such distinction. It is impossible, indeed, to find any solid reason for saying that if I contract with a miller to grind my wheat at 15s. a load, he shall be bound to deliver it to me when ground without receiving the price of his labour; but that if I merely deliver it to him to grind without fixing the price, he may detain it until I pay him, though probably he would demand and the law would give him the very same sum.

Certainly if the right of detainer, considered as a right at common law (and it must be so considered in this case), exists only in those cases where there is no manner of contract between the parties, except such as the law implies, this court cannot extend the rule, and authorities were quoted to establish this proposition, but upon consideration, we are of opinion that those authorities are contrary to reason and to the principles of law, and ought not to govern our present decision. The earliest of them is to be found in 2 ROLLE'S ABRIDGMENT, p. 92, which, however,

is only a dictum of WILLIAMS, J.; and it does not appear on what occasion it was pronounced or that it governed the decision of any case. It is in these words : A

"If I put my clothes to a tailor to make, he may keep them until satisfaction for the making, Trinity Term 3 Ja. K. B., by WILLIAMS, J."—"But if I contract with a tailor, that he shall have so much for making my apparel, he cannot keep them until satisfaction for the making, Trinity Term 3 Ja. K. B., by WILLIAMS, J." B

This distinction appears to have been acknowledged by HOLT, C.J., in *Collins v. Ongly* (2) as quoted by RYDER, C.J., in *Brenan v. Currint* (3). But the point was not in judgment before HOLT, C.J., and, therefore, the opinion then delivered by him, although entitled to great respect, has not the weight that would belong to a judicial decision of that very learned judge. C

The latter case of *Brenan v. Currint* (3) is, as far as we can find, the only case wherein this distinction was made the foundation of the judgment of any court. It was there carried to the extremest limit; for the contract was only to pay a reasonable sum, which is no more than the law would have implied if the parties had not expressed it. The opinion of POPHAM, C.J., in the *Hostler's Case* (4), has sometimes been cited as an authority for this distinction, but the only distinction plainly expressed on that occasion applies to the sale of a horse for his keep, and not to a detainer of the animal. The Chief Justice there says : D

"That an innkeeper cannot sell a horse for his keep, where the price of it has been agreed upon, though he may do so if there has been no agreement for the price;" E

but the power of sale in the case there put has been since denied : see *Jones v. Pearle* (5). *Hostler's Case* (4) was an action for the keep of the horse; and all that was said by POPHAM, C.J., as to detainer and sale was extrajudicial. It was in the very same year, term and court, in which the opinion of WILLIAMS, J., is said to have been delivered; and if (as seems very probable) his opinion was delivered on this occasion, it was extrajudicial also. *Chapman v. Allen* (6) has also been quoted on this subject. That case, however, does not appear to have been decided on the ground supposed, but rather on the ground that a person taking in cattle to agist could not detain until the price be paid; or if he could in general do so, yet that in the particular case the defendant was guilty of a conversion as against the plaintiff, who was a purchaser of the cattle, by having delivered them over to a third person, on receiving from such third person the amount of his demand. F G

In *Cowell v. Simpson* (7), LORD ELDON, L.C., considers a lien as a right accompanying an implied contract; and in one passage of his judgment he is reported to have said (16 Ves. at p. 281) : H

"If [the possession] commences under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing, the one contract destroys the other." H

It is evident, however, from other parts of the report that the Lord Chancellor was there speaking of a special contract for a particular mode of payment. Such a contract is apparently inconsistent with a right to detain the possession, and consequently will defeat a claim to the exercise of such a right. We agree that where the parties contract for a particular time or mode of payment, the workman has no right to set up a claim to the possession inconsistent with the terms of his contract. If WILLIAMS, J., is to be understood to speak of a contract for the time as well as the amount of payment, his opinion will not be contrary to our present judgment; and the authorities built upon it will have been founded on a mistake. We are inclined to think that he must have intended to express himself to that effect; because the earliest authority that we have met with mentions an agreement for the time of payment, but makes no distinction between an implied contract and a I A

A contract for a determinate price. This authority is in the YEAR BOOK, Easter Term, 5 Edw. 4, fol. 2, b. :

"Note, also, by HAYDON, that an hosteler may detain a horse, if the master will not pay him for his eating. The same law is if a tailor make for me a gown, he may keep the gown until he is paid for his labour. And the same law is, if I buy of you a horse for 20s., you may keep the horse until I pay you the 20s.; but if I am to pay you at Michaelmas next ensuing, here you shall not keep the horse until you are paid."

In this passage the law, as applied to the cases of the hosteler, the tailor, and the vendor, is said to be the same, and in the latter the sum is supposed to be fixed. The distinction drawn is where a future time of payment is fixed. If so material a distinction as that which depends upon fixing the amount of the price had been supposed to exist at that time, we think it would have been noticed in this place; and not being noticed, we think it was not then supposed to exist.

So, in *Cowper v. Andrews* (8), HOBART, C.J., speaking of the word "pro," "for," says (Hob. at pp. 41, 42), that this word

"works by condition precedent in all personal contracts. As if I sell you my horse for £10, you shall not take my horse, except you pay me £10, 18 Edw. 4, 5, and 14 Hen. 8, 22, except I do expressly give you day; and yet in this case you may let your horse go and have an action of debt for your money; and so may the tailor retain the garment till he be paid for the making, by a condition in law."

The reason in the case of sale is given in the YEAR BOOK, 14 Hen. 8, 20, a. :

"The cause is for that each has not the same advantage the one against the other; for, the one will have the thing in possession, the other but an action, which is not reason, nor the same advantage."

Considering the operation of the word "for," as noticed by HOBART, C.J., whose opinion is confirmed by the cases he refers to and by others also, no reason can be assigned for saying that it shall not have the same effect in a contract to grind a load of wheat for 15s. as in a contract to sell a load of wheat for £15. The former, indeed, is in substance a sale of a certain portion of the time and labour of the miller and of the use of his machinery. And as it is clear that the miller could not maintain an action upon the contract without averring that he had ground, and was ready to deliver, the wheat, if the other party can by law recover the wheat without averring that he had paid or tendered the price of the grinding, he will have an advantage above the miller; for he will have his goods and the miller will have only an action. If the distinction which has been contended for on the part of the plaintiff should be allowed, what must be said in those cases where a workman is not only to bestow a portion of his labour on a chattel delivered to him, but also to apply to it some materials or goods of his own, for a fixed price? As in the case of a picture-frame sent to be gilded or varnished, and even in the old case of cloth sent to a tailor to be made into a garment, is the chattel to be retained by the workman on the ground of his having applied to it his paint or varnish or thread or other materials, or must he deliver these to his employer without payment because he has bestowed his own personal labour in addition to them?

Upon the whole, we think this supposed distinction is contrary to reason, and to that principle in the law which requires the payment of the price and the delivery of the chattel to be concurrent acts, where no day of payment is given; and, therefore, we think *Brenan v. Currint* (3), and the dicta on which it appears to have been founded are not law, and that the judgment in the present case must be for the defendants.

Judgment for defendants.

SCHMALING v. TOMLINSON AND OTHERS

[COURT OF COMMON PLEAS (Gibbs, C.J., Heath, Chambre and Dallas, JJ.),
April 29, 1815]

[Reported 1 Marsh. 500; 6 Taunt. 147; 128 E.R. 989]

Contract—Privity—Contract of service—Assignment to third person without consent of other party to contract—Rights of assignee against that other party.

A firm employed by the defendant to transport goods to a foreign market delegated the performance of the entire contract to the plaintiff who carried it out without the privity of the defendant.

Held: there being no privity between the plaintiff and the defendant, the plaintiff could not recover his commission or payment for his services from the defendant.

Notes. Referred to: *Meyerstein v. Eastern Agency Co.* (1885), 1 T.L.R. 595.

As to rights of strangers to a contract, and as to the person by whom a contract is to be performed, see 8 HALSBURY'S LAWS (3rd Edn.) 66 and 161; and for cases see 12 DIGEST (Repl.) 45 et seq., 660 et seq. As to the assignment of liabilities by act of parties, see 8 HALSBURY'S LAWS (3rd Edn.) 258; and for cases see 12 DIGEST (Repl.) 665 et seq. As to the position of a sub-agent, see 1 HALSBURY'S LAWS (3rd Edn.) 172, 173; and for cases see 1 DIGEST (Repl.) 450, 451.

Case referred to:

(1) *Cull v. Backhouse* (1793), 6 Taunt. 149; 128 E.R. 990; 1 Digest (Repl.) 450, 1023.

Rule Nisi obtained by the defendants to set aside the verdict and enter a nonsuit in an action to recover the sum of £3,600 being the amount of commission, duties, freight, premiums of insurance, warehouse rent, and other charges, incurred by the plaintiff in shipping and forwarding a quantity of cocoa, the property of the defendants, from London to Amsterdam.

The circumstances in which the plaintiff had undertaken this work appeared at the trial before GIBBS, C.J., as follows: In consequence of Hulletts, the defendants' brokers in London, having recommended Aldibert, Becker & Co. to the defendants as perfectly safe persons, the defendants wrote to Hulletts, that although Aldibert, Becker & Co. were unknown to themselves, if they, Hulletts, thought them respectable men, the defendants would employ them to transport the cocoa to Amsterdam, and Aldibert undertook to conduct the whole, by the circuitous route which the state of European commerce then rendered necessary, and the defendants knew no one but Aldibert, Becker & Co. in the business. Aldibert, Becker & Co. employed the plaintiff, who was indebted to them, to perform the whole business, which the plaintiff did, but without any communication from the defendants, to whom he now looked for payment. The defence was that the defendants were liable to Aldibert, Becker & Co., whom alone they had entrusted, and to no one else.

GIBBS, C.J., was strongly inclined to think there was no privity between the parties and that the action would not lie. The jury found that the goods were sent as was intended, but that there was no privity between the plaintiff and the defendants, and a verdict passed for the plaintiff, subject to an award as to the amount, and to the opinion of the court, whether in these circumstances the plaintiff was entitled to recover to any and what extent. *Serjeant Best* obtained a rule nisi to set aside the verdict, and enter a nonsuit.

Shepherd and *Serjeant Lens* for the plaintiff, showed cause against the rule: The peculiar state of the commercial world at the time of this transaction, rendered it necessary that the goods should be conveyed by such concealed agents as

A Aldibert, Becker & Co. might employ; and they, having found such a one in the plaintiff, he forthwith became the immediate agent of the defendants, and entitled to look to them for payment. This case differs from that of *Cull v. Backhouse* (1)* cited by the Chief Justice at the trial; for there the plaintiff was employed to do only a part of the business which the defendant had commissioned the prime agent to perform; whereas here is a transfer of the entire employment, and the plaintiff is responsible for the whole to the defendant, as well as to Aldibert, Becker & Co. At all events the plaintiff may recover for a certain part of the money, being that which he actually disbursed, and a certain part of the work, being that which he himself actually performed in England. It will not follow that if the plaintiff may recover, all the persons on the continent who had any share in transporting the goods may, therefore, in like manner recover their respective debts against the defendants; for those persons all acted by the orders of the plaintiff. He who deals with an agent, believing him to be a principal, may, when the principal is discovered, charge the principal.

Serjeant Best was not called on to support the rule.

Cur adv. vult.

D April 29, 1815. **GIBBS, C.J.**, delivered the following opinion of the court.—There is no privity between the plaintiff and the defendants. There was nothing by which the defendants could conjecture that the plaintiff ever would be introduced to them; nothing by which they should know that they ever should meet with such a person as the plaintiff. The defendants must indeed know that some persons must be employed under Aldibert, Becker & Co. to get the goods to Amsterdam, but there is nothing whereby they ever authorised Aldibert, Becker & Co. to employ any one person to conduct the whole. An argument was raised by counsel for the plaintiff on this ground, that the defendants must know that someone would be employed by Aldibert, Becker & Co.; but he forgets the fact that another person introduced Aldibert, Becker & Co. to the defendants as the persons who were to conduct the whole; and there is no pretence that the defendants ever authorised them to employ any other to do the whole under them. The defendants looked to Aldibert, Becker & Co. only, for the performance of the work, and Aldibert, Becker & Co. had a right to look to the defendants for payment, and no one else had that right. The consequence, therefore, is that the plaintiff must be nonsuited, and the rule to set aside the verdict must be made absolute.

Rule absolute.

I
* *Cull v. Backhouse* (1), B. R. Guildhall sittings after Hilary Term, 1793, before LORD KENYON, C.J. That was an action for work and labour, and money paid, brought to recover a compensation for conveying corn from the interior parts of North America down to the coast, and the dues paid on shipping it. A person who was commissioned by the defendant to purchase and ship wheat for him, employed the plaintiff to bring it down to the coast, and to pay shipping charges, etc., but failed to pay him, whereupon he claimed the amount from the defendants, who had not at that time paid to their immediate agent any part of the sum due for this service. LORD KENYON, C.J., held that the plaintiff must sue the person who actually employed him, and not the defendant.

HARTLEY v. HITCHCOCK

[COURT OF KING'S BENCH (Lord Ellenborough, C.J.), November 30, 1816]

[Reported 1 Stark. 408]

Lien—Repairer's lien—Loss of lien—Owner allowed to have possession of repaired chattel from time to time.

A. repaired a carriage for B. and allowed him to take it away from time to time after the repairs were completed. At the expiration of two months A. refused to let B. take away the carriage unless he paid a weekly fee for standage and the cost of repairs. In an action of trover,

Held: A., having relinquished possession after the repairs were completed, could not afterwards detain the carriage for the cost of repairs, nor, without an express contract, for standage unless B. left the carriage for an unreasonable time.

Notes. Referred to: *British Empire Shipping Co. v. Somes* (1858), E.B. & E. 353.

As to lien of work and labour, see 2 HALSBURY'S LAWS (3rd Edn.) 127 et seq.; and for cases see 32 DIGEST (Repl.) 259, 286, et seq.

Action of trover to recover the value of a tilbury.

The defendant was a coach-maker, and the plaintiff had sent his tilbury to him to be repaired. After the repairs had been completed, the tilbury remained, by the permission of the defendant, in his yard, and the plaintiff had frequently taken it out of the yard and returned it. At the expiration of two months the defendant, on Oct. 12, refused to permit the plaintiff to take away the tilbury unless he paid for the standage for two months, at the rate of two shillings per week and also the amount of the repairs for which, it was stated, the plaintiff had given a bill of exchange, which would be due on Oct. 23. The plaintiff tendered him one shilling and sixpence per week for the standage.

Storks for the defendant, contended that he had a right to detain the tilbury for the repairs and also for the standage at the rate of two shillings per week, supposing that sum to be no more than a reasonable compensation.

Bolland for the plaintiff.

LORD ELLENBOROUGH, C.J.—The defendant, after the repairs were completed, relinquished his possession and could not afterwards detain for the amount of the repairs. With respect to standage, there can be no legal claim for it without an express contract between the parties, or unless the owner has left his property on the premises beyond a reasonable time, and after notice has been given to him to remove it.

Verdict for plaintiff.

EARL OF LONSDALE v. NELSON AND OTHERS

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), November 14, 1823]

[Reported 2 B. & C. 302; 3 Dow. & Ry. K.B. 556; 2 L.J.O.S.K.B. 28; 107 E.R. 396]

Nuisance—Abatement—Abatement without notice—Nuisance by act of commission—Nuisance by omission—Overhanging trees—Security of lives and property.

PER BEST, J. : Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them. There is, however, no decided case which sanctions the abatement by an individual of nuisances from omission except that of cutting the branches of trees which overhang a public road or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence which distinguishes this case from most of the other cases which have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands.

Notes. Considered: *Jones v. Williams* (1843), 11 M. & W. 176; *Lemmon v. Webb*, [1891-4] All E.R. Rep. 749; *Campbell Davys v. Lloyd*, [1901] 2 Ch. 518; *Noble v. Harrison*, [1926] All E.R. Rep. 284. Referred to: *Lyme Regis Corp'n. v. Henley*, [1824-34] All E.R. Rep. 503; *Lagan Navigation Co. v. Lambeg Bleaching, Dyeing and Finishing Co.*, [1926] All E.R. Rep. 230; *Davey v. Harrow Corp'n.*, [1957] 2 All E.R. 305.

As to abatement of nuisance, see 28 HALSBURY'S LAWS (3rd Edn.) 150 et seq.; and for cases see 36 DIGEST (Repl.) 302 et seq.

Cases referred to in argument :

Penruddock's Case (1598), 5 Co. Rep. 100 b; Jenk. 260; 77 E.R. 210; 36 Digest (Repl.) 305, 518.

Baten's Case (1610), 9 Co. Rep. 53 b; 77 E.R. 810; 36 Digest (Repl.) 302, 482.

Mouse's Case (1608), 12 Co. Rep. 63; 177 E.R. 1341; sub nom. *Gravesend Barge Case*, 1 Roll. Rep. 79; 8 Digest (Repl.) 21, 116.

R. v. Wilcox (1690), 2 Salk. 458; 91 E.R. 395; 36 Digest (Repl.) 347, 875.

Rule Nisi obtained by the plaintiff to enter judgment non obstante veredicto in an action of trespass in which the plaintiff alleged, in the first count of the declaration, that the defendants broke and entered the manor of the plaintiff, called Seaton, and pulled down a quantity of wooden paling and fencing of the plaintiff and erected a quantity of wooden paling and fencing and deposited there a quantity of timber, bricks, stones and rubbish. The second count was for breaking and entering the close of the plaintiff, but was in all other respects like the first.

The defendants denied liability and pleaded that the close was part and parcel of the manor of Seaton, and that, at all material times there was an ancient and public port or harbour, called Workington harbour, partly within the manor and close, and also in the river Derwent, in a certain part thereof, where the river now is. That at all material times and from time whereof the memory of man is not to the contrary, the Derwent was a public and common navigable river, in which the tides and waters of the sea had flowed and re-flowed.

The defendants stated that at all material times there was in that part of the harbour which was in the manor and close, a certain ancient work or erection

belonging to the harbour, which was necessary for the support, maintenance and preservation of the harbour, for rendering it safe and commodious for the ships and vessels resorting thereto. Further that before the material time, this erection was in great decay, for want of necessary repairing; and that it so remained and continued, but the plaintiff did not, nor would repair it but wholly neglected so to do. Wherefore the defendants, while the erection was in such a ruinous condition, for the purpose of repairing it, broke and entered the manor and close and repaired the erection; and because the paling and fencing were part of the erection and in great decay, the defendants pulled them down and repaired the erection with the new paling, fencing, bricks, etc.

The fourth plea stated that a part of a public navigable river was situate within the manor and close, and that the work or erection in question in that part of the river was requisite and necessary for rendering the navigation of the river safe and commodious.

At the trial before Wood, B., at the Cumberland Summer Assizes, 1822, a verdict was found for the plaintiff on the first plea, and for the defendant on the second and fourth. Counsel for the plaintiff obtained a rule nisi for entering judgment for the plaintiff on the second and fourth pleas, non obstante veredicto, when the court directed that it should be argued as a Special Case.

Parke for the plaintiff.

Alderson for the defendants.

ABBOTT, C.J.—I am of opinion that the plaintiff is entitled to judgment, non obstante veredicto, on the second and fourth pleas.

This was an action of trespass. The first count charged a breaking and entering of the plaintiff's manor, and the second count a breaking and entering of the plaintiff's close. The only difference between them is the substitution in the latter of the word close for manor in the former. On the general issue a verdict was found for the plaintiff. It was, therefore, established that he was entitled to the manor and close, and in possession of both; and the only question is whether the special pleas are a good justification of that which was done.

It is incumbent on him who enters on the land of another to show that he has a right to do so. The substance of the pleas is that there is an ancient and immemorial harbour and navigable river, partly situate within the manor and close, and that, in that part which is within the manor and close, there is an ancient work or erection (not that there has been such a work from time immemorial) requisite and necessary for the maintenance of the port, and for rendering it and the navigation of the river safe and commodious for the ships resorting thereto. There is a further allegation, that this work was in a state of decay and that the plaintiff did not nor would repair it but neglected so to do wherefore the defendants entered and repaired.

The defendants have not alleged that immediate repairs were necessary, nor that any person bound to repair had neglected to do so after notice, nor that a reasonable time for making the repairs had elapsed. They have not even alleged that they had occasion to use the port or river; and for anything that appears on these pleadings, they may have been mere volunteers, not at all interested in the preservation of the work in question, nor prejudiced by the want of those repairs which they thought fit to do. On these grounds, I am of opinion that judgment be entered for the plaintiff on the issues on the second and fourth pleas.

BAYLEY and HOLROYD, JJ., concurred.

BEST, J.—Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them. There is, however, no decided case which sanctions the abatement, by an individual, of nuisances from omission except that of cutting the branches of trees which overhang a public road or the private property

of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence which distinguishes this case from most of the other cases that have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands but follow the advice of SIR MATTHEW HALE, and appeal to a court of justice.

It is not stated in this plea that this building had been out of repair for any time. An accident the day before it was repaired might have reduced it to the state in which it was found by these defendants. Neither does it appear that this building was immediately wanted, either for the safety or convenience of such as resorted to the port, or that these defendants ever had or were ever likely to have occasion to use it, or had any more right to interfere with the repairs of it than all the other subjects of the realm. If no person in particular be bound to repair, those who wish to do any repairs ought to give him, on whose land they have occasion to enter for that purpose, some notice of their intention that he may decide whether he will not rather do what is necessary himself than suffer the intrusion of strangers on his estate. I am, therefore, of opinion that these pleas cannot be supported.

Judgment for plaintiff.

ATTORNEY-GENERAL v. CATHERINE HALL, CAMBRIDGE (MASTER AND FELLOWS)

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), February 8, 9, 11, 12, 1820]

[Reported Jac. 381; 37 E.R. 894]

Charity—Corporation—Visitor—Mandamus to hear dispute—Review of decision by court—Sovereign visitor of old foundation—Accession—Sovereign visitor of new foundation—Declaration by founder that no visitor.

The Court of King's Bench will grant a mandamus to the visitor of an eleemosynary corporation commanding him to hear a dispute between members of the corporation, but if the visitor's decision is wrong the court cannot alter it.

If the Sovereign is visitor of an old foundation which accepts an accession the Sovereign becomes visitor of the new foundation even if the founder has declared that there shall be no visitor.

Charity—Condition—Rents of devised property not to be increased—Validity.

Devise of an estate for charitable purposes, with a direction that the rents should not be raised: **Held:** this direction was void, and there was no resulting trust for the heir-at-law as to the increased rents.

Notes. Considered: *A.-G. v. Drapers' Co.* (1843), 6 Beav. 382. Referred to: *A.-G. v. Greenhill* (1863), 33 Beav. 193.

As to the visitor of an eleemosynary corporation, see 4 HALSBURY'S LAWS (3rd Edn.) 408-414; and for cases see 8 DIGEST (Repl.) 504-508.

Cases referred to:

(1) *Thetford School Case* (1609), 8 Co. Rep. 130 b; 77 E.R. 671; 8 Digest (Repl.) 443, 1328.

- (2) *A.-G. v. Coventry Corpn.* (1700), 2 Vern. 397 (see also 3 Madd. 353); reversed (1702), Colles, 280; 1 E.R. 286, H.L.; subsequent proceedings sub nom. *Coventry Corpn. v. A.-G.* (1820), 7 Bro. Parl. Cas. 235; 2 Eq. Cas. Abr. 192; 3 E.R. 153, H.L.; 8 Digest (Repl.) 444, 1330 et seq.
- (3) *Arnold v. A.-G.* (1698), Show. Parl. Cas. 22; 1 E.R. 15, H.L.; 8 Digest (Repl.) 445, 1358.
- (4) *A.-G. v. Sparks* (1753), Amb. 201; 27 E.R. 134; 8 Digest (Repl.) 444, 1332.
- (5) *A.-G. v. Earl of Winchelsea* (1791), 3 Bro. C.C. 373; 28 E.R. 591; 8 Digest (Repl.) 445, 1360.
- (6) *A.-G. v. Bristol Corpn.* (1818), 3 Madd. 319; reversed (1820), 2 Jac. & W. 294; 37 E.R. 640, L.C.; 8 Digest (Repl.) 446, 1363.
- (7) *A.-G. v. Andrew* (1798), 3 Ves. 633; 30 E.R. 1194, L.C.; affirmed 1800, Feb. 20, H.L. (see 7 Ves. 223); 8 Digest (Repl.) 433, 1235.
- (8) *R. v. Bishop of Lincoln* (1785), 2 Term Rep. 338, n.; 100 E.R. 182; 8 Digest (Repl.) 510, 2357.

Bill for an account of property comprised in a devise for charity and other relief.

Mary Ramsden, widow, by her will dated Nov. 3, 1743, gave all her estates, both real and personal, to trustees upon trust and for several uses therein mentioned, and, after certain bequests and directions, devised as follows:

"When the annuitants hereinafter mentioned are dead, and all other things appointed my executors to do are performed and also a site of ground purchased or procured for erecting a building for the reception of six fellows and ten scholars in the college or hall of St. Catherine the Virgin, in the University of Cambridge, then my trustees do well and truly convey all the real estates above mentioned and all the personal estate to the master and fellows of the college or hall of St. Catherine the Virgin, in the University of Cambridge for ever for the uses and purposes hereinafter mentioned, viz., for erecting the buildings aforesaid and for the maintenance of six fellows and ten scholars in the said college or hall and for other uses in such manner and under such directions as are contained in a writing hereunto annexed under my hand and seal intituled 'Rules and orders touching the benefaction of Mrs. Mary Ramsden to Catherine Hall, in Cambridge,' which writing, consisting of ten half-sheets of paper and thirty-three sections or paragraphs, I do make a part of this my said will. I do appoint and order that the buildings on my estate be kept in good repair, that the rents continue the same as at the time of my decease, and that leases be not made for a longer term than eleven years."

The paper referred to in the will contained several rules for the government of the foundation. The first and second related to the buildings to be erected for the reception of the new fellows and scholars. By the third rule it was directed that when the building should be completed and be fit to be inhabited and the whole expense of it cleared, then the annual rents and profits were to stand for ever appropriated for the uses and purposes thereafter mentioned and principally for the founding and maintaining six fellowships and ten scholarships in the hall or college, to be called by the name of the Skirne fellowships and scholarships. The next eight rules related to the qualifications and the elections of fellows. By the ninth rule the first election was to be by the master and fellows of Catherine Hall, the vice-chancellor of the university having a casting vote. In the subsequent elections the fellows of the new foundation were, by the eleventh rule, to join and have equal votes, and they were to attend the examinations preceding the elections. By the twelfth rule the testatrix appointed that for the maintenance of the fellows they should have clear £52 a year, besides their lodgings rent free. The fellows of this foundation were in all things not therein specially directed otherwise to be subject to all the rules, orders, statutes, and discipline of the college; they were to be obliged in their turns to perform all college and university exercises; and to stand to all commons in the hall and all other college dues as the then fellows

did. By the thirteenth rule the fellows were to reside in the college six months in the year, or, if they resided for a less time, they were to forfeit 16s. 8d. a week, "to be applied as hereinafter directed to the common stock of the college." By the fourteenth rule the profits during the vacancy of a fellowship were to be "laid aside as above mentioned for the common stock of the college, to be applied as hereafter directed."

By the seventeenth rule in all elections of scholars after the first (in which the master and fellows of Catherine Hall only were to be the electors), the fellows of this foundation were to be joined with them, and have equal votes. By the nineteenth rule the stipends of the scholars were to be £15 a year, besides their chambers rent free. They were to be subject in all things to the master and fellows, and to the discipline of the college in the same manner as the then scholars. By the twenty-second rule, they were also, in case of non-residence, to forfeit 5s. per week, which was to go to the common stock. Rule 27 was as follows:

"The rents of the estates given in support of this benefaction, I think, now stand at a reasonable rate, at which I hope they may be always kept; and as I desire the tenants may always have good and beneficial bargains, I would have no attempts, if possible, made to raise them. As they now stand I hope, after all deductions on account of taxes and repairs and charges of management, the payment of the fellows and scholars, and the other small payments charged in the last article, there will still a surplusage remain from the rents and profits of the estates for the benefit of the college, which, together with the forfeitures that shall accrue from the absence and vacancies of the fellowships and scholarships, I would have thrown into the common stock of the college, and improved if it may be as a fund for the repairs of the college in general as well the old as the new buildings, or the discharge of any debt that may now lie on the old college on account of the buildings already erected, or the making any additional buildings, or buying of books for the library, or other such public uses within the said college, but first, after all the necessary outgoings for taxes, repairs, and management, I would have the fellows and scholars paid before any other disbursements whatsoever. And if the rents of the estates prove at any time not sufficient to pay the same, I would have the forfeitures for absences and vacancies brought in aid, and pay the whole which is appointed to be distributed before anything be laid aside for the common stock of the college."

Rule 28 directed the estates always to be let out as near as might be at the then rents, no lease to be longer than eleven years, and no fines to be taken. By r. 29 the estates were to be visited every five years by the bursar and one of the fellows of the foundation, and the expenses of the journeys paid out of the rents. The accounts of this foundation were to be annually audited, the audit to be immediately after the common college audit, and the fellows of this foundation to be present and assist therein. Rule 32 was as follows:

"And whereas I have been informed likewise that there are some of the fellows of this college of bye foundations, who are called fellows though they have no power or privileges as such, for the avoiding all mistakes in the construction of these orders and rules, wherever the master and fellows of the college are mentioned I would always have it understood to be meant of the master and fellows of the old foundation."

The whole concluded in the following terms:

"Great care having been taken to make these rules and orders explicit and precise so that it is hoped they cannot easily be mistaken, I, therefore, appoint no visitor of this foundation, but if any errors or mistakes have been committed, or complaint shall hereafter arise touching the execution of any of these orders or statutes, for the rectifying the same, I do direct that application be always

made to the Lord High Chancellor or Lord Keeper of the Great Seal of Great Britain that the same may be heard by way of petition or such other summary manner as his Lordship in his wisdom shall appoint, and by him to be finally determined."

The testatrix died in 1745. Proceedings in Chancery were afterwards had relative to her property in the course of which the will and the schedule of rules were established by a decree made on Dec. 9, 1752, and in 1767 the estates devised by the testatrix were, pursuant to the decree, conveyed by the surviving trustee to the master and fellows of Catherine Hall in trust for the master and fellows according to the true intent and meaning of the will and the rules and orders thereto annexed.

The gross annual rents of the estates, which at the death of the testatrix amounted to £674, had since increased to nearly £2,000. Some sums had also been received from the sale of timber. The surplus rents after payment of the stipends to the fellows and scholars of Mrs. Ramsden's foundation and the other charges made by her were thrown into the common stock of the college, or, as it was usually called, the college stock, a fund which also comprised part of the rents of the fellowship estates and other revenues of the old foundation, chamber rents, sundry payments by members of the college, payments on admissions, and degrees, compositions, and vacant fellowships and scholarships. This fund was under the exclusive control of the master and fellows of the old foundation. By several college orders the stipends of the Skirne fellows and scholars had been increased. The last increase was in 1807 when an order was made under which each of the Skirne fellows received £68 per annum, and each of the scholars £20 per annum out of the college stock in addition to the stipends given by the will. Additions had also been made out of the same fund to the stipends of the master and fellows of the old foundation, and various other expenses of the college were defrayed out of it. Some parts of it had at different times been laid out in buildings, enclosures, and other improvements, and in the purchase of land.

It appeared that, between 1786 and 1790, several sums of money, part of the college stock, had been invested in the 3 per cent. consolidated annuities, and, by a college order made in 1791, the sums thus purchased together with the accumulations and additions that might be made to them were to be denominated the patronage fund and to be employed in improving and augmenting the ecclesiastical patronage of the old foundation of the college by paying annuities of £120 and £150 respectively to the future incumbents of two college livings of small value, and, after that purpose should be answered, in purchasing ecclesiastical preferment for the benefit of the Skirne fellows. No additions were afterwards made to the patronage fund, but it received considerable increase by being suffered to accumulate.

On May 24, 1805, an order was made by the Lord Chancellor as visitor of the college in right of the Crown upon the petition of the master of the college giving liberty to propose a plan for the raising and application of the patronage fund. Pursuant to this order, a plan was laid before one of the Masters of the court and approved by him so far as related to the allotting two annuities of £120 and £150, in augmentation of the two livings mentioned. It did not appear that this plan, after receiving the approbation of the Master, was submitted to the Lord Chancellor. In 1816, one of the two livings in question becoming vacant, one of the fellows of the old foundation was presented and he petitioned the Lord Chancellor as visitor that the annuity of £150 might be paid him out of the interest of the patronage fund which then amounted to £12,802 3 per cent. consols. By the affidavit in support of the petition, containing a statement of accounts, it appeared that £2,712 7s. 4d. consols, part of this fund, had arisen from the revenues and estates of the old foundation, and by the order made on hearing the petition on Aug. 13, 1816, the Lord Chancellor as visitor signified his assent that the master and fellows

A should be at liberty, if they thought fit, to apply the sum of £2,712 7s. 4d. consols in augmentation of the living, but without prejudice to any claim they might have to the remaining part of the fund as having arisen from the revenues and estates of the old foundation or otherwise.

B The present suit was commenced in June, 1817, by an information and bill by five of the fellows of Mrs. Ramsden's foundation against the master and fellows of the college and the heir-at-law of Mrs. Ramsden. The scholars and one of the fellows who declined to join were also made defendants. It prayed that the accounts of the property comprised in Mrs. Ramsden's benefaction might be taken, that the fellows and scholars of her foundation might be declared to be its primary objects, that their stipends might be increased, that a scheme might be approved of for the disposition of the surplus rents and accumulations, and that the stipends, if increased, might be paid or allowed to the plaintiffs from the time of their respectively becoming fellows. The master and fellows by their answer contended that the management of the common stock, including the surplus rents of Mrs. Ramsden's estates, was vested in them and that it was the intention of the testatrix materially to benefit the old foundation, and they submitted that the stipends of the Skirne fellows and scholars ought not to receive any further increase.

D *Hart, Heald and Pemberton* for the relators, and *Shadwell* for the defendants in the same interest: The increased value of the estates has produced a considerable surplus income, which was not anticipated by the testatrix. Her will expresses a wish that the rents, being then fixed at a reasonable rate, might remain unaltered, but that wish cannot, under present circumstances, prevent the devisees from letting the estates according to the improved values. As the whole property is given to charity, the heir-at-law is excluded from this surplus, and the question is to what purposes of charity it is to be applied. Not being in the contemplation of the testatrix, the directions in her will and in the rules do not reach it; it is not expressly disposed of, and it ought, therefore, to be applied *cy-près*. The object of the testatrix was principally to benefit the new foundation, and the surplus should, therefore, be applied in furtherance of that object. There is no intention expressed of giving anything exclusively for the benefit of the old foundation. The surplus which might exist at the time she gives for the benefit of the college and desires that it may form part of the common stock, but the directions which follow show that she means the college consisting of both the foundations, for the specified purposes to which it is to be applied are for the benefit of both, and the other public uses to which it may be applied must be understood to mean uses of the same nature as those specified before in the benefit of which the whole college would participate. The common stock which she speaks of means a fund to be used for the benefit of both foundations. If, therefore, the court should be of opinion that the surplus which has now arisen ought to be applied to purposes analogous to those to which the testatrix has devoted the then surplus, it would follow that the new foundation is entitled to share it equally with the old. [*Thetford School Case* (1), *A.-G. v. Coventry Corpn.* (2), *Arnold v. A.-G.* (3), *A.-G. v. Sparks* (4), *A.-G. v. Earl of Winchelsea* (5), and *A.-G. v. Bristol Corpn.* (6) were referred to.]

H *Duckworth* for the heir-at-law.

I *Wetherall and Matthews* for the master and fellows of the old foundation: The design of the testatrix was to give the surplus absolutely to the old foundation. Colleges not being bound to adopt accessions to their foundations, some advantage is usually proffered to induce them to allow a new foundation to be grafted on their establishments, and in this case the benefit given to the old college is the surplus which might remain after defraying the expenses of the new fellowships and scholarships. The testatrix hopes that a surplusage will remain for the benefit of the college, and r. 32 shows that she is here speaking of the old college. She then directs it to be thrown into the common stock of the college, a fund which was then in existence, and which belonged to the old foundation. The surplus is, therefore,

expressly given to them, without any control on the part of the Skirne fellows, subject only to the duty of repairing, building, etc. The amount to which the surplus has attained cannot vary the question. If the case were before a visitor he might perhaps think himself justified in entering into other considerations which cannot be attended to by the court, but the question upon this information is whether the new foundation has a legal right to the surplus. The decision must depend on the legal construction of the will and rules by which it is given to the master and fellows without any liability to account for the application of it, and they have acted with great liberality in giving the additional stipends to the new members of the college.

Feb. 12, 1820. **LORD ELDON, L.C.**—It appears to me that in any way of stating this case the relief prayed for is much more extensive than in any case of the kind that has ever been brought before the court, but that furnishes no objection, for in a charity case, if relief ought to be given, it may be given whatever be the form in which it is applied for. I have looked at *A.-G. v. Bristol Corpn.* (6), but it does not apply to the present case, except in the particular that the vice-chancellor decided that case on the intent and meaning of the founder of the charity, and the single question was whether the vice-chancellor had rightly discovered what was the true intention of the founder.

The true question here is: What did Mrs. Ramsden, in point of law, by the instrument which is called her will declare her intention to be with respect to any possible surplus that might arise out of the rents and profits of her estate? It is, therefore, unnecessary to go into many of those points of doctrine which were stated at the Bar, but I take it to be quite clear that no college is bound to accept an accession to its foundation; on the other hand, it is equally clear that, if a college does accept an accession, it must accept it according to the terms proposed by the donor unless in the acceptance it makes a new bargain for other modifications. That a college is not bound to accept an accession was fully settled in *A.-G. v. Andrew* (7). Though in that case it was thought by many that Trinity Hall, Cambridge, which had been dealing for many years with the funds which were given to it in support of the new accession, had accepted it, the court decided that it had not, but the court did not mean to vary the rule that, if a college had accepted an accession, it would be bound by such acceptance.

Counsel for the master and fellows of the old foundation has taken a distinction between the power of the Lord Chancellor sitting in curia and a visitor sitting in camera. I do not enter into that distinction, for I am not now called on to determine what a visitor may do. It is enough to say with respect to that question, as LORD MANSFIELD said in *R. v. Bishop of Lincoln* (8), that the Court of King's Bench will grant a mandamus to a visitor commanding him to hear the complaint alleged, but that, if the visitor decides wrongly, the court cannot alter his decision. But I am not here acting as visitor because, on looking at the last clause of Mrs. Ramsden's will, I find she says that she will appoint no visitor. I agree that, if there had not been these negative words, it might have been contended that I am the visitor; she, however, having thus expressed herself, it seems to me that it was her intention that the Lord Chancellor should not be visitor, but that under his judicial authority he should take jurisdiction to hear any dispute by petition or otherwise in a summary way—a jurisdiction which the Lord Chancellor has not. I think, therefore, it is impossible that I can be considered as visitor in this case, and I likewise think that, sitting in a judicial capacity, I cannot be prescribed to by any individual as to the course to be pursued with respect to any proceedings in this court. The testatrix had not power to give the jurisdiction which she has attempted to give.

The question which I have to decide is this: What was the true intent and meaning of Mrs. Ramsden in making this will? This question must be decided on general principles. This case is very important with regard to other collegiate

A institutions. I do not know much about the colleges at Cambridge, but I know that at Oxford there are some colleges in which accessions have been made to the old foundations of such a nature that the new fellows are made part of the original body, and are entitled to the same allowances, the same rights of electing, and to all the other privileges of the old foundation. There are other colleges which are formed of old and new foundations having different estates, in which the fellows of the new foundations are not entitled to the privileges of the old, but in which the founder has left the rents and profits of his estates to be equally divided among them both, or where, from usage or from what may be evidence of the terms on which the new foundations were accepted, the rents and profits are equally divided. There are likewise other colleges at Oxford to which estates have been given to pay sums of money to support fellows who are maintained in this way out of the estates, and the surplus has been enjoyed according to usage for a long course of years, which may be taken as evidence of the terms on which they were accepted. There are cases in which such distribution has existed for centuries, and I am sure you could not introduce a new rule into the universities with respect to the application of their funds without causing considerable confusion and distress, and such consequences make it the imperative duty of the court, before it does so, to be quite sure that the usage is contrary to the intention of the founders and that that intention requires the usage to be interrupted. The court ought to be sure that such was the intention of the testatrix before it lays down any rule respecting the application of the fund in this case, but if the court sees clearly that it was her intention that the surplus arising out of the rents and profits of her estate, after all the uses which she had specified had been executed, should be divided equally among the fellows and scholars of both the old and new foundation, or should be applied exclusively for the benefit of her own foundation—I say, if the court is perfectly sure that such was her intention, it is bound to order such application.

F Let us look at this case. In 1743 this lady makes her will. [His LORDSHIP read the material parts of the will, observing that there was no part of it specifying who she meant by the master and fellows of the college, and he continued:] In r. 32 of the rules and regulations which she has made part of her will there is her exposition of these terms, stating that she means the master and fellows of the old foundation only. They are to be the devisees under her will. She then goes on to say that the estates are given to them “for the uses and purposes hereinafter mentioned, viz., for erecting, etc., and for other uses, etc.,” and then she refers to the rules and regulations which have been established by a decree as part of her will. It has been argued that the whole of the rents and profits of the estates were left for the support of Mrs. Ramsden’s foundation, and that no part of the surplus belonged to the old foundation. It has likewise been argued that the surplus ought to have been equally divided between the fellows and scholars of the new foundation and those of the old foundation. The question, however, comes at last to this—whether, on the true construction of this instrument, the enjoyment of the surplus is or is not given by this testatrix to the master and fellows of the old foundation as one of the benefits which they were to receive for accepting this new accession.

I There is an intention expressed in this part of her will respecting not raising the rents of her estates. One question is whether she meant that the rents should continue the same during the lives of the then tenants, or that the rents should never be raised. If it was her intention that the rents should not be raised during the lives of the then tenants, that would be to give the difference to the tenants for the time being, but, if she meant that the rents should for ever continue the same, she gave a direction which was inconsistent with the legal devise of the estate, and the court has often held that it cannot give effect to such words. This sort of clause operates as nothing in either way; it does not narrow the gift. It appears to me that the heir-at-law, therefore, has no interest in this estate. There is no resulting

trust for him and the information must be dismissed against him, but he must have all his costs. A

With respect to the rules, there is hardly any part of them that does not deserve attention. The testatrix mentions how the new fellows are to be provided for, appointing that they do have £52 a year, and directs that they should in all things be subject to the rules and statutes of the college. But if I understand it, they are not entitled to all the privileges of the old fellows. They are entitled to vote together with the old fellows in the future choice of the Ramsden fellows, but not in the choice of the old fellows, and it is quite clear that they have not in fact had the same privileges as the fellows of the old foundation. Then follows the clause with respect to residence under which the forfeitures were to be thrown into the common stock of the college. This is a very material regulation, because it does not appear to me, that according to the obvious sense of the words "common stock," as expressed in this will, they must mean a common stock of the old and new colleges together, but that the words "common stock" must be taken to mean, the common stock of the college at the time this will was made. B C

Then follows r. 27 which has a peculiar importance because it is on this clause, connected with every other clause to which we can look for the exposition of the meaning of the words in this clause, that the question depends. If there was any surplus of the rents remaining it was to be for the benefit of the college and with the forfeitures to be thrown into the common stock. The first question is what these words "for the benefit of the college" mean? I think these words mean, for the benefit of the college of the old foundation, and that the surplus which might remain out of the rents and profits of the estate after all the purposes of the will had been executed, together with the forfeitures that would accrue in consequence of non-residence, were to be for the benefit of the old foundation and to be thrown into their common stock as the common stock of the college. If this clause had ended here, it seems to me to be quite clear, that both the surplus and forfeitures were given for the benefit of the old college, and the difficulty arises on the subsequent words in this clause, directing it to be improved as a fund for repairing, building, buying books, or other such public uses. D E F

If an information had been filed on the death of the testatrix respecting her will, it is quite clear that the new and old fellows must have at least admitted that, if the surplus with the forfeitures could be improved as a fund for the repairs of the college in general, for buying books, etc., and if such purposes had not been executed, it would have been the duty of the court to have ordered this surplus to be appropriated for the execution of those purposes, and I think at present that it would be my duty to refer this case to the Master to see whether there is a fund which ought to be set apart for the repairs of the new and old colleges in general, whether there is any debt remaining which ought to be discharged; whether any buildings ought to be erected; whether there ought to be a fund for the purchasing of books for the library; and whether all or a part of the fund should be kept for other uses within the college. The words are "other public uses within the said college," and it seems to me that the meaning of these words is, any other purposes within the walls of the college. G H

The material question is with respect to the surplus after all these purposes have been fulfilled: Is it given to the college for their own use and benefit, or does the college take this surplus only because they are devisees of the estate, and does the case, therefore, fall within the rule of those cases in which the primary intent will determine how the fund so given is to be distributed? Is it one of those cases in which the testatrix has directed that the whole of the surplus should be applied to certain purposes, or is it a gift of the surplus for the benefit of the college after certain particular purposes have been carried into execution? I take this to be the true way of stating the question. One thing is clear—that, if the surplus was no larger than she expected it would have been at the time she made the will, it would be clearly given for the benefit of the old college, and then are you to say that they I

A are not entitled to it, because this surplus has increased to a much larger sum than she thought it would do?

B She goes on to say that, if the rents and profits prove not sufficient to pay the fellows and scholars, she would have the forfeitures, etc., brought in aid, before anything be laid aside for the common stock of the college. By these words she means the common stock that belongs to the old foundation, and does not this show that she did not mean to give them these forfeitures unless there was a deficiency to make good the payments to them? If this surplus is to go wholly to them, the forfeitures would be taken back out of the common stock, for the benefit of those who forfeited them. Rule 29 directs the expenses of visiting the estates to be paid out of the rents. It has been contended that this direction was unnecessary if the college was to take the whole surplus of the estate, but that cannot be maintained if you look at the whole of the will because this is the will of a person who supposes that there might be a deficiency in the fund, and, if that took place, the college would not have these expenses without this direction, and then it comes back to this question: If she gave the surplus to the old college, supposing it would be small, has the court a right to say that the devisees who are to take it if it is small, are not to take it if it is large? There follow the directions as to the audit which seem to me extremely material because the intention with respect to the surplus in 1820 cannot differ from what it was at the time this will was made, in 1743. If at the end of the first year after this will came into operation, after the scholars and fellows were all paid, there was a clear surplus of £5, can any person doubt that that would have been an accretion to the common stock of the old college, forming in the next year a part of their college audit which is distinguished by the regulations from the audit of this foundation? The new fellows are to assist at the audit of the new foundation with the old fellows. Nothing could come under that audit but the account of the rents and clear profits of the estate of the foundress, and no account of any surplus that had been previously thrown into the common stock, could form a part of their audit.

F I have gone through all the particulars of the will in this circumstantial manner, because my first impressions, I confess, were not the same as the opinion I now hold, which opinion is that the surplus ought to be considered as a gift by the testatrix to the college and that with respect to the rents and profits of the estates not necessary for those purposes which she specifies in her will they are taken from the heir-at-law and belong to the college. On first hearing this case, I thought that any surplus there might be after all the specified purposes of her will had been satisfied ought to be distributed between the two colleges in equal proportions, but on looking more particularly and very accurately into this will I confess it is my present opinion that this was a gift for the benefit of the old college, and that it was not given by the testatrix to be divided between the two colleges. I think it is impossible to say but that that is the general effect of the whole of her will taken together.

H The other question I hardly know how to deal with, for supposing this surplus was given for the benefit of the old college it is clear that the different purposes which are to be first effected—the erection of buildings, etc.—are not to be purposes more for the benefit of the old college than for the new. I feel a difficulty to know what to do with respect to that part of the case because after the fund has become the common stock of the college is it not a question more proper for the visitor to decide than me? I will give my opinion on that question if I am required so to do.

I A question being suggested at the Bar whether the King or the heir-at-law was the visitor of this foundation, the Lord Chancellor observed, that the foundress had said that she appointed no visitor. The King is the visitor of the old college, and the question is whether, if a person makes an addition to an old foundation, the visitor of that foundation does not become the visitor of the new foundation, and whether the foundress saying that she appoints no visitor, is sufficient to take from him that authority? I have no recollection of any case on the subject, but I should

think that, if the King was the visitor of the old college and they accepted an accession to it (which I doubt whether they could do without the King's consent), the King would become the visitor of the new foundation, although the testatrix had said there should be no visitor at all. A

His LORDSHIP declared that the directions contained in the will of the testatrix which required that the rents of her estates therein mentioned should continue the same as at the time of her decease and that no attempts should be made to raise the same, were void and that the defendant Charles Smith, the heir-at-law of the testatrix, had no right or interest to or in the said real estates, or the rents and profits thereof, or any part of such rents and profits, by way of resulting trust or otherwise. The surplusage of the rents and profits of the testatrix's estate remaining after the several deductions and payments mentioned in r. 27, which surplusage, together with the forfeitures mentioned in the rule, were directed to be thrown into the common stock of the college, was, according to the true construction of the said will and rules, intended to be given to the master and fellows of Catherine Hall of the old foundation of the college, and as to so much of such surplusage as was not necessary to be applied as a fund for the purposes mentioned in r. 27, the same belonged to the master and fellows of the old foundation. His LORDSHIP did not think proper to give any directions touching the application of any part of the surplus rents and profits and forfeitures for the purposes mentioned in r. 27 at present or to proceed further than to make such declarations of the rights of the parties as therein were contained and such order as to costs as was thereafter given. Subject to such declarations as were thereinbefore contained, and to such directions as to costs as were thereafter given, His LORDSHIP ordered that the information and bill be dismissed. B C D E

BUTLER v. WILDMAN

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), February 4, 1820] F

[Reported 3 B. & Ald. 398; 106 E.R. 708]

Insurance—Marine insurance—Risks insured against—"Jettisons . . . enemies . . ."—Cargo thrown overboard to avoid capture by enemy vessel.

Underwriters insured a Spanish ship and dollars carried in it and belonging to a Spanish subject, the policy describing the perils insured against (*inter alia*) as ". . . enemies . . . jettisons . . . and all other losses, perils and misfortunes." At the time of effecting the policy, underwriters knew the Kingdom of Spain to be at war with its South American colonies. During the voyage, the captain of the ship, in order to prevent the dollars falling into the hands of an enemy vessel which was about to attack, threw the dollars overboard. The insured ship was immediately afterwards captured. In an action on the policy, G H

Held: this was a loss by jettison, the term, in an insurance policy, signifying any throwing overboard of the cargo for a justifiable cause; it was also a loss by "enemies"; and the assured was, therefore, entitled to recover on the policy.

Notes. Considered: *Phillips v. Nairne* (1847), 4 C.B. 343; *Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.*, [1886-90] All E.R. Rep. 241; *The Knight of St. Michael*, [1898] p. 30. Distinguished: *Kacianoff v. China Traders Insurance Co.*, [1914] 3 K.B. 1121. Considered: *Becker, Gray & Co. v. London Assurance Corpn.*, [1916-17] All E.R. Rep. 146. Referred to: *Australasian Insurance Co. v. Jackson* (1875), 33 L.T. 286; *Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro* (1887), 19 Q.B.D. 362; *Symington v. Union Insurance Society of Canton* (1928), 138 L.T. 386; *Forestal Land, Timber and Railways Co. v. Richards, Middows, Ltd. v. Robertson, Howard Bros. & Co. v.* I

A *Kahn*, [1940] 4 All E.R. 96; *Canada Rice Mills, Ltd. v. Union Marine and General Insurance Co.*, [1940] 4 All E.R. 169.

As to perils insured against, see 22 HALSBURY'S LAWS (3rd Edn.) 73 et seq.; and for cases see 29 DIGEST (Repl.) 227 et seq.

Cases referred to :

- B** (1) *Cullen v. Butler* (1816), 5 M. & S. 461; 105 E.R. 119; *previous proceedings* (1815), 4 Camp. 289, N.P.; 29 Digest (Repl.) 260, 1774.
- (2) *Hadkinson v. Robinson* (1803), 3 Bos. & P. 388; 127 E.R. 212; 29 Digest (Repl.) 241, 1820.
- (3) *Hunter v. Potts* (1815), 4 Camp. 203, N.P.; 29 Digest (Repl.) 235, 1766.
- (4) *Rohl v. Parr* (1796), 1 Esp. 445, N.P.; 29 Digest (Repl.) 285, 2157.
- C** (5) *Mouse's Case* (1608), 12 Co. Rep. 63; cited in 2 Bulst. at p. 280; 77 E.R. 1341; sub nom. *Gravesend Barge Case*, 1 Roll. Rep. 79; 24 Digest (Repl.) 1148, 104.

Demurrer in an action on a policy of insurance.

D The declaration was on a policy of insurance on dollars at and from Cadiz to any port or ports in Cuba, and from thence to La Guaiara. The policy was in common form, and described the perils insured against to be the "seas, men of war, fire, enemies, pirates, rovers, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come, to the hurt, detriment, and damage of the said goods and merchandises, and ship, etc., or any part thereof."

E The declaration averred that one Joze Dieze Ymbrechts, a Spanish subject was interested in the dollars insured and also that Lopez, the commander of the vessel was a Spanish subject, and that at all material times there was a state of war between Spain and the government of parts of South America, formerly constituting part of the Spanish dominions. That the defendant, at the time of effecting the policy, had notice of these facts.

F The declaration then stated, that while the ship was in the course of her voyage, an armed vessel proceeding from and acting under the authority of the government in the said parts of South America approached the insured ship for the purpose of attacking it, and afterwards did attack and capture it, resulting in its total loss. That just before the attack the commander of the insured ship in order to prevent the dollars from falling into the hands of the persons on board the armed vessel, threw into the sea 100,000 of the dollars mentioned in the policy. The defendant, the underwriter, demurred to the declaration.

Campbell for the defendant, supported the demurrer.

Barnewall for the plaintiff.

H **ABBOTT, C.J.**—I am of opinion that the plaintiff is entitled to recover. The defendant, on this general demurrer, has taken two objections: one to the form of the declaration in which the loss is stated; the other, that this is not a loss within the policy. [His LORDSHIP then considered the wording of the declaration and held that the loss was sufficiently stated].

I The question arises whether this be a loss for which the underwriters are liable. I am of opinion that this is a loss by jettison, or if not strictly speaking by jettison, it is something ejusdem generis, and, therefore, falls within the general words, "all other losses and misfortunes, etc." Jettison, in its largest sense however, signifies any throwing overboard; but, in its ordinary sense, it means a throwing overboard for the preservation of the ship and cargo, and most of the jurists treat of it in this sense under the head of general average.

The present case is an extraordinary species of jettison. I cannot, however, distinguish it in principle from the case where the captain sets fire to his ship to prevent her falling into the hands of the enemy. It is laid down, by **EMERIGON**

and POTHIER, that the underwriters are liable for such a loss, and therefore, they are equally so in the present case. It is said, however, that in those cases the assured and underwriters were all of the same nation. So long, however, as the insurance of the property of a foreigner is not contrary to the law of England, the underwriter who insures must be considered as placing himself in the same situation as the foreigner, for he has undertaken to indemnify the assured against enemies, and that must mean enemies of the State of which the assured is a member. I am, therefore, of opinion that the plaintiff is entitled to the judgment of the court.

BAYLEY, J.—I am of the same opinion. If the dollars had not been thrown overboard, it is clear that they would have fallen into the hands of the enemy for the ship was, in fact, taken; and if the loss here stated had been declared on as a loss by jettison or by enemies, or within the concluding words "all other losses and misfortunes," the facts stated would have supported that averment.

Jettison, in its largest sense, means any throwing overboard. Its true meaning in a policy of insurance seems to me to be any casting overboard *ex justa causa*. Was that so here? The circumstances are these. This was a Spanish ship, and the property insured was Spanish, and there was a war between Spain and her colonies. It was, therefore, the duty of the master who was a Spanish subject, to prevent anything which could strengthen the hands of the enemy from falling into their possession. As money would strengthen the enemy, it was the duty of the master to throw it overboard; and the sacrifice of the money was, therefore, *ex justa causa*. Therefore, that this is a loss by jettison. But if it be not a loss by jettison, it is a loss by enemies. It clearly falls within the principle stated by EMERIGON, in the case of the destruction of the ship by fire; and I think the enemy was the proximate cause of loss.

In point of principle, there is no distinction between this and the case of a ship burnt, to prevent its falling into the hands of the enemy, and I can see no solid distinction between the ship and cargo. The cargo which, in this case, was money becomes immediately convertible to hostile purposes. But, assuming that this was not strictly jettison, it is something *ejusdem generis* and may, therefore, be comprehended within the words "all other losses and misfortunes."

In *Cullen v. Butler* (1), a British ship of war mistaking a British trading vessel for an enemy, fired into and sunk her. It was contended that this not being a cause of loss described in any of the enumerated risks was not within the policy; and *Hadkinson v. Robinson* (2), *Hunter v. Potts* (3), and *Rohl v. Parr* (4) were cited. The court, however, were of opinion that it was a loss within the meaning of the words "all other losses and misfortunes." I think, that the facts stated in this case, constitute a loss within the meaning of those words. The judgment must, therefore, be for the plaintiff.

HOLROYD, J.—This is a loss within the policy and by jettison, for the reasons already given by the court, although it be not that species of jettison which would be the subject of general average. It seems to me also that it is a loss by enemies; for the meditated attack was the direct cause of the loss. Suppose that the cargo, instead of being dollars, had been gunpowder or other ammunition and that, instead of having been thrown overboard, a part had been consumed in resisting the attack of the enemy, that would clearly be a loss by enemies; and I cannot distinguish that case from this.* If we were to hold that this were not a loss

* A loss by jettison, even in its confined sense, viz., where goods are thrown overboard in a storm for the sake of preserving the ship and the remainder of the cargo, is usually declared upon as a loss by perils of the sea; yet, in that case, it might be urged that the loss proceeded immediately from the act of the captain, and that the underwriter was thereby deprived of all chance of the property being saved, which might be the case if the storm had suddenly abated. If jettison, therefore, be a loss by perils of the sea, the loss stated in this declaration must equally be a loss by enemies. A common carrier is liable for all losses, except those proceeding from the act of God, or the King's enemies. The throwing overboard of goods in a storm to preserve the lives of passengers, has been held to be a loss proceeding from the act of God so as to excuse the carrier: see the *Gravesend Barge Case* (5).

A within the policy, we should hold out a temptation to the captain of a vessel, even with warlike stores on board, rather to suffer them to fall into the hands of the enemy than to sacrifice them in this manner. We ought, therefore, to hold this to be a loss for which the underwriters are liable. I think that this is a loss which comes within the words "all other losses and misfortunes," which include all losses of the same nature with those described in the enumerated risks.

B **BEST, J.**—This question is new in the courts of this country. In the absence of all authority, we must put that construction on the contract of assurance which is most agreeable to justice. French policies are nearly similar to those used in this country. As learned French writers and the tribunals of France have put a construction on their policies, in cases like the present, we may avail ourselves of their opinions and decisions, to assist us in deciding on the policy now under our consideration.

C **POTHIER**, in his **TREATISE ON THE CONTRACT OF INSURANCE**, c. 1, s. 2, art. 2, gives the description of general risks in these words :

"Seront aux risques des assureurs toutes pertes et dommages qui arriveront sur mer et généralement toutes fortunes de mer."

D This writer, in the next page, states that in his opinion, the underwriters are responsible for such a loss as that which is sought to be recovered in this case. It appears also from **EMÉRIGON**, 438, that there are decisions of the courts of France, pronounced by the Parliaments of Bordeaux and Provence, on appeals from inferior tribunals, which expressly confirm the opinion of **POTHIER**. In these cases, the assured and underwriters were subjects of the same country but this circumstance appears to me to make no material difference.

E The defendant knew that the assured was a Spaniard, and that there was war between her and her colonies and the insurance is against enemies. The underwriter must have presumed that the assured would act as became a good subject of the country to which he belonged and it was the duty of a loyal Spaniard to prevent money from falling into the hands of the enemies of Spain. The loss comes within the general words of the policy. The use of these words is to enlarge the construction of the terms by which particular losses are before mentioned and to extend them to cases coming very near, but not precisely within the specified losses. Thus one of the losses particularly specified is a loss by enemies. If there had been no general words, the loss by enemies might be said only to include an actual taking or destruction by the hand of the enemy, although it may be observed that such a loss would fall within the other words, takings at sea, men of war, letters of mart and countermart. The general words, however, afford a complete answer to such an argument by including all losses which are the consequences of justifiable acts done under the certain expectation of capture or destruction by enemies. The loss, in the present case, is the consequence of one of those justifiable acts. Dollars, we have been told, are not warlike stores but they will afford the readiest means of procuring every instrument of war.

F It has been said, also, that this act of the captain deprived the underwriter of the chance of re-capture. As the event has shown that his conduct was not the effect of a vain fear but of a resolution wisely and honestly taken, he was justified in doing what he did and the underwriters have no right to object although they might have been placed in a less advantageous situation than they otherwise would have been in. It is objected, that British underwriters ought not to be made to pay for Spanish patriotism; but they must be liable to these payments if they insure Spanish ships against enemies when Spain is engaged in war. For these reasons, I am of opinion, that judgment should be given for the plaintiff.

Judgment for plaintiff.

DEYBEL'S CASE

[COURT OF KING'S BENCH (Bayley, Holroyd and Best, JJ.), February 5, 1821]

[Reported 4 B. & Ald. 243; 106 E.R. 926]

Habeas Corpus—Return to writ—Need to show legality of applicant's detention.

In a return to a writ of habeas corpus it must be made quite clear that a party detaining a prisoner has authority by law so to do.

Evidence—Judicial notice—Division of kingdom into counties—Parts of counties.

The court will take judicial notice of the general division of the kingdom into counties, but that cannot be extended to particular parts of counties and their local situation.

Notes. The statute 59 Geo. 3, c. 121 (1819, Smuggling) was repealed by the Customs Act, 1825, repealed by S.L.R. 1873. Forfeiture of ships for offences within prescribed limits is now provided under ss. 75 and 76 of the Customs and Excise Act, 1952 (32 HALSBURY'S STATUTES (2nd Edn.) 768, 769. The writ of habeas corpus existed at common law prior to the Habeas Corpus Act, 1679 (6 HALSBURY'S STATUTES (2nd Edn.) 84). Procedure on application for and appeal from habeas corpus are provided by ss. 14 and 15 of the Administration of Justice Act, 1960 (40 HALSBURY'S STATUTES (2nd Edn.) 222, 223). Procedure is regulated by R.S.C. (Revision) 1965, Ord. 54, rr. 1-9 (ANNUAL PRACTICE).

Distinguished: *Re Baines* (1840), Cr. & Ph. 31. Considered: *R. v. Brixton Prison (Governor), Ex parte Pitt-Rivers*, [1942] 1 All E.R. 207. Referred to: *R. v. Mount* (1875), L.R. 6 P.C. 283.

As to contents of return to writ of habeas corpus, see 11 HALSBURY'S LAWS (3rd Edn.) 44; and for cases see 16 DIGEST (Repl.) 299 et seq. As to judicial notice of county divisions, see 15 HALSBURY'S LAWS (3rd Edn.) 338; and for cases see 22 DIGEST (Repl.) 145.

Objection to the return to a writ of habeas corpus.

The prisoner, an impressed seaman, was brought up by a writ directed to the Admiral of the Fleet at Chatham. Objection was taken to the return to the writ in that it did not state with sufficient distinctness that the ship on board of which the prisoner was found was at the time within the limits specified in s. 1 of 59 Geo. 3, c. 121 (1819, Smuggling), viz., within four leagues of that part of the coast of Great Britain which is between the North Foreland and Beachy Head, or within eight leagues of any part of the coast.

The return to the writ stated, that, on Nov. 28, 1820, a foreign smuggling vessel, called the *George*, of Flushing, on board of which were six subjects of His Majesty, being mariners, was found and discovered by the commander and crew of His Majesty's revenue cruiser, called *The Griper*, to have been and to be within eight leagues of that part of the coast of Great Britain called Suffolk, that is to say, within eight leagues of Orfordness, in the county of Suffolk, having then and there on board thereof divers large quantities of foreign spirits, tea and tobacco (as thereafter specified). The return further stated that the vessel was liable to forfeiture, and was seized, and that the prisoner, Jacobus Deybel, being a subject of His Majesty, and a mariner and seafaring man, was found on board the vessel so being liable to forfeiture, and seized, and was, by virtue of the statute liable to be stopped, arrested, and detained, for the cause aforesaid, and being so liable, was arrested. It then stated, that being so arrested and liable, and being fit and able to serve in His Majesty's naval service, he was afterwards carried before two of His Majesty's justices of the peace residing at the port of Harwich, into which port of Harwich the vessel was then and there taken and carried, and upon due proof, as by the statutes is required, was committed to answer such information as might be preferred, and being so committed, was impressed, and was for that cause detained.

Serjeant Lawes for the prisoner, objected to this return.

Jervis for the Crown, in support of the return.

BAYLEY, J.—It is quite true that this court will take judicial notice of the general division of the kingdom into counties, because they are continually in the habit of directing their process to the sheriffs of those counties, and because they are mentioned in a great variety of Acts of Parliament. But still, I think that the present return is insufficient.

In these cases, the greatest certainty is requisite, for the court must see distinctly that the party who is brought up is justly deprived of his liberty. Section 1 of the Smuggling Act, 1819 [repealed], says that a party may be properly detained in custody if he is found on board a vessel within four leagues of the coast between the North Foreland and Beachy Head, or within eight leagues of any other part of the coast. This return does not follow the words of the Act but states that the vessel was discovered, not within eight leagues of the coast of the county of Suffolk, but within eight leagues of a place in a part of the coast called Suffolk. I cannot say, judicially, that there is no place on the coast between the North Foreland and Beachy Head, which is called Suffolk, and, therefore, if it had stopped there, it seems to me, that this return would have been insufficient. But it is said, that there is an additional averment, stating, that the vessel was discovered within eight leagues of Orfordness, in the county of Suffolk. I have before said that this court will take judicial notice of the general divisions of counties, but that cannot be extended to the particular parts of counties and their local situation. We know very well that there are many parts of counties separated from the general body of the county. There is a part of the county of Durham which is situated to the north of Northumberland, and so the parish of Creyke, belonging to the same county, is surrounded by the North Riding of Yorkshire; and there are many other parts of other counties similarly situated.

The court, therefore, cannot judicially know whether Orfordness, which is averred to be part of the county of Suffolk, may not be an isolated part of it, situated on the coast between the North Foreland and Beachy Head; and if so, there is nothing on this return to show that the vessel was discovered within the limits mentioned in the Act. The proper course would have been, to have stated, negatively, that the vessel was found within eight leagues of a part of the coast of Great Britain, not between the North Foreland and Beachy Head, to wit, within eight leagues of Orfordness, in the county of Suffolk. The present return, however, is insufficient, and the prisoner must be discharged.

HOLROYD, J.—I am of the same opinion. The present objection will be valid, unless the court are bound by law to take judicial notice, not only of every county, but of the local situation of every place in any county; and I think that they are not bound so to do. I agree that this allegation, taken altogether, must be taken as a positive allegation that the vessel was found within eight leagues of a part of the county of Suffolk. For, though part of this allegation is under a videlicet, it is, nevertheless, sufficiently certain. But assuming that to be so, still the court cannot take judicial notice of the local situation of Orfordness. Here it was necessary to have stated that Orfordness was not between the North Foreland and Beachy Head, and this not having been done, I think that this return is insufficient.

BEST, J.—It ought to be quite clear in a case like the present that a party detaining a prisoner has authority by law so to do. It ought, therefore, to appear on the face of the return that the case is brought accurately within the provisions of the Act; now that has not been done here. We ought, it is true, to take judicial notice of the counties of England, and of those which are maritime counties, as being noticed in a variety of Acts. But we cannot do this, with respect either to the local situation of the different places in each county, nor of the distances of one county from another. It seems to me, therefore, that we cannot take notice,

judicially, either that Orfordness may not be an isolated part of the county of Suffolk, or even if it be part of the body of that county, that it is not within eight leagues of Beachy Head. I think, therefore, that the objection ought to prevail.

Prisoner discharged.

R. v. INHABITANTS OF ST. AUSTELL

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), May 8, 1822]

[Reported 5 B. & Ald. 693; 1 Dow. & Ry. K.B. 351; 1 Dow. & Ry. M.C. 89; 106 E.R. 1344]

Rates—Rateable occupation—Grant by landlord of licence to dig minerals—Reservation of eighth share to grantor—Liability of grantor to be rated.

By indenture, C. a landowner, granted a licence to R. to enter, dig and take away minerals, yielding to C. a one-eighth share of all the minerals so dug after processing or the proceeds of sale of the same.

Held: in respect his one-eighth share C. was liable to be rated as an occupier of land, the reservation operating as an exception out of the demise and not being in the nature of a rent.

Notes. Distinguished: *R. v. Trent and Mersey Canal* (1825), 6 Dow. & Ry. K.B. 47; *R. v. Tremayne* (1832), 4 B. & Ad. 162. Applied: *Crease v. Sawle* (1842), 2 Q.B. 862; *Van Mining Co. v. Llanidloes Overseers* (1876), 1 Ex.D. 310. Referred to: *Roads v. Trumpington Overseers* (1870), L.R. 6 Q.B. 56.

As to liability to the rate in general, see 32 HALSBURY'S LAWS (3rd Edn.) et seq.; and for cases see 38 DIGEST (Repl.) 478 et seq.

Cases referred to:

- (1) *Lead Smelting Co. v. Richardson* (1762), 3 Burr. 1341; 1 Wm. Bl. 389.
- (2) *Rouls v. Gells* (1776), 2 Cowp. 451; 1 Doug. K.B. 304, n.; 1 Bott, 139; 98 1182; 38 Digest (Repl.) 559, 477.
- (3) *R. v. Baptist Mill Co.* (1813), 1 M. & S. 612; 105 E.R. 229; 38 Digest (Repl.) 557, 465.
- (4) *R. v. Bishop of Rochester* (1810), 12 East, 353; 1 Bott, 217; 104 E.R. 138; 38 Digest (Repl.) 560, 486.
- (5) *R. v. Earl of Pomfret* (1816), 5 M. & S. 139; 1 Bott, 235; 105 E.R. 1002; 38 Digest (Repl.) 559, 481.
- (6) *Doe d. Hanley v. Wood* (1819), ante p. 136; 2 B. & Ald. 724; 106 E.R. 529; 19 Digest (Repl.) 214, 1573.
- (7) *R. v. Parrot* (1794), 5 Term Rep. 593; 1 Bott, 182; 101 E.R. 332; 38 Digest (Repl.) 558, 468.
- (8) *R. v. Inhabitants of St. Agnes* (1789), 3 Term Rep. 480; 1 Bott, 167; 100 E.R. 688; 38 Digest (Repl.) 559, 478.

Case Stated by sessions on appeal by Thomas Carlyon against the following assessment for the relief of the poor of the parish of St. Austell, Cornwall.

“Rates on tin and copper dues, and water-courses.

Thomas Carlyon, Esq., for Crinnis copper dues.

	£	s.	d.
Annual return	4,080	0	0
Amount taken at two-fifths	1,632	0	0
Assessment at 3s. in the pound	244	16	0

The sessions amended the rate by striking out this assessment and stated the following Case. Thomas Carlyon, at the time of making the rate, was not an

A inhabitant of St. Austell, nor the occupier of any land, house or other property therein, unless he was deemed to be such occupier in respect of the said dues by reason of the following facts: that being seised in fee of all the lands within which a certain mine was situate, by indenture dated Jan. 12, 1811, Carlyon granted to Joshua Rowe, licence to work all the minerals in his lands called Crinnis in the parish of St. Austell and to dispose of them in any way subject to certain reservations, and to make shafts and sheds, etc., for a term of twenty-one years, subject to the payment of one-eighth part of all such minerals (after processing) to Carlyon his heirs or assigns or pay in money the value of such one-eighth part at Carlyon's election within two months of its sale. The licensee covenanted to pay all rates and taxes assessed on the minerals or the proceeds of sale or on Carlyon and indemnify him against the same.

C By virtue of this grant the mine had been worked ever since by Rowe and certain persons claiming under him, at their own sole risk and expense, by their own labourers and under the entire direction and superintendence of their own agents and without any expense, risk or interference whatsoever on the part of Carlyon. Various shafts, levels and other works had been dug and made, and counting houses and other houses built by virtue of the grant, and the mine, all the erections thereon and shafts, levels and other workings were, at all material times, in the sole occupation and possession of the licensees.

D The mine was now a declining mine, but considerable quantities of ores had been mined and, after processing, sold by the licensees without any control or interference by Carlyon. No part of the ores raised had ever been rendered to Carlyon in kind; but in lieu thereof, one-eighth part of the money, from time to time arising from the sales of the ores, had been paid to him in pursuance of the indenture. He had been, from time to time, rated and assessed towards the relief of the poor of the parish of St. Austell, in respect of such one-eighth part of the money so arising and had paid the several assessments up to the making of the rate appealed against.

F Wyld in support of the order of sessions: In *Lead Smelting Co. v. Richardson* (1), it was first determined that mines are not rateable generally, partly on the ground that coalmines alone having been mentioned in the statute, the rule *expressio unius est exclusio alterius* applies. and partly because of the risk attending the working of them. In *Rowls v. Gells* (2), the person rated was the lessee of the lot and cope; and he was rated on the ground that he was the occupier of property to which the risk attending mining concerns did not apply. There, too, the persons working were acting under a general custom within the district, and not under a specific contract, as here. *R. v. Baptist Mill Co.* (3) was also similar in both these respects to *Rowls v. Gells* (2).

G Here, however, the owner is for the first time sought to be rated. *R. v. Bishop of Rochester* (4) and *R. v. Earl of Pomfret* (5) are in point. Those were both cases of owners letting out their property on a written contract, and the judgment of the court was against the rate. The owner of a mine in circumstances like the present, may run a considerable risk; for he may be obliged to incur great expense in opening the mine before he lets it to the licensee, and after having received the rent in ore, may be at great expense in making the minerals merchantable.

H By the instrument in question, the right of possession in the mine passed to the adventurer, and the landlord, if he entered on it, would be guilty of trespass; unless, as in *Doe d. Hanley v. Wood* (6), he came on the land for the purpose of re-entry, pursuant to a power reserved. This is, in fact, a reservation of rent and a rent is not rateable. There is an alternative in receiving the rent either in ore or in money, and the lord has elected to take it in money. In *R. v. Earl of Pomfret* (5), it was held that the defendant was not rateable in similar circumstances. It may be said that the court there went on the ground that the lead reserved had gone through the process of smelting. Here, however, the ore is to

be made merchantable; and it cannot surely depend on the quantum of manufacture to which it is subjected whether it be rateable or not. This, therefore, although a reservation of part of the thing demised, does not operate as an exception but as a render. Consequently the order of sessions was right. A

Gurney and Adam for the Crown were not called on to argue.

ABBOTT, C.J.—I am of opinion that Carlyon is liable to be rated for the dues in question. I am unable to distinguish this case from *Rowls v. Gells* (2) and *R. v. Baptist Mill Co.* (3), and, therefore, we ought to decide conformably to those authorities. Notwithstanding all that has been urged on this subject, I cannot distinguish between the cases where a party takes an interest under a specific contract, as in this case, and where the adventurers work under a custom previously existing throughout a district. B

The case is distinguishable from *R. v. Earl of Pomfret* (5) in two respects; first, because there was an absolute demise in that case of all the mines, under which the possession, both of that part which was worked and that which was not worked, passed to the lessees: but here there is an express reservation of part. In the second place, the share reserved to the lord, in *R. v. Earl of Pomfret* (5), was of smelted lead; but here the reservation is of part of the native mineral. C

On these grounds, it seems to me that we ought to decide in favour of the rate; and I do that with the less reluctance because it is still open to the party to institute an action against the person who may levy for the rate, and so to bring the question before a higher tribunal. D

BAYLEY, J.—We ought to ignore the circumstance of this being a failing mine. For it is a beneficial and useful property to the person on whom this rate has been made; and it was held in *R. v. Parrot* (7) that a coalmine, whether profitable or not, is still rateable. This falls within the principles laid down in *Rowls v. Gells* (2), *R. v. Inhabitants of St. Agnes* (8), and *R. v. Baptist Mill Co.* (3), and is distinguishable from *R. v. Bishop of Rochester* (4) and *R. v. Earl of Pomfret* (5). E

Here, the person rated is in fact an occupier of land and derives a profit in respect of that occupation; and that, according to the doctrine laid down in the first set of cases to which I have referred, makes him rateable. He has not dispossessed himself of the possession of the land, as was done in the two latter cases. In *Rowls v. Gells* (2) it was first decided that a party was rateable for lot and cope. It is said that the party rated there was a lessee. That distinction makes no difference; for, if the lot and cope had not been rateable in the hands of the original proprietor, it would not have been so in the hands of his lessee. The true ground of that decision was, that the party was there considered as an occupier of the land. *R. v. Inhabitants of St. Agnes* (8) proceeded on the same ground. F

In *R. v. Baptist Mill Co.* (3) it was determined that the lessees under the lord of the manor of his lot and free share of calamine were liable to be rated as occupiers of land. The decision went on the ground that the lord of the manor would, but for the lease, have been rateable for it also, for the court considered him as occupying the land by the hands of the adventurers. The latter were to work the mine and he was to receive part of the ore gotten and the court considered him as joint occupier with them. G

In *R. v. Bishop of Rochester* (4), the mine was let; and, whether it was worked or not, still the bishop was completely out of possession of it, and the adventurers worked for their own exclusive profit. There, the rent reserved was a money-rent, and the relation between the parties to the contract was that of landlord and tenant: and all that the bishop had was the reversion of the land. That, also, was the main ground of the decision in *R. v. Earl of Pomfret* (5). H

In this case, the licensees have not the sole and exclusive occupation of the mine; they have only the sole and exclusive privilege of working it. This is not a conveyance of any interest in the mine till it is actually worked. It is only a I

A privilege to dig for ore and then, only on the terms of leaving a certain portion of that ore in a fit state for the landlord. It seems to me, therefore, that, according to the authorities to which I have referred, Carlyon must be considered as the occupier of land. Therefore, that he is liable to the present rate.

HOLROYD, J.—I agree.

BEST, J.—If it were true that we must either overrule *R. v. Baptist Mill Co.* (3), and the cases confirming that decision, or *R. v. Earl of Pomfret* (5), I should be inclined to support the former. But it is not necessary, inasmuch as there is a material distinction between them. Here, it is clear that Carlyon is an occupier of land. For the mine is not in the exclusive occupation of the licensees; and whatever, by the indenture, is not granted out of Carlyon, remains in him. All that the licensees take under it is a licence to enter and dig and take away the minerals. But when they have done so, and the minerals are brought to grass, a division of the ore between them and the landlord takes place. This, then, is the same as if, instead of working for wages, they worked on condition of being paid by a certain share of the produce. In this case, therefore, the rate must be supported.

Order of sessions quashed.

Ex parte LLOYD

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), November 5, 1822]

[Reported Mont. 70, n.]

Counsel — Retainer — Absolute engagement by client — Period of retainer — Jurisdiction of court.

A retainer is an engagement for the assistance of a barrister, either generally in all causes in which the client may be engaged, or in some particular cause to which the retainer is specially limited. It is a declaration by the client that he intends to send a brief to the counsel he has retained. It is an absolute and not a conditional engagement. The court has no jurisdiction to interfere with a barrister in the exercise of his discretion as to the client upon whose retainer he might think proper to act. A barrister is bound to act for the party by whom he is retained as long as his services are required and no longer.

Notes. The Retainer Rules are dealt with in BOULTON'S CONDUCT AND ETIQUETTE AT THE BAR, 1965 (4th Edn.) at p. 36 et seq.

As to principles of retainer of a barrister, see 3 HALSBURY'S LAWS (3rd Edn.) 55; and for cases see 3 DIGEST (Repl.) 367, 368.

Petition by Lloyd to restrain the respondent, Montague, from acting as counsel on behalf of a bankrupt from whom he had received a retainer, after he had acted as counsel against him on the retainer of the petitioner. Two questions arose, first, for whom under the circumstances of the case the respondent ought to act as counsel; and secondly, whether the LORD CHANCELLOR had jurisdiction to determine the matter.

The respondent had received a retainer from the petitioner with the usual fee of one guinea and had repeatedly acted under that retainer against the bankrupt. The meetings were adjourned from time to time. In the interval after one of the adjournments, a general retainer was left on behalf of the bankrupt. At the next meeting, of which the petitioner's solicitors had notice, they did not send any brief. The bankrupt did send a brief and as a right claimed the respondent's assistance. The respondent attended before the commissioners as counsel for the bankrupt.

The following propositions were submitted in argument as being established propositions: (i) A barrister ought not to exercise any discretion as to the suitor for whom he pleads in the court in which he practises. (ii) A barrister is bound to act for the party by whom he is retained as long as his services are required and no longer. (iii) The disputes as to different retainers must be decided, not by any public tribunal, but by the barristers themselves. It was further stated in argument that in its true meaning, a retainer is an engagement for the assistance of a barrister, either generally in all causes in which the client may be engaged, or in some particular cause to which the retainer is specially limited. It is a declaration by the client that he, at all events, intends to send a brief to the counsel whom he has retained. It is an absolute and not a conditional engagement. If by accident the client omit to send a brief and a brief is tendered by the opposite party, courtesy requires that notice should be sent to the retaining client; but if the retaining client intentionally omit to send a brief, such notice is not only not requisite, but improper. The engagement is not conditional.

Horne and Pepys for the petitioner.

The Attorney-General (Sir Robert Gifford), Treaslove and Parker for the respondent.

LORD ELDON, L.C. (on the opening of the petition), expressed his clear decided opinion, that he sitting in bankruptcy had no jurisdiction whatsoever to interfere with a barrister in the exercise of his discretion as to the client upon whose retainer he might think proper to act. But on being asked by counsel to hear the petition as it was unsettled and of importance to the Bar, he said that as *amicus curiae* he would hear the petition and after hearing argument he declared that the respondent was bound, under the circumstances of the case, to act as counsel for the bankrupt.

Petition dismissed.

DYSON AND ANOTHER v. COLLICK

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), April 26, 1822.]

[Reported 5 B. & Ald. 600; 1 Dow. & Ry. K.B. 225; 1 Dow. & Ry. M.C. 70; 106 E.R. 1310]

Trespass—Action—Plaintiff—Possession sufficient to support—Contractor constructing canal—Erection of dam with permission of landowner.

Contractors making a navigable canal with the permission of the owner of the soil erected on his close a dam of earth and wood across a stream for the purpose of completing their work.

Held: they had possession sufficient to enable them to maintain trespass against a wrongdoer.

Notes. Considered: *R. v. Brighton Gas Light and Coke Co.* (1826), 5 B. & C. 466; *Hastings Corpn. v. Ivall* (1875), L.R. 19 Eq. 558. Referred to: *Harper v. Charlesworth* (1825), 3 L.J.O.S.K.B. 265.

As to action for private nuisance by occupier, see 28 HALSBURY'S LAWS (3rd Edn.) 154; and for cases see 36 DIGEST (Repl.) 309. As to possession to support trespass, see 38 HALSBURY'S LAWS (3rd Edn.) 743 et seq.; and for cases see 46 DIGEST (Repl.) 368 et seq.

Cases referred to:

- (1) *Duke of Newcastle v. Clark* (1818), 8 Taunt. 602; 2 Moore, C.P. 665; 129 E.R. 518; 41 Digest (Repl.) 70, 459.
- (2) *Welch v. Nash* (1807), 8 East, 394; 103 E.R. 394; 26 Digest (Repl.) 371, 814.

A **Motion** by the defendant for a rule nisi to enter a nonsuit or for a new trial in an action of trespass by breaking down the plaintiff's dam. Issue was joined on the defendant's plea of not guilty. The defendant contended that the plaintiffs had no such interest in the soil to maintain trespass.

B The plaintiffs were employed as contractors by Portsmouth and Arundel Navigation Company to make a navigable canal from the river Arun to Chichester harbour and from thence to Langstone and Portsmouth harbours, with a cut or branch from Hunston common to the city of Chichester. The trespass complained of consisted in breaking down a dam which was across the watercourse from the river Lavant resulting in the water flowing with great force into the watercourse and forcing a great quantity of the meadowland into the branch from Hunston common and filling it up.

C At the trial, before WOOD, B., at the assizes for the county of Sussex, the only question of law was whether the plaintiffs had such an interest in the bank in question as to entitle them to maintain trespass. It appeared that the plaintiffs in performing their contract, in making the branch from Hunston common, in February, 1821, had erected a dam upon the locus in quo by permission of the owner of the soil. The dam was six feet thick, and was twelve feet across, and was formed of earth and wooden piles. It had been originally made in January, 1821; between that time and December it had been repaired by the plaintiffs. A verdict was found for the plaintiffs.

Serjeant Taddy for the defendant, moved for a rule nisi to enter a nonsuit.

E **Per Curiam** (ABBOTT, C.J., BAYLEY, HOLROYD and BEST, JJ.): The dam was erected by the plaintiffs at their own expense, and with their own materials, upon the locus in quo, with the consent of the owner of the soil, for a special purpose. Until that purpose was completed, the plaintiffs were entitled to the possession of the dam. It is perfectly clear that the person in possession of property, whether rightfully or wrongfully, may maintain trespass against a mere wrongdoer. Indeed, if they had any other than a partial or subordinate interest in the dam, trespass is the only proper remedy. This case is distinguishable from that of *Duke of Newcastle v. Clark* (1), for there the commissioners of sewers had no possession, but had a mere right to enter upon the locus in quo and to do certain acts. In *Welch v. Nash* (2), the posts were put into the lands of another without his permission; and yet it was held that the party who put them there might recover in trespass for taking them away, where the general issue only was pleaded. That could be only on the ground that the posts were the property of the plaintiff; for if they were not so, it would have been a good defence to the action.

Rule refused.

WAKEMAN v. ROBINSON

[COURT OF COMMON PLEAS (Dallas, C.J., and Burrough, J.), April 29, 1823]

[Reported 1 Bing. 213; 8 Moore, C.P. 63; 1 L.J.O.S.C.P. 70; 130 E.R. 86]

Negligence—Defence—Accident—Unavoidable accident—Some blame attaching to defendant though no intention to injure.

If one does an injury by unavoidable accident, an action will not lie. Aliter, if any blame attaches to him, though he be innocent of any intention to injure, as if he drive a horse too spirited, or pull the wrong rein, or use imperfect harness, and the horse taking fright kills another horse.

Notes. Explained: *Cotterill v. Starkey* (1839), 8 C. & P. 691. Considered: *Hall v. Fearnley* (1842), 3 Q.B. 919. Considered and Explained: *Stanley v. Powell*, [1886-90] All E.R. Rep. 314. Referred to: *Fowler v. Lanning*, [1959] 1 All E.R. 290.

As to imminence of risk of danger and as to circumstances in which new trial refused in action for negligence, see 28 HALSBURY'S LAWS (3rd Edn.) 13 et seq., 109 et seq., respectively; and for cases see 36 DIGEST (Repl.) 137. As to defences to action for trespass, see 38 HALSBURY'S LAWS (3rd Edn.) 758 et seq.; and for cases see 46 DIGEST (Repl.) 352 et seq.

Cases referred to in argument:

Gibbons v. Pepper (1695), 1 Ld. Raym. 38; 4 Mod. Rep. 404; 2 Salk. 637; 91 E.R. 922; 46 Digest (Repl.) 428, 717.

Weaver v. Ward (1616), Hob. 134; 80 E.R. 284; 46 Digest (Repl.) 352, 4.

Underwood v. Hewson (1724), 1 Stra. 596; 93 E.R. 722; 46 Digest (Repl.) 416, 590.

Leame v. Bray (1803), 3 East, 593; 102 E.R. 724; 46 Digest (Repl.) 403, 446.

Rule Nisi obtained by the defendant for a new trial, in an action of trespass for an injury done to the plaintiff's horse in consequence of the defendant's driving a gig against it, on the ground of misdirection in that the jury was not directed to consider whether the accident was unavoidable or occasioned by the fault of the defendant.

The plaintiff's wagon and horses were proceeding slowly along their proper side of the road towards London. The defendant was coming from London in a gig, at the rate of seven or eight miles an hour. When the defendant was near the plaintiff's wagon, a coach proceeding towards London, approached them on the side of the road opposite to that which was occupied by the wagon. The defendant drove between the coach and the wagon; and though in the interval there was room for two or three carriages abreast, the defendant's horse plunged and running the shaft of the gig against one of the plaintiff's wagon-horses, so injured it that it afterwards died.

The defence was that the defendant's horse being frightened by the near, noisy, and rapid approach of a butcher's cart, became ungovernable; that the injury being thus occasioned by unavoidable accident, without any negligence or default on the part of the defendant, he was not in any way responsible for the consequences. The weight of evidence, however, went to establish that the defendant's horse was young and spirited; that he had no curb chain; that the defendant in his alarm, pulled the wrong rein, and that he ought to have continued a straight course, allowing the coach to pass between him and the wagon.

PARK, J., who presided at the trial directed the jury, after a full summing-up, that this being an action of trespass, if the injury was occasioned by an immediate act of the defendant, it was immaterial whether that act was wilful or accidental. He did not direct them to consider whether the accident was occasioned by any negligence or default on the part of the defendant, or was wholly unavoidable, nor

A was he requested to do so by the defendant's counsel. The jury found a verdict for the plaintiff. *Serjeant Pell* for the defendant, obtained a rule nisi to set aside the verdict.

Serjeant Vaughan for the plaintiff, showed cause against the rule.

Serjeant Pell for the defendant, supported the rule.

B **DALLAS, C.J.**—If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie; but, under all the circumstances that belong to it, I regret that this case comes before the court. The action was trespass, and the trespass was clearly made out against the defendant. It has been contended, indeed, that the defendant would not have been liable under any form of action; but, upon the facts of the case, if I had presided

C at the trial, I should have directed the jury that the plaintiff was entitled to a verdict, because the accident was clearly occasioned by the default of the defendant. The weight of evidence was all that way. I am now called upon to grant a new trial, contrary to the justice of the case, upon the ground that the jury were not called on to consider whether the accident was unavoidable, or occasioned by the fault of the defendant. There can be no doubt that the judge who presided would have taken

D the opinion of the jury on that ground, if he had been requested so to do; and under all the circumstances, I am of opinion that a new trial ought not to be granted in this case.

BURROUGH, J., concurred.

Rule discharged.

E

JAMES v. CATHERWOOD

F [COURT OF KING'S BENCH (Abbott, C.J., Holroyd and Best, JJ.), June 3, 1823]
[Reported 3 Dow. & Ry. K.B. 190]

Conflict of Laws—Foreign law—Recognition—Revenue law of foreign country.

The courts of this country will take no notice of the revenue laws of foreign States. Therefore, where assumpsit was brought for money lent in France and unstamped receipts were produced in proof of the loan, evidence to show that

G by the law of France such receipts required stamps to render them valid was rejected.

Notes. Considered: *Government of India v. Taylor*, [1955] 1 All E.R. 292.

Referred to: *Bristow v. Sequeville* (1850), 5 Exch. 275.

As to evidence being procedural relating to contracts made abroad, see 7

H HALSBURY'S LAWS (3rd Edn.) 175 et seq.; and for cases see 11 DIGEST (Repl.) 324 et seq.

Cases referred to:

(1) *Boucher v. Lawson* (1736), Cunn. 144; Lee temp. Hard. 85, 194; 94 E.R. 1116; 11 Digest (Repl.) 440, 823.

(2) *Holman v. Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 11 Digest (Repl.) 325, 16.

I

Motion by the defendant for a new trial on the ground that the defendant should have been allowed to produce evidence of the revenue laws of France in an action of assumpsit for money lent. The defendant had pleaded non assumpsit and the Statute of Limitations.

At the trial before ABBOTT, C.J., at the second Middlesex sittings, in Easter Term, it appeared that the money was lent by the plaintiff to the defendant in France, in 1814, where both parties then resided. To prove the loan, receipts for

the money, dated in 1817, and signed by the defendant, but not stamped, were tendered in evidence. The defendant's counsel objected to those receipts as inadmissible, and offered to show that by the law of France such receipts required a stamp; but the judge being of opinion that they were admissible here as acknowledgments of the debt without any stamp, rejected that evidence, and the plaintiff had a verdict.

Chitty for the defendant, moved for a new trial, on the ground that the defendant should have been allowed to produce evidence of the law of France, to show that in that country such receipts were not legal without a stamp, and contended, that as every contract must be entered into in conformity with the *lex loci*, it was competent to the defendant to show that this contract had not so been entered into.

ABBOTT, C.J.—This point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of LORD HARDWICKE, L.C., that in a British court we cannot take notice of the revenue laws of a foreign State. [See *Boucher v. Lawson* (1) and per LORD MANSFIELD, C.J., in *Holman v. Johnson* (2)]. It would be productive of prodigious inconvenience, if in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was in order to ascertain whether the instrument was or was not valid. Nothing must be taken by the motion.

HOLROYD and BEST, JJ., concurred.

Rule refused.

LINGARD AND ANOTHER v. MESSITER

[COURT OF KING'S BENCH (Bayley, Holroyd and Best, JJ.), Hilary Term, 1823]

[Reported 1 B. & C. 308; 2 Dow. & Ry. K.B. 495; 1 L.J.O.S.K.B. 121; 107 E.R. 115]

Bankruptcy—*Property available for distribution*—*Property in reputed ownership of bankrupt*—*Machinery demised to bankrupt by judgment creditor*—*Marked with creditor's name*—*Notoriety of change of property.*

The bankrupt, a clothier, was possessed of certain machinery which he used in his business down to the time of his act of bankruptcy. Prior to the bankruptcy, the defendant, having obtained judgment against the bankrupt, bought the machinery from the sheriff, which sale was confirmed by the bankrupt. Subsequently, the defendant demised the machinery at an annual rent to the bankrupt who continued in possession for some years. After the demise, the defendant's initials were marked on every piece of machinery. In an action by the plaintiffs, as assignees of the bankrupt, to recover the machinery in the bankrupt's possession as reputed owner within the Bankrupts Act, 1623, they proved that the bankrupt had once been the real owner of the goods and that he had continued in possession of them until his act of bankruptcy.

Held: the plaintiffs having shown *prima facie* that the bankrupt had continued in possession of the machinery as owner, it then lay on the defendant to prove that the bankrupt had ceased to be reputed owner, but the marking of the defendant's name on the goods was not sufficient evidence of the notoriety of the change of property, and there was no evidence that the bankrupt had ceased to be reputed owner.

Notes. The Bankrupts Act, 1623 (21 Jac. 1, c. 19), was repealed by the Bankrupts Act, 1825 (6 Geo. 4, c. 16). As to property in the possession, order or disposition of the bankrupt see now s. 38 (c) of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 373).

- A** Distinguished: *Storer v. Hunter* (1824), 3 B. & C. 368. Considered: *Watson v. Peache* (1834), 1 Bing. N.C. 327. Followed: *Leake v. Loveday* (1842), 4 Man. & G. 972. Considered: *Hamilton v. Bell* (1854), 10 Exch. 545; *Re Sketchley, Ex parte Boulton* (1857), 1 De G. & J. 163. Distinguished: *Vicarino v. Hollingsworth* (1869), 20 L.T. 362. Applied: *Re Jones, Ex parte Lovering* (1874), 9 Ch. App. 621. Followed: *Re Fowler, Ex parte Brooks* (1883), 23 Ch.D. 261. Considered: *Sharman v. Mason*, [1899] 2 Q.B. 679. Referred to: *Re Fox, Ex parte Oundle and Thrapston R.D.C. v. Trustee*, [1948] 1 All E.R. 849.
- B** As to reputed ownership, see 2 HALSBURY'S LAWS (3rd Edn.) 488 et seq.; and for cases see 5 DIGEST (Repl.) 797 et seq.

Cases referred to:

- C** (1) *Lingham v. Biggs* (1797), 1 Bos. & P. 82; 126 E.R. 790; 5 Digest (Repl.) 853, 7171.
 (2) *Bryson v. Wylie* (1784), 1 Bos. & P. 83, n.; 1 Cooke's Bankrupt Laws, 7th Edn., p. 341; 126 E.R. 791; 5 Digest (Repl.) 810, 6848.
 (3) *Knowles v. Horsfall* (1821), 5 B. & Ald. 134; 106 E.R. 1142; 5 Digest (Repl.) 809, 6843.
- D** (4) *Thackthwaite v. Cock* (1811), 3 Taunt. 487; 2 Rose, 105; 128 E.R. 193; 5 Digest (Repl.) 864, 7254.
 (5) *Watkins v. Birch* (1813), 4 Taunt. 823; 128 E.R. 555; 25 Digest (Repl.) 174, 34.
 (6) *Horn v. Baker* (1808), 9 East, 215; 103 E.R. 555; 5 Digest (Repl.) 804, 6803.

E **Rule Nisi** obtained by the defendant for a new trial in an action of trover for machinery, consisting of scribbling-engines, tuckers and spinning-jennys.

At the trial before RICHARDSON, J., at Somerset Assizes, the plaintiffs proved an act of bankruptcy to have been committed in May, 1818, a good petitioning creditor's debt and the issuing of the commission on Sept. 27, 1819.

F Fry, the bankrupt, had carried on the business of a clothier for many years and was originally possessed of the machinery in question, as his own property, and continued to use it in his business down to the time of the act of bankruptcy. In Trinity Term, 1815, the defendant obtained two judgments against the bankrupt for £1,500, and issued an execution thereon, and by deed reciting the two writs of execution and that the sheriff had agreed to sell for £1,050 to the defendant the goods mentioned in the schedule, which were the machinery in question, the sheriff and the bankrupt assigned and confirmed to the defendant all the machinery.

G On Nov. 22, 1815, the defendant, by deed reciting the assignment, demised the machinery in question to the bankrupt for twelve months at the rent of £10 per month. This latter deed contained covenants by the bankrupt to pay the rent and repair the machinery, and a proviso that if the bankrupt should fail in any of the covenants or be incapable of carrying on the business by bankruptcy, death or otherwise, the deed was to be void and the defendant was to be at liberty to take the goods and dispose of them. The bankrupt had possession of the goods for the year and paid the rent and, at the expiration of that year, it was agreed between the bankrupt and the defendant to renew the letting for another year on the same terms. The whole rent was paid by the bankrupt up to 1818.

H **I** After the first demise the initials of the defendant's name, N. M. were put on every article. The defendant then endeavoured to prove that the bankrupt did not continue in the possession of the machinery until the act of bankruptcy was committed, but on that point there was contradictory evidence. One witness stated it to be a well-known usage to let machinery to clothiers. The judge was of opinion that the property was in the possession, order and disposition of the bankrupt, by the consent of the true owner, within the statute 21 Jac. 1, c. 19 (Bankrupts Act, 1623) and he left it to the jury to find, on the evidence, whether the possession continued in the bankrupt until the time of the act of bankruptcy. They found

that it did and the verdict was accordingly entered for the plaintiffs. A rule nisi **A**
for a new trial was subsequently obtained by the defendant.

Selwyn for the plaintiffs, showed cause against the rule: *Lingham v. Biggs* (1) and *Bryson v. Wylie* (2) show that the bankrupt had the machinery in question in his possession, order and disposition, within the meaning of the statute 21 Jac. 1, c. 19. The plaintiffs, by showing that the machinery had once been the property of the bankrupt and that it continued in his possession down to the time of the act of bankruptcy, made out a prima facie case to entitle them to recover; for where a person who has at one time been the owner of property, continues in possession of it, the presumption is that he continues in such possession as owner. The defendant did indeed prove that the real ownership had ceased before the act of bankruptcy but the reputed ownership would continue as long as the possession continued, unless it was made notorious to the world that there had been a change of property. **B**

Knowles v. Horsfall (3) shows that the marking of the name of the purchaser on the goods is not sufficient evidence that the change of possession is notorious, so as to take the case out of the statute. **C**

As to there being an usage to rent and hire such machinery, that was only spoken to by one witness and no stress was laid on it at the trial. In *Thackthwaite v. Cock* (4), **MANSFIELD, C.J.**, lays it down that the custom must be such that persons dealing with traders may see and know that the goods may possibly not be the property of the possessor. The defendant not having proved any notoriety of the change of property, there was no evidence to go to the jury to show that the reputed ownership which had been proved to have been at one time in the bankrupt had ceased. **D**

Gaselee for the defendant, supported the rule: The fact of the sheriff having been in possession under an execution of these goods, was evidence that the change of property was notorious in the neighbourhood. In *Watkins v. Birch* (5), where a defendant had confessed judgment and, the creditor having taken his goods in execution, bought them by public auction and took a bill of sale for a valuable consideration from the sheriff, and afterwards let the goods to the former owner for a rent which was paid, it was held that that creditor had a good title which could not be impugned as fraudulent by other creditors having executions against the same defendant. Besides, in this case it was proved to have been the usage to rent such machinery. **E**

In *Horn v. Baker* (6) it was expressly laid down that where there was a usage to rent and hire vats for the purpose of distilling, the possession and use of such articles would not carry the reputed ownership. The notoriety of the change of property in this case was a question of fact and ought to have been submitted to the jury. **F**

BAYLEY, J.—I am of opinion that there is no ground for disturbing this verdict. In *Lingham v. Biggs* (1), a person who was allowed to have possession of goods in circumstances which give the reputation of ownership, was considered as having the order and disposition of them, within the meaning of 21 Jac. 1, c. 19, s. 11. In actions brought by the assignees of a bankrupt to recover property possessed by the bankrupt as reputed owner, it lies on them to show, in the first instance, that the bankrupt was the reputed owner at the time of his act of bankruptcy. **G**

There are two classes of cases where property demised to the bankrupt has been held to pass to his assignees, under 21 Jac. 1, c. 19; the first is where the bankrupt has once been the owner, the other where he has not. The evidence required to establish reputed ownership in each of these cases is different. In the former case, when it is once proved that the bankrupt has been the owner and has continued in possession till the time of the act of bankruptcy, the presumption is that he then continued in possession in the character of owner, and, therefore, proof of those facts is prima facie evidence that the bankrupt is both reputed and real owner. In the latter case, the mere possession of the things demised may not of itself be sufficient **H**

A to show that the bankrupt was the reputed owner of them; and it may then be necessary for the assignees to establish that fact by other circumstances.

In this case, it was proved that the bankrupt was once the owner of the machinery and the jury have found that it continued in his possession to the time of the act of bankruptcy. That being so, the reputed ownership must be presumed to have continued as long as the possession continued. It was proved that he had ceased
B to be the real owner but he would continue to be the reputed owner until it had been made notorious to the world that he had ceased to be the real owner.

It has been held that where there has been a public sale of property under an execution, the new owner may permit the former owner to continue in possession and that, in the event of the bankruptcy of the latter, the property will not pass to his assignees. In that case the change of property becomes notorious by the public
C sale. If the vendee, however, permits the former owner to continue in possession without making the change of property notorious to the world, the consequence will be that, in the event of his bankruptcy, it will pass to his assignees as being in his order and disposition, within the statute.

The question of reputed ownership, generally speaking, is a question of fact for the jury; but when it is once proved, in an action brought by the assignees of the
D bankrupt, that the latter who was the former owner of the goods, continued in possession till the time of his act of bankruptcy, it must be taken that he continued in possession as owner till that time, unless it be shown by the defendant, not only that there was a change of ownership but that that change of ownership had become notorious to the world.

In this case the defendant did not give any evidence to prove the notoriety of the change of ownership and, that being so, I am of opinion that there was no evidence
E to go to the jury on that question and that the rule for a new trial must be discharged.

HOLROYD, J.—I am of the same opinion. The property in this case was demised to a person who had been the owner and continued in his possession till the
F time of his act of bankruptcy. If it had been demised to a person who never had been the owner, and he afterwards became bankrupt, the mere possession might not be sufficient to show that he was either the real or reputed owner.

The plaintiffs, by showing that the property once belonged to the bankrupt and that he continued in possession until the time of the act of bankruptcy, made out a
G prima facie case that he was not only the reputed but the real owner. The defendant has shown that there was a change of property previously to the act of bankruptcy and that the bankrupt, therefore, was not then the real owner. But it was also incumbent on the defendant to show that the bankrupt was not then the reputed owner and for that purpose, to prove that the change of property had become notorious to the world. The fact of the goods having been seized under an execution
H and the sheriff's officer having been in possession, was at most only evidence of the notoriety of their having been taken in execution. That execution, however, might have been withdrawn in consequence of the debt having been paid, and the very circumstance of the bankrupt's having afterwards continued in the possession of the machinery might well have induced others to believe that such was the fact, and that he still continued the owner.

I think, therefore, that there was not any evidence to go to the jury to show that the bankrupt had ever ceased to be the reputed owner of these goods and, that being
I so, the verdict is right, and this rule must be discharged.

BEST, J.—If the machinery had been let to a person who had never been the owner and he had become bankrupt, it would have been for the plaintiffs to show not only that the bankrupt was in possession but that he was in possession in such circumstances as might fairly induce others to think and treat him as real owner. In such a case, the mere possession might not be sufficient to induce others to consider him as the owner. But the very fact of the continued possession of

property by a person who, at one time, is proved to have been the owner raises a presumption that he still possesses it in the character of owner. A

The plaintiffs have established the fact that the bankrupt was once the owner of the machinery in question and that he continued in possession of it till the time of the act of bankruptcy. It was then incumbent on the defendant to show that the property was left in the possession of the bankrupt in circumstances which could lead no man to suppose that he was the real owner. The defendant has in fact proved that the bankrupt had ceased to be the real owner before his bankruptcy but not that he had ceased to be the reputed owner, for he did not show that the change of property was notorious to the world. B

In *Knowles v. Horsfall* (3) the fact of the initials having been written on the casks was held not to be sufficient evidence of the notoriety of the change of property. *Lingham v. Biggs* (1) and *Bryson v. Wylie* (2), show that this machinery was in the possession, order and disposition of the bankrupt within the 21 Jac. 1, c. 19. C

On the whole, I am of opinion that as the plaintiffs did establish that the bankrupt was the reputed owner of the machinery and that as the defendant did not show that that reputed ownership had ever ceased, there was no evidence to go to the jury on that point. The verdict was, therefore, right and this rule must be discharged. D

Rule discharged.

BEAUMONT v. DUKES

[ROLLS COURT (Sir Thomas Plumer, M.R.), February 11, 21, 1822]

[Reported Jac. 422; 37 E.R. 910]

Specific Performance—Sale of land—Contract—Representations by vendor as to future acts. F

The defendant purchased a piece of building land at an auction at which, on the vendor's written instruction, the auctioneer stated that the vendor intended to widen a narrow lane leading to the land and to form a new street as shown on a plan, and that he would apply for an Act of Parliament to enable him to carry out the work if it could not otherwise be done. The vendor failed to carry out any of the work. In an action by him for specific performance of the contract of sale, G

Held: the contract had been obtained by representations made by the vendor as to his future plans which he had not performed; therefore, he was not entitled to specific performance. H

Notes. As to representations as to future acts, see 36 HALSBURY'S LAWS (3rd Edn.) 314, 315; and for cases see 44 DIGEST (Repl.) 89, 90. H

Bill for specific performance of a contract for the sale of land by auction.

In April, 1812, the defendant purchased by auction a piece of building ground in George Street, Stepney, for £70. In an action for specific performance, the defendant in his answer stated that the approach to George Street from Mile End Road was by a very narrow and dirty lane, called White Horse Lane, and that the auctioneer at the sale declared that the plaintiff intended to make the lane wide and commodious and also to make a new street from George Street to Mile End Road; he said that he was induced to purchase in the confidence that those improvements would take place as they would much increase the value of the land, but that the plaintiff had not taken any steps towards effecting the alterations, and that he had converted part of the ground over which the proposed new street was to have passed into a farmyard. By the decree made on Feb. 16, I

A 1818, it was referred to the Master to inquire whether the plaintiff could make a good title, and when he could make it; and whether the abstract delivered showed that he could make a good title, and when it was delivered. The Master was also to inquire whether the representations stated by the defendant were made at the sale, whether anything had been done on the ground on each side of White Horse Lane, and whether the ground over which the new street was intended to run
B had been converted to any other purpose. The Master, by his report, found that the plaintiff could make a good title, but that the title was not complete till May, 1820. To this part of the report an exception was taken, which was overruled. It also appeared by the report that the plaintiff was not the owner of the White Horse Lane or the adjacent ground; but that the plaintiff had, previously to the sale, given to the auctioneer a paper in his own writing which had been lost,
C but the substance of which the auctioneer stated to be that it was in contemplation to widen White Horse Lane by purchasing the houses at the entrance, and to form a new street leading from Mile End Road to George Street, as represented by the dotted lines on a map or plan annexed to the particulars, and that, if the same could not be otherwise done, the plaintiff would apply to Parliament for an Act to enable him so to do. That paper, by the plaintiff's directions, was read
D to the persons assembled at the sale. Nothing had been done on the ground on each side of White Horse Lane since the agreement. The Master also found that the ground over which the new street was to run had not been converted to any other purpose; it was, however, stated by a witness that a part of it had been turned into a farmyard.

E *Shadwell* for the plaintiff.
Agar and *Phillimore* for the defendant.

SIR THOMAS PLUMER, M.R.—It is fairly admitted that the court, having a discretion either to grant a specific performance or to leave the parties to law if the fact be established that any fraud is to be imputed to the vendor, or if
F there has been any mistake or surprise that operates in conscience against his demand to have the contract performed, it is an answer to him. The defendant here has made two objections in his answer: first, that the plaintiff's title was imperfect; and, secondly, that he purchased on the faith of representations made at the auction by the plaintiff's agent, which considerably enhanced the price but which, in the event, have not been fulfilled. As to the first point, it appears
G that the title is now complete, though it was not at the time of filing the bill; that, however, goes to costs only, and not to the main point of specific performance.

As to the second point, it is unfortunate that the paper read at the sale has been lost. Its contents are, however, supplied by the memory of the auctioneer; and the first observation that arises is that the subject of the representations was not a future project contemplated by a third person. If that had been the case,
H the plaintiff might have held out the expectations with a degree of uncertainty whether they would be fulfilled. If he had said merely that a plan was in contemplation, that would not have been an undertaking to do anything himself; it would only be holding out a hope as to the future conduct of a third person not under his control, and it would be the fault of the bidder if he relied on so loose and vague a report. But here the representation went to induce a belief that the
I plan was in contemplation by himself; we must take it as a statement of what he intended to do himself.

The ground was described as building ground in a street; and the value of the lot must, of course, depend very much on the communication to it. The representation that was made was, therefore, calculated to enhance the price and we must consider it to have been meant, not merely as a loose statement, but to operate on the sale; the auctioneer is authorised to announce it and a plan, showing the alteration intended, is put into the hands of the bidders. In one respect, indeed, it is overstated in the answer; for it appears that the plaintiff

was not the owner of the land on which the improvement was to be made. This makes a difference as to the certainty of the plan being carried into execution; but he appears to have represented that, if he was not the owner, he was about to become so and that, if necessary, he would even apply to Parliament to overcome any obstacles that might intervene. Surely, then, he held it out to them as a plan with respect to which he was in earnest and which, in his judgment, was practicable. Then, was he sincere in this? It does not appear that from that time he has taken any step to realise it. When the objection was made in the answer, the onus of showing what steps he had taken and what had prevented him from completing the improvement lay on him. He has not proved it, and we must, therefore, assume that he has done nothing. Is this keeping good faith with those who listened to his statements? It is perfectly consistent with everything which appears that this might only have been a plan on paper, made use of to allure purchasers without any design of carrying it into effect.

It comes to this, that the representation stated by the auctioneer was made by the directions of the plaintiff, and that it influenced the purchase; the defendant swears that he bought on the faith of it, and from the nature of the subject it is reasonable to suppose that he did. I think that this does afford a ground for saying that the plaintiff is not entitled to the specific performance of a contract thus obtained. It must stand or fall to the full extent; we cannot cut down the price and say how much would have been given if this had not been done. The statement made was not the loose puffing of an auctioneer, but a written declaration by the vendor himself. The contract was obtained by representations made by the vendor as to his future plans, which he has not performed, and it cannot, therefore, be executed by a court of equity.

Bill dismissed.

BROOKS AND ANOTHER v. GREATHED

[ROLLS COURT (Sir Thomas Plumer, M.R.), January 21, February 3, 1820]

[Reported 1 Jac. & W. 176; 37 E.R. 342]

Execution—Sequestration—Receiver—Disturbance of possession of sequestrator.

The possession of a receiver or sequestrator is not to be disturbed without the leave of the court.

Angel v. Smith (1) (1804), 9 Ves. 335, followed.

Notes. Considered: *Empringham v. Short* (1844), 3 Hare, 461. Applied: *Musadee M.C. Sherazee v. Meerza Shoostry* (1854), 8 Moo. P.C.C. 90.

As to sequestration, see 16 HALSBURY'S LAWS (3rd Edn.) 68 et seq.; and for cases see 21 DIGEST (Repl.) 686 et seq. As to the effect of the appointment of a receiver against a party claiming possession, see 32 HALSBURY'S LAWS (3rd Edn.) 419 et seq.; and for cases see 39 DIGEST (Repl.) 53 et seq.

Case referred to:

(1) *Angel v. Smith* (1804), 9 Ves. 335; 32 E.R. 632, L.C.; 39 Digest (Repl.) 52, 625.

Petition by the plaintiffs praying that accounts may be taken of their annuities and other encumbrances, and other relief.

By indenture dated Feb. 3, 1810, the defendant Greathed granted to Copland an annuity of £300 per annum for the life of the defendant, secured on an estate in the county of Dorset by a term of ninety-nine years in a trustee, and the appointment of a receiver. That annuity was subsequently assigned to the plaintiff Davis. In March, 1815, the defendant made a mortgage with trusts for sale of the same premises to the plaintiffs Brooks and Dixon who, as it was alleged, had

A no notice of the annuity; the estate was expressed to be conveyed to them subject to the existing encumbrances, but the annuity was not otherwise mentioned. In June, 1816, the plaintiffs Brooks and Dixon filed a bill for a sale of the estate. Copland and the plaintiff Davis were not made parties to the bill, nor was any notice taken of their security. In July, 1816, the plaintiffs Brooks and Dixon obtained an order for a receiver, and on Dec. 7, 1818, a decree for a sale. The payments of the annuity being in arrear, in March, 1818, the plaintiffs Davis and Copland, together with the trustee and receiver nominated in the deed of 1810, filed the bill in the second cause to have the proper accounts taken and the priorities of the encumbrances ascertained. The plaintiffs Brooks and Dixon were made parties to this suit and were served with subpoenas in April, 1818, previous to the decree in the first cause. They put in an answer in January, 1819, contesting the validity of the annuity deed. The plaintiffs in the second suit had not taken any subsequent step. They now presented a petition praying that accounts might be taken of their annuities and the other encumbrances and their priorities ascertained, and that the receiver in the first cause might apply the rents in payment of the annuity and the other encumbrances, according to their priorities, or that the petitioners might be at liberty to bring ejectments as they should be advised. The petition was supported by an affidavit, attesting the execution of the deed of February, 1810.

Wingfield and Lovat for the plaintiffs.

Horne, Temple and Richards for the defendant.

E Feb. 3, 1820. **SIR THOMAS PLUMER, M.R.**, after stating the circumstances and remarking on the length of the interval between the appointment of a receiver in the first cause and the commencement of the second, continued: In this state of things, the petition is presented praying in the alternative either that the accounts may be taken, and the rents and profits applied to keep down the annuity, or for liberty to bring ejectment. I think that the second part of the prayer, and that only, can be granted. For though the plaintiffs have not yet proved their deed and their suit is, therefore, not yet ripe for an order on it, yet the matter is quite in a fit state for their right to be ascertained by a trial at law. This, however, cannot be done without the leave of the court. It was so settled in *Angel v. Smith* (1), when the rule was laid down both with respect to receivers and sequestrators that their possession is not to be disturbed without leave. But when a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment or to permit him to be examined pro interesse suo, which may perhaps often be the most convenient mode. It would be extremely hard if the practice were different; the party would then be kept out of possession or, if he proceeded at law, he would be liable to punishment for a contempt.

H The reason why I do not take the other course prayed by the petition is because the plaintiffs have not used the active diligence which they ought to have done in the second suit which they thought the fittest to bring the matters in dispute to a decision; the suit has been left at issue more than a year. To the other part of the prayer they are, however, clearly entitled.

Order accordingly.

SMITH v. CHANCE

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), June 19, 1819]

[Reported 2 B. & Ald. 753; 106 E.R. 540]

Agriculture—Tenancy—Covenant—Covenant by tenant either to consume hay on premises or to bring two loads of manure for every load of hay removed—Tenant selling hay before bringing manure—Right to recover price from purchaser.

Sale of Goods—Delivery—Duty of seller to deliver—Seller leaving premises on which goods lying.

Per HOLROYD, J.: A party cannot maintain an action for the price of goods sold and delivered until he has either delivered them or done something equivalent to delivery; as, for instance, if he has put it in the vendee's power to take away the goods himself.

The plaintiff was tenant of some pasture land under an agreement one of the terms of which was that he would either consume the hay on the premises or for every load of hay removed would bring two loads of manure. On quitting possession of the premises the plaintiff sold to the defendant part of a rick of hay which he had left standing, but without mentioning the agreement respecting the manure. The succeeding tenant refused to allow the defendant to take away the hay until the plaintiff had brought in the manure. After about a month, during which time the hay had been spoiled by the weather, the succeeding tenant consented that it should be removed by the defendant. The defendant refused either to take the hay or to pay the plaintiff for it.

Held: the succeeding tenant had the right to refuse to allow the hay to be removed until after the manure had been brought in; it was incumbent on the plaintiff to have brought on the manure before the sale; and, therefore, he was not entitled to recover the price from the defendant.

Notes. Considered: *Westropp v. Elligott* (1884), 9 App. Cas. 815.

As to covenants in an agricultural tenancy, see 1 HALSBURY'S LAWS (3rd Edn.) 263 et seq.; and for cases see 2 Digest (Repl.) 49 et seq. As to delivery of goods, see 34 HALSBURY'S LAWS (3rd Edn.) 91 et seq.; and for cases see 39 DIGEST (Repl.) 659 et seq.

Rule Nisi obtained by the defendant to set aside the verdict in an action of assumpsit for hay sold and delivered.

The plaintiff was tenant of a piece of pasture land near Worcester called the Further Hill, which he occupied from Candlemas, 1815, to Candlemas, 1817, when he quitted the premises in consequence of a notice given by himself. One of the terms on which he held the land was that he would consume the hay on the premises, or for every load of hay would bring two wagon-loads of Worcester muck and spread the same. At the time when the plaintiff quitted the possession, a part of a rick of hay was left standing on the premises. That hay the plaintiff sold to the defendant, but without mentioning the agreement respecting the muck. The succeeding tenant, Phillips, who had previously given permission to the plaintiff to carry off the hay provided he would fulfil his agreement with the landlord as to the manure, in consequence of some dispute between himself and the plaintiff as to the terms, immediately on the defendant's sending persons to truss and carry away the hay forbade their proceeding to do so, and threatened to bring an action against them if they carried away the hay before the plaintiff had brought on the manure. In consequence of this the defendant desisted, and the hay remained on the land till about a month afterwards when, an arrangement having been come to between the plaintiff and Phillips, the latter then consented to the hay being carried off the premises. In the interval, however, the hay had

A been spoiled by exposure to the weather, and the defendant then refused either to take or to pay for it. RICHARDSON, J., thought that, inasmuch as the bringing on the manure was not a condition precedent to carrying off the hay, the defendant was entitled, notwithstanding the refusal of Phillips, to have taken the hay after he had purchased it, and that he might, if necessary, have brought trover for it; he could not, therefore, resist the demand made by the plaintiff for the payment of the stipulated price. The jury accordingly found a verdict for the plaintiff. The defendant subsequently obtained a rule nisi to set aside the verdict.

Fuller for the plaintiff, showed cause against the rule.

Jervis and *Russell* for the defendant, were not called on to support the rule.

ABBOTT, C.J.—I think that the learned judge was mistaken in the view which he took of this case. For I am of opinion that neither the plaintiff nor the defendant could, without Phillips's permission, have removed this hay from the premises. That permission, as it appears from the evidence, was given sub modo; for Phillips only consented that the hay should be taken away, provided the plaintiff fulfilled his agreement with the landlord. The learned judge thought that, by that agreement, the plaintiff was not bound to bring on the manure till after the hay had been removed. That was so during the possession of the land by the plaintiff, but after the expiration of the plaintiff's tenancy the succeeding tenant might then refuse to permit the plaintiff to carry away the hay till after the manure was brought on. I think, therefore, that the learned judge was wrong, and that a satisfactory defence was made out in evidence.

BAYLEY, J.—The circumstances in which this hay was placed ought to have been communicated to the defendant at the time of the sale. He would naturally suppose that the plaintiff had a right to deliver the hay, whereas the contrary turns out to be the fact.

HOLROYD, J.—I am of the same opinion. A party cannot maintain an action for the price of goods sold and delivered until he has either delivered them or done something equivalent to delivery; as, for instance, if he has put it in the vendee's power to take away the goods himself. But here the defendant was prevented from carrying away the hay by Phillips, on whose premises it was standing. And it was incumbent on the plaintiff to have removed that obstacle previously to the sale.

BEST, J., concurred.

Rule absolute for new trial.

WEBB v. PLUMMER

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), June 19, 1819]

[Reported 2 B. & Ald. 746; 106 E.R. 537]

Agriculture—Tenancy—Covenant excluding allowance for foldage from incoming tenant—Exclusion of custom of country.

By the custom of the country the outgoing tenant of a farm was entitled to an allowance for foldage from the incoming tenant. By the outgoing tenant's lease he covenanted that he would at all times during the term fold his flocks on those parts of the premises on which they had usually been folded under a penalty if he omitted to do so. Although certain payments were specified which the incoming tenant was to make, no mention was made for payment for foldage.

Held: the terms of the lease excluded the custom of the country and the outgoing tenant was not entitled to any allowance in respect of foldage.

Notes. Distinguished: *Holding v. Pigott* (1831), 7 Bing. 465; *Hutton v. Warren*, [1835-42] All E.R. Rep. 151. Considered: *Spartali v. Benecke* (1850), 10 C.B. 212. Distinguished: *Brown v. Byrne* (1854), 3 E. & B. 703; *Re Constable and Cranswick* (1899), 80 L.T. 164. Considered: *Westacott v. Hahn*, [1917] 1 K.B. 605. Referred to: *Wooler v. Knott* (1876), 1 Ex.D. 124.

As to agricultural tenancies and custom of the country, see 1 HALSBURY'S LAWS (3rd Edn.) 257 et seq.; and for cases see 2 DIGEST (Repl.) 18 et seq.

Cases referred to:

(1) *Senior v. Armutage* (1816), Holt, N.P. 197; 2 Digest (Repl.) 21, 92.

(2) *Wigglesworth v. Dallison* (1779), 1 Doug. K.B. 201; 99 E.R. 132; 2 Digest (Repl.) 24, 114.

Also referred to in argument:

Doe d. Dagget v. Snowden (1775), 2 Wm. Bl. 1224; 96 E.R. 720; 2 Digest (Repl.) 11, 38.

Rule Nisi obtained by the defendant to set aside the verdict in an action in which the plaintiff, the outgoing tenant of a farm, claimed from the defendant, the incoming tenant, a sum in respect of foldage.

At the trial before PARK, J., it was admitted that, by the custom of the country such an allowance was usually made, but the defendant contended that, under the special provisions of the plaintiff's lease, the custom of the country was excluded. The following were the clauses relied on:

"And also that the said Henry Webb shall not, during the term, carry, or cause or suffer to be carried from off the premises, any hay, straw, corn in the straw, haulm, sheaf, or fodder, muck, dung compost, or sullage, that shall grow, arise, or be made in or upon the said demised premises; but yearly and every year, in a good husband-like manner, fodder out, lay, spread, spend, and use the same, in or upon some proper part thereof, upon pain of forfeiting £3 for each load so carried away from the said demised premises; and also shall and will, at all times during the said term, penn or fold his flock of sheep, which he shall keep upon the said demised premises, upon such parts where the same have been usually folded, upon the penalty of £3 a time for each and every time that the same shall be folded off from the demised premises, or on any other part thereof, than where the same have been usually folded as aforesaid; and also shall and will, in the last year of the said term, at the usual time for moving the dung out of the closes, carry all the dung and manure arising on the premises in the preceding year to such part or parts of the said fallowed lands or grattens as shall be appointed by the lessor.

A his heirs or assigns or the next succeeding tenant or tenants, and there cast the same into a mixen or mixens, he and they paying for fallowing such land and carrying out the dung, but nothing for the dung itself, and also grass in the ground, and for thrashing out the corn, as is customary between a tenant coming in and a tenant going out of a farm."

B PARK, J., directed the jury to find a verdict for the plaintiff, with liberty to move to enter a verdict for the defendant. The defendant obtained a rule nisi accordingly.

Marryat and Chitty for the plaintiff, showed cause against the rule.

Gurney, Serjeant Doyley and Courthope for the defendant, in support of the rule.

C **ABBOTT, C.J.**—There is no doubt that, by a special covenant, a party may waive the benefit of the custom of the country, whether general or particular; and the only question is whether the plaintiff in this case has waived the benefit of being paid for the foldage by the covenants in this lease. On considering the whole lease, I am of opinion that he has so waived this advantage for which, in all probability, he must have received some corresponding benefit. He covenants that he will at all times during the term fold his flock which he shall keep on the demised premises on such parts thereof where the same have been usually folded on the penalty of £3 a time for every time the same shall be folded off from the demised premises or on any other part thereof than where the same had been usually folded. It is said that this covenant does not absolutely bind the tenant to keep as well as fold his flock. I think that it does, but that does not form the ground of my judgment for the lease further proceeds to bind the tenant in the last year of his term to carry all the manure arising on the premises to such part of the fallowed lands as shall be appointed by the landlord or the incoming tenant; and then there follows a provision as to the payments which are to be made by the incoming to the outgoing tenant, viz.:

F "for fallowing such land and carrying out the dung, but nothing for the dung itself, and also grass in the ground, and for thrashing out the corn, as is customary between a tenant coming in and a tenant going out. . . ."

G There are, therefore, certain payments specified, which the incoming tenant is to make, but no payment for foldage is mentioned. It must, therefore, be considered as wholly excluded by the lease. On the whole, I am of opinion that, by the express terms of the lease which specifies certain particular payments to be made on quitting the premises, the custom of the country as to the payment for foldage is waived, and, therefore, that the plaintiff is not entitled to recover.

H **BAYLEY, J.**—I am of opinion that the plaintiff is not entitled to recover the compensation in question. Where there is written agreement between the parties, it is naturally to be expected that it will contain all the terms of their bargain; but if it is entirely silent as to the terms of quitting, it may let in the custom of the country as to that particular. If, however, it specifies any of those terms, we must then go by the lease alone. The custom of the country applies to those cases only where the specific terms are unknown; and it is founded on this principle, that justice requires that a party should quit on the same terms as he entered. If, therefore, the party, when he entered on the farm, paid for a waygoing crop or for foldage, manure, fallowing or tillage, then if the lease be wholly silent as to the terms on which he is to quit, the custom of the country may be introduced and he may be entitled to receive for a waygoing crop, foldage, etc. I On this ground *Senior v. Armytage* (1) was determined, for the lease there was wholly silent as to the terms of quitting, and the claim there was different from the present, being a claim for labour done by the outgoing tenant from which he could not himself derive any benefit. Here, too, there is a specific contract to fold the flock on the premises under a penalty. My judgment, however, is founded particularly on the last stipulation in the lease, by which the plaintiff is prohibited

from carrying off the manure, and by which the incoming tenant is directed to make certain payments to him; and if a lease speaks distinctly of the allowances to be made on quitting, it seems to me to exclude all others which are not named. A

HOLROYD, J.—I am of the same opinion. It seems to me that the covenant in the lease that the plaintiff will fold his flock which he shall keep, etc., is binding on him to keep a flock and fold it on the usual parts of the demised premises. For although the words of a covenant are to be construed according to the intent of the parties, yet they are to be taken most strongly against the party who stipulates. To this covenant there is attached a penalty, the only effect of which is to give the landlord an option, either to bring an action for damages for the breach of the covenant to fold or to proceed for the penalty. But even supposing that there was no covenant to fold in this lease, still, inasmuch as it provides for the payments which the incoming tenant is to make, it seems to me that its language is equivalent to this, that the incoming tenant shall pay for such things as are specified, and no more. For the rule *expressio unius est exclusio alterius* applies. Then, as the parties have provided for all the payments that were to be made and as they have not mentioned foldage, it follows that the plaintiff is not entitled to any compensation for it, and that the verdict must be entered for the defendant. B C D

BEST, J.—I had at first some doubt in this case, but, on looking at the whole deed, I think that it was intended by the parties that it should contain all the terms of quitting and that the custom of the country should not prevail. In *Wigglesworth v. Dallison* (2), there were no sufficient circumstances to exclude the custom; and, unless it appears that there is nothing to exclude it, the agreement must regulate the rights of the parties. Here the parties have made some stipulation as to the terms of quitting and, if they had intended that this or any other payment should be also made, they would have introduced them into the lease. I think, therefore, that the verdict should be entered for the defendant. E

Rule absolute. F

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R. v. BORRON

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.), Hilary Term, 1820]

[Reported 3 B. & Ald. 432; 106 E.R. 721]

B

Magistrates—Misconduct—Principles on which criminal information granted.

Where a criminal information is applied for against a magistrate the question for the court is not whether the act done might, on full and mature investigation, be found strictly right, but from what motive it proceeded—whether from a dishonest, oppressive or corrupt motive, under which description fear and favour may generally be included, or from mistake or error. In the former case alone will the application be granted.

C

Notes. Referred to: *Ex parte Fentiman* (1834), 2 Ad. & El. 127.

As to grounds for granting criminal information against a magistrate, see 25 HALSBURY'S LAWS (3rd Edn.) 160–162; and for cases see 33 DIGEST (Repl.) 167 et seq.

D

Rule Nisi for a criminal information against the defendant, John Arthur Borron, one of Her Majesty's justices of the peace for the county of Lancaster.

J. Williams showed cause against the rule.

Denman, Chitty and Hill in support of the rule.

Cur. adv. vult.

E

ABBOTT, C.J., delivered the following judgment of the court.—In the course of the last term, a rule was granted on the application of Mr. Charles Pearson, an attorney of the city of London, calling on the defendant to show cause why a criminal information should not be exhibited against him for refusing to take the examination of two persons of the names of Thomas Richardson and Robert Rimmer on a charge against a third person of having feloniously cut and wounded Thomas Richardson on Aug. 16, 1819, at Manchester. The defendant is a justice acting for the Warrington division, and not for the division of Manchester, wherein the offence was alleged to have been committed. Cause was shown against the rule on the last day of the term, and it appearing on the arguments of counsel that an important question was supposed to be raised regarding the execution of the office of a justice of the peace on the one hand, and the right of the subject to inquiry and investigation on the other, we thought it expedient to peruse the affidavits attentively before we pronounced our rule in the case, which could not, without great inconvenience, be done on the last day of the term. We have, accordingly, perused the affidavits attentively during the late vacation, and, on such perusal, it appears to us that the application for a criminal information is not sustained.

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The application is made against a defendant who is one of that class of persons to whom this country is under as great obligations as this or any other nation is, or ever was, to any members of its community.—I speak of the gentlemen residing in the different parts of England who act in the execution of His Majesty's commission of the peace and gratuitously devote a great portion of their time and bestow much valuable, but often thankless, labour in the administration of many branches of the law, among others, in most of the early and in many of the mature stages of our criminal jurisprudence. In this most valuable class, many persons are found who possess a sound knowledge of the law, united with the most useful and extensive practical information. They are called on in many cases of a difficult and in many of a delicate kind, and are, in general, addressed by those who apply to them with the respect that is due to their station and character. The present case affords an unusual, if not a solitary instance, of address in the language of demand and menace. They are, indeed, like every other subject of this kingdom,

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answerable to the law for the faithful and upright discharge of their trust and duties. A But, whenever they have been challenged on this head, either by way of indictment, or application to this court for a criminal information the question has always been, not whether the act done might, on full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive or corrupt motive, under which description fear and favour may generally be included, or from mistake or error. In the former case alone, they have become B the objects of punishment. To punish as a criminal any person who, in the gratuitous exercise of a public trust, may have fallen into error or mistake belongs only to the despotic ruler of an enslaved people and is wholly abhorrent from the jurisprudence of this kingdom. On these principles, the present application to this court is to be decided by us. But even if it were to be decided on a more strict and rigid rule, we should not be able to find any error or mistake in the conduct of the C defendant except, perhaps, that of having shown too much attention to an application made to him in a most improper and unbecoming manner.

Mr. Charles Pearson of London, the person now applying to this court, informs us by his affidavit that he was retained on Oct. 23, 1819, by Thomas Richardson of Manchester to bring before the proper tribunal a charge which he had to prefer D against an individual, whose surname is mentioned, for having feloniously, etc., cut and wounded the said Richardson, on Aug. 16, at Manchester. He then proceeds to mention the facts of the case, as communicated to him by Richardson, all the material parts whereof are also mentioned in the affidavit of Richardson, and such of them as are said to have been witnessed by Robert Rimmer are mentioned in his affidavit also. Affidavits to be sworn by these two persons were prepared by E Pearson after his return to London, and sent down by him to Manchester; and their affidavits now before the court appear to contain many expressions not likely to be used by persons of their situation in life. These affidavits present two facts very important to the present inquiry: first, that the name of the person by whom the supposed felony was committed was unknown to Richardson and Rimmer at the time, and was not discovered until after the assizes which had intervened between F the subject of complaint and the application to the defendant; secondly, that the attack on Richardson was made wantonly and wilfully after the meeting at Manchester had been dispersed by the authority of the justices acting in that district; when Richardson was going from the place of meeting peaceably and alone; at a time, therefore, and under circumstances in which those who had ordered the dispersion of the meeting, whether such order had been properly or improperly G given, could not be responsible for the act of the supposed offender. Pearson further states a measure adopted by himself for the purpose of satisfying himself that Richardson had not mistaken the person accused, in which he appears to have conducted himself with becoming caution.

The first of these facts, namely, the discovery of the name of the offender after the assizes, does not appear to have been communicated to the defendant. According H to the representation made to him, the supposed offender was living at Manchester, not having fled nor being likely or expected to fly from the calls of justice. The latter of these facts, namely, the time and circumstances of the alleged offence, were, at the first interview, mentioned to the defendant, but his attention was not then, or afterwards, called to them as it ought to have been in order to remove the ground of his disinclination to interfere which was manifested at the first meeting. I On the contrary, the defendant was informed, as the reason for applying to him to exercise his authority on a matter arising in a part of the country in which he did not reside and for which he had never acted, that the justices acting for the Manchester division had refused to inquire into some similar charges against the yeomanry, alleging that they might be in some sense considered as connected with the proceedings of that day and, as such, so implicated as to render it improper for them to take cognisance of the charges. And it is obvious to us, and was apparent at the time, that the defendant's reluctance to act on the occasion was grounded

A on the consideration that his brother justices were in some way connected with the subject of complaint. It was the duty of an attorney to have pointed out the distinction. For such purposes, and perhaps for such alone, can the presence of an attorney be useful on such an occasion.

B It appears further by the affidavits on each side that the defendant desired a day to consider the matter and, before his final refusal, consulted another justice of the county who agreed in opinion with him as to the conduct proper for him to adopt; and the fact of such consultation, at least, if not the opinion of the other justice, was made known to Pearson. The reason of the defendant's refusal to act, as furnished to the court by the affidavit of Pearson, was that he declined any official interference with regard to individuals who could with difficulty be separated from the magistrates of Manchester on legal grounds. From the defendant's affidavit C also, it appears that this was the reason assigned by him, though much more at large; more, indeed, than was necessary. By his affidavit it also appears to the court for the first time that he accompanied his then refusal with expressions to the following effect: "I by no means, however, wish it to be understood that I shrink from any responsibility on this occasion from personal inconvenience or trouble; and D that if I am directed by the Court of King's Bench, to which you intimate your intention to apply, I shall, fearlessly, and without regard to any party, proceed to investigate the charges submitted to me; charges which, not being now entertained, cannot be attended with any further consequences than the not securing the persons of the individuals charged during the interval to the next assizes, when E bills of indictment may be preferred, which my refusal does not prejudice; a circumstance which, considering the lapse of time that has intervened from the day the cause of complaint arose, without the party's absconding, gives rise to little apprehension of such an event taking place."

If this offer to investigate the charges in case this court should direct the defendant to do so, had been communicated to us by the affidavit of Pearson, most undoubtedly we would not have granted a rule for a criminal information. The F suppression of the offer necessarily leads us to discharge the rule with costs, according to the usual practice in cases of this kind, and induces a strong suspicion that the application was made for a very different purpose from that of having the matter of Richardson's complaint investigated by a justice of the county; for the defendant's refusal was made on Oct. 26, and a mandamus might have been moved for on the sixth or seventh of the following month, and it is not surmised that the G person accused had absconded, or that an ultimate failure of justice is likely to occur.

[His LORDSHIP referred to other circumstances in the case which are now rendered obsolete as a result of s. 99 of the Magistrates' Courts Act, 1952.]

Rule discharged.

A

FARRANT *v.* THOMPSON

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Best, JJ.),
June 10, 1822]

[Reported 5 B. & Ald. 826; 2 Dow. & Ry. K.B. 1; 106 E.R. 1392]

B

Conversion—*Wrongful removal by tenant of demised machinery*—*Seizure by sheriff*—*Purchase from sheriff*—*Landlord's right to bring trover.*

By an agreement in writing the plaintiff let a windmill to a tenant who offered to sell part of the mill machinery to the defendant. The machinery having been removed from the mill by the tenant, it was seized under a *fi. fa.* by the sheriff at the suit of a third person and the defendant later purchased it from the sheriff.

C

Held: the machinery, being annexed to the mill and forming parcel of the inheritance, had been wrongfully severed by the tenant; thereupon it became the property of the plaintiff who was entitled to bring trover for it even during the continuance of the term.

D

Notes. Considered: *Bland v. Lynam* (1827), 5 L.J.O.S.C.P. 87. Referred to: *Garland v. Carlisle* (1837), 4 Scott, 587; *Wiltshier v. Cottrell* (1853), 1 E. & E. 674; *Petre v. Ferrers* (1891), 61 L.J.Ch. 426.

As to conversion, see 38 HALSBURY'S LAWS (3rd Edn.) 775 et seq.; and for cases see 46 DIGEST (Repl.) 458 et seq.

E

Case referred to:

(1) *Gordon v. Harper* (1796), 7 Term Rep. 9; 2 Esp. 465; 101 E.R. 828; 46 Digest (Repl.) 488, 360.

Also referred to in argument:

Doe v. Thorn (1813), 1 M. & S. 425; 105 E.R. 159; 21 Digest (Repl.) 608, 973.

Manning's Case (1609), 8 Co. Rep. 94 b; 77 E.R. 618; 21 Digest (Repl.) 608, 975.

F

Motion by the defendant for a rule nisi to enter a nonsuit in an action of trover.

On July 10, 1820, by an instrument in writing, the plaintiff agreed to purchase of one Richards for the remainder of a term of ninety-nine years certain premises at Cudham, in Kent, on which Richards had erected a windmill, with the appurtenances, the same having been demised to him for the term of ninety-nine years at a yearly rent. The agreement contained a stipulation on the part of the plaintiff to grant a lease of the premises to Richards for the term of thirty years at the yearly rent of £80. The plaintiff paid the purchase-money, and Richards became his tenant and paid rent according to agreement. In September, 1821, Richards offered to sell to the defendant part of the machinery of the mill which he was then about to remove to Grays, in Essex. A day was fixed for bringing the machinery to Grays, and it was then agreed that the defendant and his millwright should meet Richards at Grays for the purpose of purchasing the machinery. The machinery was severed by Richards from the mill and, while on the road from Cudham to Grays, was seized in execution by the sheriff under a *fi. fa.* at the suit of a third person. The defendant afterwards became the purchaser under the sheriff.

G

H

At the trial before ABBOTT, C.J., it was contended that the plaintiff was not entitled to recover, because the purchase by the defendant under the execution was equivalent to a sale in market overt and that the property was thereby changed, and that the plaintiff ought to have brought his action against the sheriff for wrongfully selling the goods; and, secondly, that as the goods were in possession of Richards under a demise, trover would not lie for them during the term. The plaintiff obtained a verdict, but ABBOTT, C.J., gave leave to the defendant to move to enter a nonsuit.

I

Scarlett, for the defendant, for the motion.

A **ABBOTT, C.J.**—I thought at the trial, and still think, that there is a material distinction between this case and that of *Gordon v. Harper* (1). In that case the goods removed were personal chattels and the tenant had not by any wrongful act put an end to his qualified possession of them. Here, however, they consisted of machinery annexed to the mill and formed parcel of the inheritance, and, when wrongfully severed, became the property of the reversioner.

B As to the other point, the sheriff wrongfully took the goods of the landlord instead of those of the tenant; he could acquire no title by his wrongful act and could, therefore, convey no title to the defendant.

C **BAYLEY, J.**—I am of the same opinion. This case is distinguishable from *Gordon v. Harper* (1) in two particulars; first, there the goods removed were personal chattels and, at the time of the seizure, continued to be in the qualified possession of the tenant which the lessor agreed the lessee should have. Here the goods were parcel of the inheritance and let to the tenant to be used during the term in a particular way, viz., in that particular place, and he, by his own act, put an end to that qualified possession. They are not in principle distinguishable from trees which are parcel of the inheritance; to the use of which the tenant has only a qualified right during his term.

D If, however, they are separated by his own wrongful act, or the act of God, the tenant has no right to the use during his term but they become absolutely vested in the person who has the next estate of inheritance. They then become his goods and chattels. Here the removal was intended to be permanent and the chattels, when severed wrongfully, did not thereby become the property of the wrongdoer, but of the landlord.

E **HOLROYD, J.**—I think trover the proper remedy. The machinery was let together with the mill, and was part of the mill. It was a part of the inheritance until the demise was made; when the demise took place, it continued part of the inheritance of the landlord and part of a chattel real in the hands of the tenant in possession. By the lease or agreement the tenant has the use, not the dominion, of the property demised; and, therefore, when he separated any part of it, to convert it from a chattel real to a chattel personal, his right of using it was at an end for any legal purpose, that right being only to use it in the state in which it was before. In the case of a lease of a house, if a tenant pulls down any part of it wrongfully and not for the purpose of repair, so as to constitute waste, the person who has the first estate of inheritance has a right to the materials of which that house was before composed; and I apprehend that he has a right to an immediate possession of those materials in the like manner as he has a right to the immediate possession of timber where it is severed from the inheritance. In that case, when detached, either by the wrongful act of the tenant himself, or by the act of God, it immediately becomes the goods and chattels of the person entitled to the first estate of inheritance, and the right which had been for some time vested in the tenant has ceased.

G I think that the tenant's right was put an end to in this case by the separation of the machinery for an unlawful purpose, which was his own wrongful act; and that, being the goods and chattels of the landlord as the person who had the first estate of inheritance in the mill, the tenant could have no right to use them as chattels personal but only while they were part of the chattel real. On the separation, the whole of the property became

H immediately vested in the landlord.

I

BEST, J., concurred.

Rule refused.

BLAKE AND OTHERS *v.* NICHOLSON

[COURT OF KING'S BENCH (Lord Ellenborough, C.J., Le Blanc and Bayley, JJ.),
November 8, 1814]

[Reported 3 M. & S. 167; 105 E.R. 573]

Lien—Work done—Printer—Printing of numbers of entire work—General lien on all copies not delivered.

A printer employed to print certain numbers of an entire work has a general lien on the copies not delivered for the whole of the balance due for printing those numbers, and not merely for the amount due in respect of copies not delivered.

Notes. Referred to: *Ford v. Bayton* (1832), 1 Dowl. 357.

As to liens for work done, see 24 HALSBURY'S LAWS (3rd Edn.) 152-155; and for cases see 32 DIGEST (Repl.) 286 et seq.

Motion by the plaintiff for a rule nisi for a new trial of an action of trover for certain numbers or parts of a printed work, called DR. HAWKER'S COMMENTARY ON THE BIBLE. The defendant pleaded the general issue.

At the trial before LORD ELLENBOROUGH, C.J., the evidence was that the defendant, who was a printer, had been employed by one Stratford, before his bankruptcy, to print several numbers, not all consecutive numbers, of the said work; of which he printed in the whole 8,750 copies, and delivered to Stratford 5,987, and the residue remained with him in his warehouse. Stratford supplied the paper for printing the several numbers from time to time as they were to be printed; and a separate charge was made by the defendant for the printing of each number, amounting in the whole to £494 2s., of which Stratford had at different times paid £185 on account. Afterwards Stratford becoming bankrupt, the plaintiffs, as his assignees, applied to the defendant for the delivery of the copies remaining in his hands, tendering to him so much as was due for the printing of those copies, in proportion to his charge for the whole. The defendant refused to deliver them, insisting that he had a lien for the whole balance. His Lordship upon this evidence considered the work as one entire work, and directed a nonsuit.

Gurney moved for a new trial; and contended that the defendant had a right to detain only for the price of printing the particular copies remaining in his hands, and not for the general balance. The printing was done sparsim, upon distinct, and some of them, not consecutive numbers, and the materials were supplied at several times and in distinct parcels, and the charges were made separately and distinct upon each number; the lien therefore ought to extend no further. General liens were not favoured in the law, and the inconvenience might be great, if they were to be extended throughout a whole work, however voluminous, such as the Encyclopædia for instance, which might be in progress for more than twenty years.

LORD ELLENBOROUGH, C.J.—I think the defendant had a lien for the whole balance, the work being an entire work in the course of prosecution, upon the same principle that a tailor, who is employed to make a suit of cloaths, has a lien for the whole price upon any part of them. It would be inconvenient if he was obliged to make stops in the course of the work; the nature of the work affords a reason for his general lien.

LE BLANC, J.—The supplying the paper from time to time did not make it the less one entire work.

BAYLEY, J.—He does a certain portion of one entire work.

Rule refused.

A

HITCHCOCK v. GIDDINGS

[COURT OF EXCHEQUER (Sir Richard Richards, C.B.), June 4, 1817]

[Reported 4 Price, 135; Dan. 1; Wils. Ex. 32; 146 E.R. 418]

B

Sale of Land—Contract—Avoidance—Defeat of subject-matter of sale by happening of contingency—Ignorance of vendor.

Notwithstanding that it is known to both the vendor and the purchaser that the subject-matter of a sale is liable to be defeated by the happening of a contingency, if that contingency has already occurred, whether or not the vendor be aware of it, the contract will be void. A contract, therefore, to purchase a remainder expectant on an estate tail will be void if at the time of the sale it has been defeated by a recovery although the vendor was unaware of it.

C

Bond—Validity—Purchase-money secured by bond—Fraud—Relief—Interest on repayment.

The execution of a bond for securing the payment of purchase-money is not a completion of the contract, and where fraud is made out the court will relieve against it. Repayment on any such bond which is declared void will include repayment of interest paid on the supposition that it was good.

D

Notes. Distinguished: *Clare v. Lamb* (1875), L.R. 10 C.P. 334; *Joliffe v. Baker* (1883), 11 Q.B.D. 255. Referred to: *Re Tyrell*, *Tyrell v. Woodhouse* (1900), 82 L.T. 675.

E

As to mistake of fact relating to the subject-matter of a contract, see 26 HALSBURY'S LAWS (3rd Edn.) 898, 899; and for cases see 35 DIGEST (Repl.) 108 et seq. As to validity of bonds, see 3 HALSBURY'S LAWS (3rd Edn.) 334, 335; and for cases see 7 DIGEST (Repl.) 171 et seq. As to interest on an action on a bond, see 3 HALSBURY'S LAWS (3rd Edn.) 349; and for cases see 7 DIGEST (Repl.) 244.

F

Cases referred to:

- (1) *Bilbie v. Lumley* (1802), 2 East, 469; 102 E.R. 448; 35 Digest (Repl.) 172, 570.
- (2) *Brisbane v. Dacres* (1813), 5 Taunt. 143; 128 E.R. 641; 35 Digest (Repl.) 172, 571.

G

Action for delivery up of a bond.

Thomas Millard being possessed of certain freehold and leasehold estates, devised all his real and personal property to Mary Gill and Ann Wrentmore for their lives, and after the death of the survivor of them to Sandy Wrentmore Gill, and Ann Wrentmore Colmer, and the heirs of their respective bodies, as tenants in common in tail; and directed that, in case either of them should die without issue, then the part of the one so dying should go to the survivor of them, and the heirs or his or her body; and in case of failure of issue of both, he limited the property to two persons of the name of Vowle in fee.

H

After the testator's death, Giddings, the defendant, purchased of the Vowles their reversionary interest under Millard's will; and, in the month of April, 1810, was applied to by the plaintiff Hitchcock, to sell it to him. The defendant at first refused, but was afterwards prevailed upon by the plaintiff to sell him his interest in one moiety of the estates in question for the sum of £5,000; and an agreement to that effect was accordingly drawn up and signed by the parties. On May 3 following, an indenture of bargain and sale was executed, by which the interest of the defendant in one moiety of the property of the testator, Thomas Millard, subject to the life estates of Mary Gill and Ann Wrentmore, and to the estates tail of Sandy Wrentmore Gill and Ann Wrentmore Colmer, was duly conveyed to the plaintiff. The plaintiff, however, did not pay the purchase-money at the time, but gave the defendant his bond for securing the payment of it with interest.

I

He afterwards paid the sum of £256 for interest, but never discharged any of the principal. A

It was subsequently discovered, that the tenants for life, together with Ann Wrentmore Colmer, who was the surviving tenant in tail, had, previously to the contract with the plaintiff, suffered a recovery, and thereby destroyed the remainder by the will limited to the Vowles, and that consequently nothing passed by the bargain and sale from the plaintiff to the defendant. In consequence of this discovery the plaintiff filed his bill, praying that the bond, given by him to the defendant for £5,000, might be declared to have been fraudulently obtained, and that it might be delivered up to be cancelled, and for a repayment of the money already paid for interest, and an injunction in the meantime. The bill charged that the defendant, at the time the contract was entered into, knew the recovery had been suffered, but kept back that fact from the plaintiff. This was positively denied by the answer and no evidence was given to fix such knowledge upon the defendant. B C

It appeared by the evidence, that the plaintiff employed his own solicitor to prepare the conveyance, who laid a draft of it, together with an abstract of the defendant's title, before Mr. Bridgman, a conveyancer at Bath, who, in the opinion, which he gave upon the title, adverted to the power which the tenant for life and tenant in tail had of barring the remainder proposed to be purchased. On April 19, the defendant went to the office of plaintiff's solicitor for the purpose of answering certain queries which had been made on the margin of the abstract by Mr. Bridgman; and on that occasion the plaintiff's solicitor asked him whether any recovery had been suffered, and he then stated it to be his belief that none had. In the afternoon of the same day a similar inquiry was made in the presence of the plaintiff, when the defendant returned the same answer, upon which the plaintiff expressed himself to be perfectly satisfied. The same assurance was given by the defendant at a subsequent meeting which took place between him and the plaintiff, when the plaintiff again expressed himself satisfied with the bargain, and said he could make £10,000 by it, and offered to purchase the remaining moiety, which was declined on the part of the defendant. D E F

On the same day the plaintiff's solicitor insisted on his accompanying him to Mr. Bridgman's, to have some further conversation on the subject of the purchase; on which occasion Mr. Bridgman stated that the only difficulty in the title was that a recovery might have been suffered, and recommended a search to be made, when the plaintiff observed that he was satisfied with the purchase, that it was worth £10,000, and that he had lately been in London and had made a search, and that no recovery had been suffered. He then directed his solicitor to proceed with the engrossment of the deed, and on the Thursday following it was executed. Afterwards, when his solicitor informed him that a recovery had been suffered, and showed him an extract of it, the plaintiff treated it with great indifference, and expressed considerable anxiety to purchase the remaining moiety. G H

Fonblanque and *Wingfield* for the plaintiff: This is a contract which a court of equity will set aside. It was entered into under a mistake; the defendant supposing he had some interest in the estate agreed to sell it to the plaintiff, who purchased it under a similar notion: it afterwards turned out that the vendor had no interest whatever. This is clearly a case in which a court of equity will interfere to prevent the contract, while yet incomplete, from being enforced. There is a difference between contracts executed and executory: where the performance has been complete the court will not undo it; but where it is incomplete, and it is founded on a clear mistake, the court will interfere to prevent the party being called upon to complete it. The contract here is executory. The execution of the bond cannot be considered as performance. In most cases, where a party cannot perform his engagements at the time stipulated, a security is given. Here was an express or at least an implied engagement that no recovery had been suffered. The fact of I

A the plaintiff having made the search for the recovery himself, rebuts the supposition of its being a matter of indifference to him, as does likewise the fact of his having become the purchaser.

B *Martin and Heys* for the defendants: The case made by the bill is fraud, and nothing has been adduced in evidence which goes to establish such a charge, and indeed all idea of fraud is totally rebutted. The bargain is not of the defendant's seeking; the plaintiff seeks him, and is so well satisfied with his bargain, that even after he has heard of the recovery he proposes, if the defendant think fit, to purchase the other moiety. This part is material with respect to costs. Where a plaintiff imputes fraud and fails, he ought to pay the costs.

C There is no doubt this is a mistake, but if parties choose to speculate, and one sells a contingency, and the other buys it, if the contract be complete, the court will not interfere. At law, if a party aware of the circumstances pay money which he is not compellable to pay, he cannot recover it: *Bilbie v. Lumley* (1); *Brisbane v. Dacres* (2). The defendant never gave any assurance that no recovery had been suffered; he only said, it was his belief that none had.

D The plaintiff, apprised of the objection, goes to London; and having made a hasty search, returns into the country, and insists upon completing his contract, and that upon terms which clearly imply he is aware he is purchasing a contingency; for he says he shall make £10,000 by his bargain. He is aware that his title is such as must be blown away, if the tenant for life and tenant in tail join in a recovery, and persists. It turns out that the act has been done which he was forewarned might be done. Suppose it had been done, the next morning: E he would have been in no better situation; and yet it is not pretended, that, in such a case, he could have been relieved.

F The only question then is whether the bond be not payment. A bond has always been considered as the close of a transaction and even a solicitor's bill will not be unravelled if a bond has been given for the amount of it. Suppose the plaintiff had given negotiable notes for the amount, would they not have been considered as payment? Why then should a party having a higher species of security be in a worse situation than he would have been in if he had taken a lower? The payment of interest was a confirmation of the transaction. At all events there is no pretence to say, that what has been already paid must be returned: to this extent the transaction must be considered as complete.

G **SIR RICHARD RICHARDS, C.B.**—There certainly is in this bill a charge of fraud, which has been established, namely, that the defendant agreed to sell to the plaintiff an estate in which he had no interest. This is fraud in a court of equity; though, perhaps, under the circumstances of this case, it is not so in a moral point of view.

H It has been said that this is a contingency, and that if a party having a property of which a certain event may defeat him, and being ignorant that such event has taken place, sell his estate to another, who being aware of the contingency upon which it depends, agrees to take the estate on those terms, the court will not relieve from so improvident a bargain. Certainly, where a party is determined to speculate and purchase an interest which he is aware may be defeated on the happening of a contingency which neither he nor the vendor is able to control it is I a foolish contract, but not such as a court of equity will interfere to set aside but then it must be clear that the contingency by which the estate may be defeated, has not taken place.

Here is an estate which, if no recovery had been suffered, was a good one. Both parties being equally ignorant that a recovery had been suffered agree for the sale and purchase of the estate, and the purchaser is content to abide the risk of a recovery being subsequently suffered. He conceives, however, he is purchasing something; that he is purchasing a vested interest. He is not aware that such interest has already been defeated. The defendant thinks he has some interest;

and the plaintiff thinks he is purchasing that interest: but this is not sufficient; A
the party selling must be satisfied that he actually has an estate to sell. Here he
only thought he had it, when he had it not. He ought to have known that he had it.

It has been argued that this bond must be considered as payment; and it has
been said that even in the case of solicitor's bills, where a bond has been given
for the balance, the courts will not unravel them; but that is because it must be B
supposed that, before so solemn an instrument is entered into, the parties have
ascertained that the accounts are correct: but even in that case if the court can
be satisfied that the bond has been unfairly obtained, it will relieve against it.

In this case a fraud has been practised by the defendant, I do not mean in a
moral point of view, but such as a court of equity will relieve against. He has sold
that which he had not—and shall the plaintiff be compelled to pay for that which C
the defendant had not to give?

With respect to the interest, that follows the bond. If application had been made
for an injunction before payment, the court would have prevented it: it must be
repaid.

With respect to costs, both parties have acted with an equal degree of folly;
and one ought not to be in a better situation than the other. Both parties must D
pay their own costs.

*Bond ordered to be delivered up and cancelled and the interest which
had been paid on it by the plaintiff to be refunded.*

YEATS AND ANOTHER v. PIM AND ANOTHER

[COURT OF COMMON PLEAS (Gibbs, C.J., Dallas and Park, JJ.), January 26, 1816]

[Reported 2 Marsh. 141; 6 Taunt. 446; 128 E.R. 1107]

*Custom—Usage—Evidence of—Admissibility—Usage repugnant to the written
contract.*

A usage of trade cannot be set up in contravention of an express contract.

Therefore, where A. agreed to sell to B. a quantity of prime bacon which
B. weighed and examined and paid for by a bill at two months, but before
the bill became due gave notice to A. that the bacon did not answer the G
contract.

Held: B. could not rely on a custom that the buyer was bound to reject the
contract, if at all, at the time of examining the goods.

Notes. Distinguished: *Parker v. Palmer* (1821), 4 B. & Ald. 387. Referred to:
Budd v. Fairmaner (1831), 1 L.J.C.P. 16; *Powell v. Horton* (1836), 2 Bing. N.C.
668; *Brown v. Byrne* (1854), 18 Jur. 700; *Maxwell v. Deare* (1854), 23 L.T.O.S. 1; H
Humfrey v. Dale (1857), 7 E. & B. 266; *Lucas v. Bristow* (1858), 27 L.J.Q.B. 364;
Land Export Corpn. v. Jubilee Coffee Roasting Co., [1958] 2 All E.R. 411.

As to nature of usages generally, see 11 HALSBURY'S LAWS (3rd Edn.) 182 et seq.;
as to admission of evidence of usage, see *ibid.* 191 et seq.; and for cases see 17
DIGEST (Repl.) 44 et seq. As to sale by description, see 34 HALSBURY'S LAWS (3rd
Edn.) 47-50; and for cases see 39 DIGEST (Repl.) 528 et seq. I

Motion by the defendants for a rule nisi to set aside the verdict and enter a
nonsuit in an action against the defendants for damages for breach of the warranty
contained in the following sale note given to the plaintiffs, dated Mar. 29, 1815:

"London, Mar. 29, 1815. Sold for account of Pim & Son to Yeats and
Acocks, fifty bales (Penrose's) prime singed bacon at 68 per cwt. *ex Vinc*
arrived; payable by acceptance at two months from landing; average weight
if required. G. Proctor."

A At the trial before HEATH, J., it appeared that Acocks, one of the plaintiffs, examined one bale on Mar. 31, and on April 3 following, weighed and examined three bales, which was the usual number to be examined out of fifty, without rejecting the contract or claiming any allowance. The defendants then drew a bill on the plaintiffs for the amount at two months, which the latter accepted and paid when due, but towards the end of May, a short time before the bill became due, the plaintiffs gave notice to the defendants that the bacon did not answer the contract. It was also stated that prime bacon such as that contracted for was not susceptible to taint. Evidence was then offered on the part of the defendants to prove that, by the custom of the trade, when a contract was entered into to sell bacon of any kind, it was the duty of the buyer to weigh and examine it as soon afterwards as he could, and then to accept or reject the contract or claim an allowance, and that, if he then neither rejected the contract nor claimed an allowance, he was bound to accept the goods, whether they were according to the contract or not. The learned judge, however, held that the usage could not be set up to countervail the warranty, and that, as the contract was in writing, the plaintiff could not be precluded from recovering on it, by proof of a custom that such contracts were sometimes dispensed with. The jury found a verdict for the plaintiffs.

Sir Samuel Shepherd for the defendants, moved that this verdict should be set aside, and a new trial granted. It ought to have been left to the jury to say—and it was a question of some importance to this branch of trade—whether the custom were not to be taken as part of the contract unless expressly excluded.

E GIBBS, C.J.—It would be attended with dangerous consequences if such a custom could be set up against the express words of the contract. Where a party undertakes that he will supply goods of a certain description, he must execute his engagement accordingly, and I neither think that the custom is admissible to contravene such a contract, nor that, in the present case, the plaintiffs were precluded from keeping the goods as long as they did. That the plaintiffs did not make their complaint at first, might, it is true, lead to a conclusion that the damage did not exist at the time of the sale, but the defendants had the full benefit of that objection, and it was in that view of the case that the plaintiffs called witnesses to prove that prime bacon could never be in the state in which this was. In answer to that the defendants might have shown that the keeping it had produced the damage, and might have gone to the jury on the question whether the damage had accrued before or after the sale. That point, however, has been settled by the verdict; and I think that the opinion of HEATH, J., for which we all feel so great a deference, was in this, as on most other occasions, perfectly correct.

DALLAS and PARK, JJ., concurred.

Rule refused.

NOVELLO v. TOOGOOD

[COURT OF KING'S BENCH (Abbott, C.J., Bayley and Holroyd, JJ.), April 29, 1823]

[Reported 1 B. & C. 554; 2 Dow. & Ry. K.B. 833; 1 L.J.O.S.K.B. 181;
107 E.R. 204]

*Constitutional Law—Diplomatic privilege—Servant of foreign ambassador—
Residence in separate house partially let—Liability of goods to distress.*

Where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings, his goods in that house, not being necessary for the convenience of the ambassador, were held to be liable to be distrained for non-payment of the poor-rate.

Notes. Considered: *Parkinson v. Potter* (1885), 16 Q.B.D. 152. Referred to: *Brunswick v. Hanover* (1844), 13 L.J.Ch. 107; *Re Suarez, Suarez v. Suarez* [1916-17] All E.R. Rep. 641; *Musmann v. Engelke* (1927), 96 L.J.K.B. 824.

As to diplomatic persons, see 7 HALSBURY'S LAWS (3rd Edn.) 267 et seq.; and for cases see 11 DIGEST (Repl.) 632 et seq.

Action of trespass by breaking and entering the plaintiff's house and distraining his goods tried before ABBOTT, C.J., when a verdict was found for the plaintiff, subject to the opinion of the court on the following Case.

The plaintiff, who was a British-born subject, from Jan. 5 to July 5, 1821, rented and occupied a house in the parish of St. James, Westminster, and let part thereof in lodgings. The plaintiff continued in the occupation of the house on Sept. 13, 1821. The defendant was collector of the poor-rate for the parish at the time of issuing the warrant and making the distress hereinafter mentioned. The defendant being such collector, on Sept. 13, 1821, entered the plaintiff's house and distrained his goods, under a warrant regularly signed and sealed by two magistrates. The rate on which the distress was founded was duly made, allowed and published.

The sum distrained for was due in respect of the plaintiff's house, for half a year from Jan. 5 to July 5, 1821, and the same was regularly demanded from the plaintiff and payment refused before the distress was made. The plaintiff, for the last twenty-five years, had been in the service of the ambassador from the Crown of Portugal (to George III, and George IV) as first chorister in the ambassador's chapel which was attached to his house, and as such, had received a salary from the ambassador, but the plaintiff did not live in the ambassador's house. During all that time he had officiated as such chorister in the chapel twice on all Sundays, saints' days and fast days, except on Wednesdays in Lent, when he had officiated only once, the service being performed only once a day.

The Portuguese ambassador professed the Roman Catholic religion and, according to the ritual of that religion, it was necessary to the due celebration of divine service that there should be a person to officiate as the plaintiff did during the time in question. The plaintiff was registered with the Secretary of State as chorister to His Excellency M. De Souza, the late ambassador of the King of Portugal, who was received as such at the English court.

During that time the name of the plaintiff was affixed in the sheriff's office, in the list of persons in the service of foreign ambassadors. The plaintiff, during the period for which the rate on him became due, acted as prompter at the King's theatre, Haymarket, and during the same period, and at the time when the distress was made, also was and acted as a teacher of music and languages from all which employments he derived pecuniary advantage. His engagement as prompter at the King's theatre was absolute and contained no exception of the times when he might be engaged as chorister in the chapel of the Portuguese ambassador.

Campbell for the plaintiff.

E. Lawes for the defendant.

A ABBOTT, C.J.—This was an action for breaking and entering the plaintiff's house and seizing and distraining his goods. The defendant's case rested on a warrant to distrain for the non-payment of poor-rates. It is found by the Case that the plaintiff is a British-born subject, that he occupied a house of which he let out a part in lodgings and that he was a teacher of languages and prompter at the Haymarket theatre. My opinion is founded on one point only, namely, that **B** the action is for taking the plaintiff's goods and not for arresting his person as to which, I give no opinion.

The question arises on an Act of Parliament, framed in very general terms :

C "That all writs and processes, whereby the person of any ambassador, or other public Minister of any foreign prince or State, authorised and received as such, or the domestic or domestic servant of any such ambassador or other public Minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized or attached, shall be utterly void."

The expression is certainly large, but the Act itself was only declaratory and in confirmation of the common law. It must, therefore, be construed according to the common law of which the law of nations must be deemed a part.

D Adopting this rule of construction, I am of opinion that whatever is necessary to the convenience of an ambassador, as connected with his rank, his duties and his religion, ought to be protected but that an exemption from the burdens borne by other British subjects ought not to be granted in a case to which the reason of the exemption does not apply. I do not say that the servant must reside in the **E** ambassador's house. I do not say that he may not have an house fit and convenient for his situation as the servant of an ambassador, nor that the furniture in such an house will not be privileged. But the facts of this case are widely different from those which I have mentioned.

F In this instance, the servant let a part of the house in lodgings. Such an house was not necessary for the personal convenience of the plaintiff and, therefore, could not be necessary for that of the ambassador, his master. If we should decide that the privilege given by the law of nations extends to such a case as this, every servant of an ambassador might take a large house for the purpose of letting it out in lodgings, and enjoy an exemption from the payment of taxes. Such a privilege is absurd in itself and not at all within the reason on which the rights of ambassadors are founded. I am very sure that it cannot be the wish of any **G** ambassador that his servant should, by colour of those rights, inhabit such an house for such purposes, without contributing to the public taxes of the country where he resides. There is nothing in the law of nations, or the Diplomatic Privileges Act, 1708 [repealed by the Diplomatic Privileges Act, 1964], which entitles the plaintiff to recover in this action. Judgment of nonsuit must, therefore, be entered.

H BAYLEY, J.—This is not the case of an arrest of the person of an ambassador's servant, nor are the goods seized such as were necessary in a residence of that description which the plaintiff's service to the ambassador required. The plaintiff's counsel claims an unrestrained exemption of all goods, without entering into the question of their being necessary or not. The consequence of such a doctrine would be to enable the servant to abuse that privilege which was intended for the **I** ambassador's convenience and not his own. Notwithstanding our decision in favour of the defendant, the plaintiff will still be able to execute all the necessary functions of his office. For these reasons, I concur in thinking that the plaintiff is not entitled to recover.

HOLROYD, J.—I am of opinion that the plaintiff is not privileged in the circumstances of this case. It is contended that, by serving the ambassador, he is entitled to an unqualified exemption of all his goods from seizure for taxes or otherwise. Even supposing him to be a domestic servant, he cannot have a privilege to

that extent. The privilege is conferred by the law of nations, in order that the ambassador may not be prejudiced in his dignity or personal comfort. It is not given for the benefit of the servant. If the debt for which the seizure was made had arisen out of the plaintiff's situation, as servant to an ambassador, the result of this case might have been different. But that was not so, nor can the ambassador be at all prejudiced by that which has been done. The reason of the privilege, then, does not apply in this instance. The plaintiff, therefore, cannot have the benefit of it and judgment of nonsuit must be pronounced.

Judgment of nonsuit.

POTINGER v. WIGHTMAN

[ROLLS COURT (Sir William Grant, M.R.), July 1, 21, 1817]

[Reported 3 Mer. 67; 26 E.R. 26]

Domicil—Change of domicil—Child—Death of father—Domicil of infant children following that of surviving mother.

After the death of the father the domicil of the children remaining under the care of the surviving mother follow that of the mother except where she changes her domicil fraudulently to obtain some advantage by altering the law of succession. Fraud may be presumed where no reasonable cause can be assigned for the change.

Notes. Explained: *Johnstone v. Beattie*, [1843-60] All E.R. Rep. 576. Referred to: *Re Beaumont*, [1893] 3 Ch. 490.

As to change of domicil by infants, see 7 HALSBURY'S LAWS (3rd Edn.) 23; and for cases see 11 DIGEST (Repl.) 354.

Case referred to :

(1) *Somerville v. Lord Somerville* (1801), 5 Ves. 750; 31 E.R. 839; 11 Digest (Repl.) 327, 23.

Bill to establish a change of domicil.

In December, 1805, Thomas Potinger, a native of England, died in Guernsey, the place of his domicil, intestate, leaving seven children living at his decease—four by a former wife (the four infant defendants) and three (namely, John Lockman Potinger, Sarah Frances Potinger, the infant plaintiffs, and Henry James Potinger, deceased before the filing of the bill) by his widow the defendant Harriett Wightman, who was then pregnant of a fourth child, afterwards born, the plaintiff, Harriet Ann Potinger. Shortly after the decease of the intestate, the Royal Court in Guernsey, on the nomination of the nearest relatives of the children, appointed the defendant Daniel De Lisle Brock guardian for the children of the first marriage, and the widow, guardian for her own children; and, by permission of the Royal Court, Daniel De Lisle Brock, and the widow, in their character of guardians, sold the real and personal estate of the intestate in the island of Guernsey, and invested the produce in the English funds. In September, 1806, the widow quitted the island of Guernsey, and came to England, bringing with her her four infant children, and from that time established her domicil in England. In May, 1809, Henry James Potinger died at the age of six years; and in April, 1812, John Lockman Potinger died at the age of ten years.

The bill prayed the usual accounts of the real and personal estate of the intestate. The decree directed an inquiry whether the intestate was domiciled in the island of Guernsey, and, if the Master should find that he was domiciled there at the time of his death, he was to inquire and state, who was, or were, his heir or heirs-at-law, at the time of his death, and what was the law of the island with respect to real and personal estates, and who was, or were, and are, according to the law

A of the said island, entitled to the intestate's real and personal estate therein, and in what shares and proportions.

By his report, dated April 8, 1816, the Master stated that the intestate was domiciled in Guernsey at the time of his death; and he also stated the law of Guernsey respecting the descent of the real estate, and the distribution of the personal estate, of persons dying intestate there, as follows:

B "When a man, a native of England, dies intestate in the said island, seised and possessed of real and personal estate there and in England, leaving a widow, and sons and daughters by a former wife, and sons and daughters by his surviving widow, who was at his death enceinte with child (which was in due time after his death born alive) the widow of such intestate is entitled
C to dower, which is the possession, use and enjoyment, during her life, of one third part of the real estate which her said deceased husband was seised and possessed of at the time of his death in the said island of Guernsey, unless by some stipulation in the marriage contract it should have been provided otherwise. One third part of the personal estate becomes the widow's property, and no real estate in Guernsey can be devised by will. The real estate in that
D island is divided after the death of the owner in the following manner, viz., one-twentieth part of the land (the buildings thereon included) belongs to the sons, and is taken where the eldest son, purposely, for him and his brothers, places a stake; out of which he is allowed for his eldership according to the quantity of land, or value of the same, viz., from 16 to 22 perches of ground adjoining the spot where he has fixed the stake. The rest of the said twentieth
E part, if any, is divided between him and his brothers in equal portions, and the remaining nineteen-twentieths of the land are divided as follows:—two-thirds to the eldest son, and his brothers, in equal portions, and the other third part for the sisters, to be divided equally between them. But, if the sons are more in number than the daughters, and, by claiming one-third of the whole real estate, the sisters would have each more than each of their brothers, the
F brothers may require that the real estate should be equally divided between all the children, the brothers giving up their claim to the said twentieth part (the eldership, which the eldest son is always entitled to, excepted) to which they would otherwise have been entitled; but the whole to be subject to the widow's dower as aforesaid. After the widow has taken one-third out of the
G personal estate, the elder son is allowed, for his eldership, one-seventh, or at most one-sixth part, of the remaining two-thirds, so far as the same consists of household furniture, plate, jewels and linen, or what is called mewbles, mewblons; and all the remainder of the personal estate is divided between him, his brothers and sisters, in equal portions. In case any or either of the sons or daughters of such deceased person should die without issue, and unmarried, the real estate, to which such children, so dying, were entitled at their
H respective deaths in the island, becomes distributable in equal portions between all the surviving brothers, exclusively of the sisters, without distinction, whether they be of the first or last wife; and a similar distribution of their personal estate, if they be domiciled in the island, takes place between the brothers, exclusively of the sisters, also without distinction, whether they be of the first or second marriage; but, if such child or children, whether they
I be of the first or second marriage, should have acquired a settlement, and be domiciled out of the island, the division of their personal estate should be made in conformity to the laws where such child or children had acquired a settlement, and were domiciled."

After ascertaining the original shares of the respective parties in the intestate's personal estate, the Master proceeded to certify that, in consequence of the death of John Lockman Potinger, and Henry James Potinger, their shares in the intestate's personal estate were become divisible in equal shares between their

surviving brothers, the defendants, Richard Potinger and William Potinger. When the cause came on for further directions, this conclusion was controverted; and it was contended, on the part of the widow and daughters, that the shares of the deceased children were distributable by the law of England. It being admitted that personal property is regulated by the domicile of the proprietor, the question was whether the deceased children retained their paternal domicile in Guernsey, or acquired a new derivative domicile from their mother in England.

By an Order dated July 26, 1816, it was referred back to the Master to report the domicile of the children at the time of their death, with liberty to state any special circumstances. By his report, dated Mar. 8, 1817, the Master found that the children, at the time of their death, were domiciled in England. The cause coming on again for further directions, the question was argued.

Bell and Heald for the defendants Richard Potinger and William Potinger, the surviving brothers.

Sir Samuel Romilly and Swanston for the plaintiffs.

Hart, Shadwell and Girdlestone for defendants in the same interest.

SIR WILLIAM GRANT, M.R.—On the subject of domicile, there is so little to be found in our own law that we are obliged to resort to the writings of foreign jurists for the decision of most of the questions that arise concerning it. The dictum of LORD ALVANLEY in *Somerville v. Lord Somerville* (1) (5 Ves. at p. 787) [that a minor cannot, during his state of pupillage, acquire a domicile of his own] has no relation to the point now in dispute. He is speaking of the power of a minor to acquire a domicile by his own acts. Here the question is whether, after the death of the father, children remaining under the care of the mother, follow the domicile which she may acquire, or retain that which their father had at his death, until they are capable of gaining one by acts of their own. The weight of authority is certainly in favour of the former proposition. It has the sanction both of VOET and BYNKERSHOEK; the former however qualifying it by a condition that the domicile shall not have been changed for the fraudulent purpose of obtaining an advantage by altering the rule of succession. POTHIER, whose authority is equal to that of either, maintains the proposition as thus qualified. There is an introductory chapter to his *TREATISE ON THE CUSTOM OF ORLEANS*, in which he considers several points that are common to all the customs of France, and, among others, the law of domicile. He holds, in opposition to the opinion of some jurists, that a tutor cannot change the domicile of his pupil, but he considers it as clear that the domicile of the surviving mother is also the domicile of the children, provided it be not with a fraudulent view to their succession that she shifts the place of her abode. And he says, that such fraud would be presumed, if no reasonable motive could be assigned for the change.

There never was a case in which there could be less suspicion of fraud than the present. The father and mother were both natives of England. They had no long residence in Guernsey, and, after the father's death, there was an end of the only tie which connected the family with that island. That the mother should return to this country, and bring her children with her, was so much a matter of course that the fact of her doing so can excite no suspicion of an improper motive. I think, therefore, the Master has rightly found the deceased children to have been domiciled in England. It is consequently by the law of this country that the succession to their personal property must be regulated.

